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Louisa Sawyer.





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AN  
ANALYTICAL DIGEST  
OF THE  
LAW AND PRACTICE  
OF THE  
COURTS OF COMMON LAW, DIVORCE, PROBATE, ADMIRALTY AND BANK-  
RUPTCY, AND OF THE HIGH COURT OF JUSTICE AND  
THE COURT OF APPEAL  
OF  
ENGLAND,  
COMPRISING  
THE REPORTED CASES FROM 1756 TO 1878,  
WITH  
REFERENCES TO THE RULES AND STATUTES,  
FOUNDED ON THE  
DIGESTS OF HARRISON AND FISHER.

BY  
EPHRAIM A. JACOB,  
OF THE NEW YORK BAR.

VOL. VI.  
CONTAINING THE TITLES  
LANDLORD AND TENANT—PAYEE.

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REFERENCES TO THE RULES AND STATUTES.

*George Sawyer*

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## I. LEASES AND AGREEMENTS, IN GENERAL.

## 1. Parties.

**Tenants in tail.**—If a tenant in tail reserves an entire rent upon a farm, in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner. *Rees v. Philip*, Wightw. 69.

A tenant in tail in remainder during the lifetime of the tenant for life, demised for several terms of ninety-nine years, at different dates, to commence immediately. In ejectment by one of the posterior lessees:—Held, that by virtue of 4 Anne, c. 16, s. 9, the leases without entry of the lessees, operated not by way of interesse termini, but as grants of estates or interests out of a remainder to which the tenants of the preceding estates had attained. *Doe d. Agar v. Brown*, 2 El. & Bl. 331; 17 Jur. 1161; 23 L. J., Q. B. 432.

A., tenant in tail, made a lease for years to B., not conformable to 32 Hen. 8, c. 28. A. died, and C., the next in tail in remainder, applied to B. to attorn, and demanded rent from him. B. did not attorn; and, after some negotiation, refused to pay any rent, on the ground that D. was entitled to the estate:—Held, that B. did not become tenant to C., and that C. could maintain ejectment against B. without serving him with notice to quit; and that the setting up the title of D. amounted to a disclaimer of the title of C. *Doe d. Phillips v. Rollings*, 4 C. B. 183; 17 L. J., C. P. 263.

If a tenant in tail makes an agreement, not under seal, to let land for fourteen years, and then dies, the issue in tail cannot be compelled specifically to perform the agreement by granting a lease under 32 Hen. 8, c. 28. *Osborn v. Marlborough*, 13 Jur., N. S. 559; 14 W. R. 886; 14 L. T., N. S. 789—V. C. S.

**Tenants for life and remaindermen.**—A tenant for life, with remainder to A., B. and C., in common in fee, granted a lease of the estates to D. for twenty-one years, which lease was confirmed by A. and C.:—Held, that the lease was good as against A. and C., and that B. could not impeach it in a suit for partition, in which he was a co-plaintiff with A. *Story v. Johnson*, 2 Y. & C. 586.

When a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question whether a term contained in the former tenancy is adopted into a new contract of demise is a question of fact. If such a tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him, in fact, nor is according to the custom of the country. *Oakley v. Monck*, 4 H. & C. 251; 1 L. R., Exch. 159; 35 L. J., Exch. 87; 14 W. R. 406; 14 L. J., N. S. 20—Exch. Cham.

A tenant for life granted a lease containing

a covenant that he would, at the expiration of the term, pay and allow the lessee, a nurseryman, for all fruit trees and shrubs then on the premises which had been planted by him. At the expiration of the lease, the lessee continued in possession, and paid rent, and upon the death of the tenant for life, he paid the same rent to the remainderman, who was not aware of the covenant in the lease:—Held, that there was no evidence that the tenancy continued upon the terms of the lease, so as to bind the remainderman by the covenant. *Id.*

A tenant for life having power to grant leases in possession may bind himself by covenant to grant a lease in reversion expectant on the determination of a subsisting term; but a trustee having a similar power cannot, for he is bound to exercise the power for the benefit of the estate. *Moore v. Clench*, 45 L. J., Chanc. Div. 80; 1 L. R., Ch. Div. 447; 24 W. R. 169; 34 L. T., N. S. 13.

**Joint tenants.**—Where a farm was demised to A. and B. jointly, and A., by agreement, underlet part of it to C., and gave receipts for payment of rent, and a notice to quit, in his name alone:—Held, that A. and B. could not maintain a joint action against C. for pulling down a shed which stood on part of the premises demised. *Steel v. Western*, 7 Moore, 29.

As to the nature and incidents of the various estates in land,—see ESTATE.

A tenant from year to year may make a lease for twenty-one years. *Mackay v. Mackreth*, 4 Dougl. 213; 2 Chit. 461.

As to the nature and incidents of tenancies from year to year,—see this title, XVI.

**Outstanding equitable interests or liens.**—A. agreed to demise premises to B. There was an outstanding equitable interest vested in C.:—Held, that B. was bound to accept a demise from A., in which C. joined, and was not justified in insisting on A. obtaining a release from C., in order to enable him alone to make a valid demise. *Reeves v. Gill*, 1 Beav. 375.

A lease granted after a judgment signed against the lessor is void. *Doe d. Putland v. Hilder*, 2 B. & A. 782.

**Ecclesiastical persons, corporations, &c.**—A new lease made by the warden and poor of an hospital, under their corporate seal, before the expiration of a former lease, to a lessee, who had then only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding on the succeeding warden and poor of such hospital. *Grumbrell v. Roper*, 3 B. & A. 711.

Churchwardens only cannot execute leases as a body corporate of parish lands under 59 Geo. 3, c. 12, s. 17. *Phillips v. Pearce*, 8 D. & R. 43; 5 B. & C. 433.

Leases by the churchwardens of A., in which the demised tenement is described as parcel of the lands of the parish church of

A., and payment of the rent to them, are *prima facie* evidence that the tenement is parish property. *Doe d. Higgs or Hobbs v. Cockell*, 6 N. & M. 179; 4 A. & E. 478.

Leases granted by deans and chapters for long terms of years, not in conformity with the disabling and restraining statutes, are not void, but voidable only. *Pennington v. Cardale*, 8 H. & N. 656; 27 L. J., Exch. 438.

By 18 Eliz. c. 10, s. 8, all leases made by spiritual persons other than for the term of twenty-one years, or three lives, whereupon the accustomed yearly rent or more shall be reserved, are void:—Held, that, in order to render a lease valid under this statute, it must be made of land which had been previously let, or on which some rent had been reserved. *Doe d. Tennyson v. Yarborough*, 7 Moore, 258; 1 Bing. 24.

A lease for twenty-one years, made within three years of a former existing lease, by a vicar, of premises belonging to a vicarage situate in London, not being the capital messuage or dwelling-house used for the habitation of the vicar, nor having ground to the same belonging above the quantity of ten acres, is a valid lease, notwithstanding the restraining statutes 13 Eliz. c. 10, 14 Eliz. c. 11, and 18 Eliz. c. 11. *Vivian v. Blomberg*, 3 Scott, 681; 3 Bing. N. C. 311; 2 Hodges, 255.

A perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts, cannot make a lease for three lives without the consent of the ordinary. *Doe d. Richardson v. Thomas*, 1 P. & D. 578; 9 A. & E. 557.

The 5 & 6 Vict. sess. 2, c. 27, does not abridge any right of leasing formerly enjoyed by incumbents. *Green v. Jenkins*, 1 De G., F. & J. 454; 28 Beav. 87; 6 Jur., N. S. 515; 20 L. J., Chanc. 505; 8 W. R. 380. See *Jenkins v. Green*, 27 Beav. 440.

As to leases of ecclesiastical property,—see ECCLESIASTICAL LAW.

#### Authority of agents, stewards and bailiffs.]

—An agreement for a lease, made with an agent who acts under a power of attorney, and a lease executed by such agent in pursuance of the agreement, effectually binds the principal. *Hamilton v. Clanricarde*, 1 Bro. P. C. 341.

If a man describes himself, in the beginning of an agreement to grant a lease, as making it on behalf of another, but in a subsequent part of it says that he will execute the lease, he is personally liable. *Norton v. Herron*, 1 C. & P. 648; 11 & M. 229—Best.

A steward has no general authority to enter into contracts for granting leases of farms for a term of years. *Collen v. Gurdner*, 21 Beav. 540.

A farm bailiff or an agent accustomed to let farms upon the ordinary terms, and receive the rents, has no authority in law to let upon unusual terms unknown to the owner, and the question was left to the jury as one of fact, whether he had express authority, or

had been held out by the owner as having it. *Turner v. Hutchinson*, 2 F. & F. 185.

#### 2. What constitutes the Relation; Validity of Leases and Agreements, generally, and Distinction between them; Confirmation.

How the relation of landlord and tenant may be created.]—If a stranger begins to build on land, supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a court of equity will not afterwards allow the real owner to assert his title to the land. *Ramsden v. Thornton*, 1 L. R., H. L. 129; 13 Jur., N. S. 506.

But if a stranger builds on land, knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it. *Id.*

So, if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined. *Id.*

By a deed between A. and B., holders of shares in a building society, and C. and D., trustees of the society, reciting the formation of the society, that A. and B. were entitled to a certain sum out of the funds in respect of their shares, and that for the security of all the payments to become due in respect of the shares, A. and B. had agreed to execute the assurance thereby made, A. and B. conveyed premises to C. and D. as such trustees, upon trust to permit A. and B. to receive the rents until default in payment of their contributions, with a power to C. and D. and the trustees for the time being of the society to appoint a person to receive the rents in case of default, and a power of sale in the like event. The deed also contained a clause whereby A. and B. agreed "to become tenants of the parties hereto of the second part, and to the trustees for the time being of the society of the premises demised henceforth during their will at the net yearly rent of 200*l.*, payable on the usual quarter days:—Held, that this deed did not operate as a demise, so as to sustain an avowry alleging a tenancy under the trustees at the yearly rent of 200*l.*, the general scope of the deed being altogether inconsistent with such a construction. *Walker v. Giles*, 6 C. B. 662; 18 L. J., C. P. 828.

By an agreement between the defendant, as a brewer, and the plaintiff, reciting that the defendant was in possession of premises whereon the sale of beer had been for some time past carried on by A. on the defendant's account, and that the plaintiff was desirous of carrying on such trade for the defendant, to which he had agreed, it was witnessed that the defendant had agreed, for the consideration therein stated, that the plaintiff should enter upon the premises and carry on thereon such trade for the defendant in the place and stead, and in the same manner and with and



on the same privileges and terms as A. had done, until the agreement should be determined by notice. And the plaintiff agreed during all the time he should carry on the trade for the defendant, that all beer sold by him should be had by him from the defendant, and that the plaintiff should not part with the premises to any person without the license of the defendant; and that, when either party should be desirous of putting an end to the agreement, the plaintiff should, on receiving from the defendant a month's notice to quit the trade, deliver up possession of the premises, and should be at liberty to leave the trade and quit the occupation of the premises on giving one month's notice to the defendant:—Held, that this did not create the relation of landlord and tenant between the parties, but that the occupation of the plaintiff was that of servant to the defendant. *Mayhew v. Suttle*, 4 El. & Bl. 347; 1 Jur., N. S. 808; 24 L. J., Q. B. 54—Exch. Cham.

G. having agreed to let premises to P. for a term of years, P. paying 100*l.* for the fixtures, a lease by deed was prepared and engrossed on parchment: P. paid down only 50*l.* It was agreed between G. and P. that P. should be let into possession as tenant from year to year on the terms of the intended lease until he paid the balance of the 100*l.* At the same time G. signed, sealed, and delivered the deed, which, however, he retained in his own possession. No third person was present. No words qualifying the delivery, or expressly stating that it was an escrow till the payment of the balance, appeared to have been used. G. brought an action for use and occupation against an assignee of P.'s interest; and, on those facts appearing, objection was taken that the action ought to have been on the covenants contained in the deed:—Held, that the circumstances warranted an inference in fact that it was agreed by both G. and P., at the time of the execution of the instrument, that it should not operate as a lease until the payment, and that if there was such an agreement by both, though no express words of delivery, as an escrow, it would operate as a deed till then; and consequently P. was tenant from year to year under the terms in the instrument, and not tenant under a deed, and that the action for use and occupation would lie against him or the assignee of his interest. *Gudgen v. Besset*, 6 El. & Bl. 986; 3 Jur., N. S. 212; 26 L. J., Q. B. 36.

Agreement in 1859, by M., that he would, by indenture to be forthwith prepared, grant unto A. a lease of a house and premises, to hold the same for the term of three years from the 25th May, at the yearly rent of 84*l.*, payable by four quarterly payments (stating the days, and what covenants should be contained in the lease); "and it is mutually agreed that these presents shall operate as an agreement only, and that, until a lease shall be executed, the rent, covenants, and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced,

in the same manner as if the same had been actually executed." A. entered, and continued in possession until a quarter's rent became due, but no rent was paid:—Held, that the agreement constituted a tenancy, with a rent reserved, or made payable, within 11 Geo. 2, c. 19, s. 1; and therefore there was a right in M. to follow goods fraudulently removed by A. *Anderson v. Midland Railway Company*, 7 Jur., N. S. 411; 80 L. J., Q. B. 94; 8 L. T., N. S. 809; 3 El. & El. 614.

A., an owner of lace machines, paid 12*s.* a week to B. for permission to place the machines in a room in B.'s factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines. B. supplied the necessary steam-power for working the machines, payment for which was included in the above sum:—Held, that there was no demise to A. of any part of the room, and no relation of landlord and tenant created between him and B. *Hancock v. Austin*, 14 C. B., N. S. 634; 33 L. J., C. P. 252; 11 W. R. 833; 8 L. T., N. S. 429.

A. let to B. a defined portion of a room in a factory, with steam-power for working lace machines belonging to B., at a certain sum per annum, payable quarterly; a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter:—Held, a sufficient demise to entitle A. to distrain. *Selby v. Greaves*, 3 L. R., C. P. 594; 37 L. J., C. P. 251; 16 W. R. 1127; 19 L. T., N. S. 186.

As to creation of tenancy from year to year,—see this title, XVI, 1.

**Want of title of lessor.**—When it appears, upon the face of an instrument, that the party intending to demise has no power to demise, the instrument is not a lease. *Hayward v. Haswell*, 1 N. & P. 411; 6 A. & E. 265; W., W. & D. 158; 1 Jur. 54.

Where there is a demise of premises and an entire rent reserved, if any part of the premises could not be legally demised, the whole is void. *Doe d. Griffiths v. Lloyd*, 8 Esp. 78—Kenyon.

A lease of lands in which the lessor was seized in fee, and of other lands of which he was seized for life (with power of leasing), at one entire rent, and the lease not well executed according to the power, is good after the death of the lessor for the lands in fee, though not for the other lands; for the rent may be apportioned. *Doe d. Vaughan v. Meyler*, 2 M. & S. 276.

The lessor of certain lands knew that as to part of them he had no title to grant the lease. The lessee did not know, and had no means of knowing, that such was the case, and the lessor did not disclose the want of title of him:—Held, that it was not necessary in equity, in order that the lessee might be relieved of the lease, that there should have been any affirmative fraud, and that the concealment by the lessor of a fact affecting the title to a material part of the demised premises was a sufficient

ground for treating the lease as set aside. *Mostyn v. West Mostyn Coal and Iron Company*, 1 L. R., C. P. Div. 145; 34 L. T., N. S. 325.

A lease having been granted by deed in terms from which the law implies a covenant for title, and the lessor proving to have no title to part of the demised premises:—Held, that the lessee might refuse to take possession of such part of the demised premises, and elect to keep the remainder, and might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counter-claim. *Id.*

As to undertaking for title implied in agreement for lease,—see this title, I, 5, a.

As to estoppel of tenant to deny title of landlord,—see this title, X.

**Demises of lands out of possession; incorporeal hereditaments.]**—By parol, a dwelling-house and premises were demised for a year. The lessee "accepted the lease, and by virtue of the demise entered upon the demised land." Before and at the time of the demise, eight acres, included in it, had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them:—Held, that the demise was altogether void. *Neale v. Mackenzie*, 2 Gale, 174; 1 M. & W. 747—Exch. Cham.

An instrument not under seal, by which land is demised, and which also attempts to demise incorporeal tenements, is not void by reason of such attempt. *Reg. v. Hockworthy*, 2 N. & P. 383; W., W. & D. 707; 7 A. & E. 492.

A demise of an incorporeal hereditament can only be valid by deed; a demise by parol of a right of hunting and sporting, together with a messuage, is therefore void. *Bird v. Higginson*, 4 N. & M. 505; 2 A. & E. 696; 1 H. & W. 61; affirmed in error, 6 A. & E. 824—Exch. Cham.

**Condition and existence of the demised premises.]**—There is no contract, still less a condition, whereby a lease would be void, implied by law on a demise of ascertained real property only, that it is fit for the purpose for which it was let. *Hart v. Windsor*, 12 M. & W. 68; 8 Jur. 150; 13 L. J., Exch. 139.

On a demise of land, or the vesture of land (as the eatage of a field), for a specific term at a certain rent, there is no implied obligation on the part of the lessor that it shall be fit for the purpose for which it is taken. *Sutton v. Temple*, 12 M. & W. 52; 13 L. J., Exch. 17.

Therefore, where A. agreed in writing to take the eatage of twenty-four acres of land from B. for seven months, at a rent of 40*l.*, and stocked the land with beasts, several of which died a few days afterwards from the effect of a poisonous substance which had accidentally been spread over the field, without B.'s knowledge:—Held, that A. was not entitled, therefore, to throw up the land, but continued liable for the whole rent. *Id.*

There is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises. *Erskine v. Adeane*, 8 L. R., Ch. 756; 42 L. J., Chanc. 835; 21 W. R. 802; 29 L. T., N. S. 234.

Where an intended lessor of a particular house knows that the house is in a ruinous state, and dangerous to occupy, and that its condition is unknown to the intended lessee, and that the intended lessee takes it for the purpose of residing in it, he is not bound to disclose the state of the house to the intended lessee, unless he knows that the intended lessee is influenced by his belief of the soundness of the house in agreeing to take it, or unless the conduct of the lessor amounts to a deceit practiced upon the lessee. *Keates v. Cadogan*, 10 C. B. 591; 15 Jur. 428; 20 L. J., C. P. 76.

The defendants agreed to let certain gardens and music-hall to the plaintiffs on four specified days to come, for the purpose of giving a series of concerts, at and for a specified rent for each of the days. The defendants were to provide a band of music and certain entertainments, and to issue advertisements of the entertainments. The plaintiffs were to pay 100*l.* in the evening of each of the days, to receive and take all the money paid by persons entering the gardens, and to provide the necessary artists for the entertainments. After the agreement was entered into, and before the day arrived for the first concert, the music-hall was accidentally destroyed by fire:—Held, that as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect of its non-performance, and that no action would lie against them. *Taylor v. Caldwell*, 32 L. J., Q. B. 164; 3 B. & S. 826; 11 W. R. 720; 9 L. T., N. S. 356.

In the absence of any agreement on the subject, a person who agrees to take a house, must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in. *Chappell v. Gregory*, 34 Beav. 250.

Where a house was described as substantial and convenient, and having five bed-rooms; on a bill for specific performance:—Held, that this was no misdescription, although the house was out of repair, and the wall in some places only half-brick thick, and some of the bed-rooms extremely small inner rooms, without fireplace. *Johnson v. Smart*, 2 Giff. 151.

When a lessee covenants to pay the rent reserved and keep the demised premises in repair, he is bound, during the term, to perform both covenants as long as the subject-matter of the demise continues to exist, although it was originally of no value. *Meath v. Cuthbert*, 10 Ir. R., C. L. 395—C. P.

As to letting furnished houses and apartments,—see this title, XIX.

As to effect of destruction of or injury to premises,—see this title, VII, 2.

**Immoral or illegal purpose of demise.]**—An owner of premises, who grants a lease of them for a term, under which the lessee enters, cannot avoid the lease on the ground that it was obtained by the fraudulent misrepresentations of the lessee as to matters collateral to the lease, e. g., that he was a respectable person, and intended to use the premises for a respectable business; whereas he was not a respectable man, and intended at the time and did afterwards use the premises for an immoral and an illegal purpose. *Feret v. Hill*, 15 C. B. 207; 2 C. L. R. 1366; 18 Jur. 1014; 23 L. J., C. P. 180.

A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee, having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee, which was being administered in equity:—Held, that the assignment, and everything arising out of it, were so tainted with the immoral purpose, that the lessee could not recover. *Smith v. White*, 1 L. R., Eq. 626; 35 L. J., Chanc. 454; 14 W. R. 510; 14 L. T., N. S. 350—V. C. K.

In an action for breach of a contract to let rooms, the defendant may justify such breach by the fact that the plaintiff intended to use the rooms for illegal purposes, whether at the time of refusing to perform the contract he assigned or really acted upon such intended use as a reason for such refusal or not. *Cowan v. Milbourn*, 36 L. J., Exch. 124; 2 L. R., Exch. 230; 15 W. R. 750; 16 L. T., N. S. 290.

Lectures in support of the propositions that the character of Christ is defective and His teachings misleading, and that the Bible is no more inspired than any other book, are blasphemous and illegal, and therefore the proprietor of public rooms, who, in ignorance of the precise subject of the lectures, contracts to let such rooms for the purpose of certain lectures being delivered therein, may, upon subsequently ascertaining the subjects and nature of them, avoid the contract, and refuse to permit the lecturer the use of the rooms, and may justify such refusal, in an action by him for breach of contract, by pleading that he intended to use the rooms for irreligious, blasphemous, and illegal lectures. *Id.*

**Validity of leases for lives.]**—A lease for lives, to begin from the day of the date thereof, with seizin delivered afterwards, is good, and shall not be said to convey a freehold to commence in futuro. *Freeman d. Vernon v. West*, 2 Wils. 163.

By an indenture, premises were demised to M. E., and her heirs, for and during the natu-

ral lives of M. E.'s son, J. E., her daughter, M. E., and A. E.'s granddaughter, and the life of the survivor of them. A. E. had a daughter, but he had not a granddaughter at the time of making the indenture, nor previously thereto, though subsequently he had several granddaughters:—Held, that the lease was good for the lives of J. E. and M. E. only. *Doe d. Pemberton v. Edwards*, 1 M. & W. 533.

An agreement that A. is to have a tenement for life, not being under seal, does not operate to pass an estate for life. *Stone v. Rogers*, 2 M. & W. 443; M. & H. 140; 1 Jur. 455.

By writing not under seal, reciting that D. had purchased for the residue of a term four messuages, in one of which the plaintiff resided, it was agreed that he should continue to reside in that messuage during the residue of D.'s interest, if the plaintiff should so long live, at the yearly rent of 1s., and D. further agreed to assign all his interest in the premises purchased by D. to the plaintiff on payment of 140*l.* within a stated period:—Held, that this was a lease. *Lovelock v. Franklyn*, 8 Q. B. 871; 11 Jur. 1035; 16 L. J., Q. B. 182.

In 1813, R. O., being seized in fee of premises, mortgaged them for a term of 500 years to H., who died in 1814, having bequeathed the premises to his widow and executrix, who entered into possession and receipt of the rents. In 1837, R. O. died intestate, and J. O., his heir-at-law, paid off the mortgage, and received possession of the premises from the executrix, but no assignment was executed by her until 1843. In 1840, J. O. demised the premises after his death to his son W. O., during the lives of himself, his wife and child, and the survivor of them, at the yearly rent of 10*l.* The yearly value of the premises was 27*l.* In 1843, J. O. mortgaged the premises to L. for securing payment of 600*l.*, and the executrix of H., by the direction of J. O., assigned the residue of the term of 500 years to a trustee for L. as a further security, and in the meantime to attend the inheritance. Neither the mortgage nor the assignment made any mention of the lease for lives. In ejectment by the heir-at-law of the lessee against the heir-at-law of R. O.:—Held, first, that the lease for lives was not a void conveyance, under 26 Eliz. c. 4, s. 2. *Owen v. Owen*, 3 H. & C. 88.

Held, secondly, that L. was entitled to the protection of the term of 500 years against the claim of the heir-at-law of the lessee for lives. *Id.*

As to nature and incidents of life estates,—see ESTATE.

**Confirmation of void leases by acceptance of rent, or other acts.]**—In general, the acceptance of rent by a person who is entitled to set aside a lease will confirm it. *Doe d. Julliffe v. Sybourn*, 2 Esp. 667—Kenyon.

Yet acceptance of rent by a tenant in tail, on coming into possession, is no confirmation of a lease made by a tenant for life, which is

absolutely void at his death. *James d. Aubrey v. Jenkins*, Bull. N. P. 96.

Nor can a lease which is void against a remainderman be set up by his acceptance of rent, and suffering the tenant to make improvements after his interest vests in possession. *Doe d. Simpson v. Butcher*, 1 Doug. 50. S. P., *Jenkins d. Yate v. Church*, Cowp. 482.

A lease executed by a tenant for life, in which the reversioner, who was then under age, is named, but not executed by him, is void on the death of the tenant for life; and an execution by the reversioner only afterwards is no confirmation of it, so as to bind the lessee in an action of covenant. *Ludford v. Barber*, 1 T. R. 86. S. P., *Doe d. Martin v. Watts*, 7 T. R. 83; 2 Esp. 501.

A tenant for life leased premises for twenty-one years, and, before the expiration of that term, died; the trustees of the remainderman, then an infant, continued to receive the rent reserved, and he, on coming of age, sold the premises by auction; in the conditions of sale the premises were declared to be subject to the lease, and in the conveyance to the purchaser the lease was referred to as in the possession of the lessee; and in the covenant against incumbrances that lease was excepted; the purchaser mortgaged, and in the mortgage deeds the like notice was taken of the lease, and the mortgagees for some time received the rent reserved:—Held, that the lease expired with the interest of the tenant for life, and that the notice afterwards taken of it did not operate as a new lease. *Doe d. Potter v. Archer*, 1 B. & P. 531. And see *Doe d. Jordan v. Ward*, 1 H. Bl. 97.

Where by lease a mortgagee demised, and the executrix of the mortgagor demised and confirmed, and a power of re-entry was reserved to them or either of them:—Held, that it operated as the demise of the mortgagee, and the confirmation of the mortgagor's representative. *Doe d. Barney v. Adams*, 2 C. & J. 232; 2 Tyr. 289.

An heir in tail having received, for ten years, rent under a demise for ninety-nine years, granted by his ancestor:—Held, a confirmation of the lease. *Doe d. Southouse v. Jenkins*, 5 Bing. 469; 3 M. & P. 59.

Where a party takes a lease of an infant's lands, and the infant, on coming of age, mortgages the property to the lessee by deed referring to the lease, this is a confirmation of the lease. *Storry v. Johnson*, 3 Y. & C. 586.

The defendant came into possession under a lease from a tenant for life, whom the lessor of the plaintiff succeeded as remainderman; a money rent was to be paid; and, by a further reservation, the tenant was to carry, or cause to be carried, three cart-loads of culm yearly to the landlord's dwelling-house. At the trial this lease was objected to as invalid, but it appeared that the lessor of the plaintiff, at the Michaelmas after the tenant for life died, told his servant to go and look for carts to bring the culm home. The servant went to the tenants, and among others to the defend-

ant, who accordingly brought a load of culm to the dwelling-house, other persons who were tenants doing the same. On the following May-day the defendant sent two other cart-loads of culm to the house, where it was received, other loads being sent in by the tenants at the same time. The jury found that the culm was carried by and received from the defendant in the way of rent under the reservation:—Held, that such finding was grounded on sufficient premises, and that, allowing the lease to be void, the receipt of culm was a recognition of the defendant as tenant from year to year. *Doe d. Tucker v. Morse*, 1 B. & Ad. 865.

A lease made by a perpetual curate of a curacy augmented by the governors of Queen Anne's Bounty, without the concurrence of the patron paramount, though confirmed by the ordinary and immediate patron, is void at common law, and consequently is not set up by acceptance of rent by the successor to the curacy. *Doe d. Brammall v. Collinge*, 7 C. B. 939; 13 Jur. 791; 18 L. J., C. P. 305.

In 1786 a dean and chapter and P. granted a lease of premises for ninety-nine years, reserving a rent to the dean and chapter and another rent to P. This lease purported to be made in pursuance of leasing powers given by a private act of parliament, but was, in fact, not in accordance with them. The rents reserved by the lease had been from time to time regularly paid to and received by the successive deans and chapters, and to and by P. and his representatives. Quære, whether the lease was void or only voidable? but Held, that if voidable, it had been set up by acceptance of rent by each successive dean and chapter, and if void, the payment and receipt of rent were evidence from which a demise from year to year by the dean and chapter would be presumed. *Doe d. Pennington v. Taniers*, 12 Q. B. 998; 13 Jur. 119; 18 L. J., Q. B. 49.

Acceptance by an adult beneficiary, after attaining his majority, of rent accruing under an invalid lease, is not a confirmation of the lease or a bar to relief by having the lease set aside. *Robson v. Flight*, 4 De G., J. & S. 608.

**Necessity of entry by lessee.**—Entry is not necessary to the vesting of a term of years in the lessee; but for the purpose of maintaining an action of trespass the lessee must enter, since that action is founded on actual possession. *Harrison v. Blackburn*, 17 C. B., N. S. 678.

A., in 1819, demised lands to B. for 100 years, and, subject thereto, he, in 1820, demised for 200 years to C., who entered. In 1822 D. recovered judgment against A., and issued an elegit, under which the lands were delivered in execution:—Held, that C. was entitled to the possession, as against D., and might maintain trespass against him, it not appearing that B. had entered under the demise to him. *Chatfield v. Parker*, 2 M. & R. 540; 8 B. & C. 543.

**Principles of distinction between leases and agreements.]**—Whether an instrument is to be construed as a lease or an agreement depends upon the intention of the parties, to be collected from the instrument itself, and the nature of the subject-matter, without reference to any extrinsic circumstances or subsequent acts of the parties. *Doe d. Morgan v. Powell*, 8 Scott, N. R. 687; 7 M. & G. 980; 8 Jur. 1123; 14 L. J., C. P. 5. S. P., *Morgan d. Dowding v. Bissell*, 3 Taunt. 65.

An instrument is not a demise, although it contains the usual words of demise, if its contents show that such was not the intention of the parties. *Taylor v. Caldwell*, 3 B. & S. 826.

Words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operate only as an agreement for a lease, and not as a lease itself. *Goodtitle d. Estwick v. Way*, 1 T. R. 735.

A clause for a future lease does not of itself necessarily intend that the instrument must be only an agreement for a lease, if the intention of the parties appears to be otherwise. *Poole v. Bentley*, 12 East, 168; 2 Camp. 286.

A memorandum of an agreement to let, which contains words of present demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease. *Warman v. Faithful*, 3 N. & M. 187; 5 B. & Ad. 1042. S. P., *Doe d. Jackson v. Ashburner*, 5 T. R. 163.

**Instances of instruments held to amount to leases; as distinguished from mere agreements.]**—B., being wrongfully dispossessed of premises, executed the following deed:—"Be it remembered that B. hath let, and by these presents doth demise to F. (the premises), as now held by W. F., for the full term of twenty-one years, to commence the 1st day of May or the 1st day of November, whichever first happens after B. recovers the lands from the heirs, &c., F. covenanting and agreeing, on the foregoing conditions, to pay to B. the sum of, &c. Leases, with power of distress, and clauses of re-entry, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party as soon as B. recovers the lands," &c.:—Held, that this instrument operated as a present demise. *Barry v. Nugent*, 3 Dougl. 179; 5 T. R. 165, n.

An instrument dated in March, 1798, whereby the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm; and the tenant agreed to take, and, upon demand, to execute a counterpart of a lease of the farm from the 5th of April, 1798, for fifteen years, under a certain yearly rent, which lease was to contain the usual covenants, and an agreement for re-entry in case of non-payment of rent, and also the further covenants, &c.; and the agreement was to bind until the lease was executed, is a present demise, and therefore requiring a lease

stamp, the agreement for a future lease, with further covenants, being for the better security of the parties. *Doe d. Walker v. Groves*, 15 East, 244.

Agreement for a lease, with stipulations for the lessee to commence with laying out a considerable sum on the premises (the lease to contain certain specified covenants), "and in the meantime, until such lease shall be executed, to pay rent, and to hold the same premises subject to the covenants above mentioned," amounts to an actual demise. *Pinero v. Judson*, 6 Bing. 206; 3 M. & P. 497.

"G. F. does this day agree to let to J. S. three cottages for ten years; he further agrees to build a brewhouse and make a cellar, at the rent of 35*l.*: he agrees to pay the ground-rent, and has this day received 4*l.* from J. S., in earnest," is an actual demise, and not an agreement for a lease. *Staniforth v. Foz*, 7 Bing. 590; 5 M. & P. 589.

A memorandum having a lease stamp, by which A. agrees to let B. lands mentioned in an annexed abandoned lease from A. to C., upon the conditions, agreements, &c., contained in the same lease, and by which A. and B. bind themselves to execute a lease similar to such abandoned lease, is itself a valid lease. *Pearce v. Cheslyn*, 5 N. & M. 652; 4 A. & E. 225; 1 H. & W. 768.

"Sept. 21, 1829.—K. agrees to let, and P. to take, a house in its unfinished state, for the term of sixty years, being the whole term that K. has the same leased to him, at the rent of 525*l.*, payable quarterly, the first payment for the half-quarter at Christmas next; P. to insure the premises, and to have the benefit of an insurance lately paid; a lease and counterpart to be prepared at the expense of P., and to contain all the clauses, covenants, and agreements K. entered into in the lease granted to him," is an actual demise, and not a mere agreement for a lease. *Doe d. Pearson v. Ries*, 8 Bing. 178; 1 M. & Scott, 250.

The defendant held premises under a lease from H. at a certain rent; and entered into an agreement with N. for the sale of all the household furniture, &c., on the premises, for a certain sum, to be paid by installments, covenanting, on payment of the whole of the purchase-money, to demise the premises to N. for twenty-five years; the lease to contain the like covenants on the part of N., as were contained in the lease under which the defendant held. The agreement also contained a covenant that N. should, in the meantime, and until such lease should be granted, pay the rent and perform all the covenants which would be to be performed by him in case the lease was actually granted; with a power of distress for non-payment of the rent. N. was let into immediate possession under this agreement, and paid rent:—Held, that the agreement amounted to a present demise. *Hancock v. Caffyn*, 1 M. & Scott, 521; 8 Bing. 358.

A party seized in fee of premises, agreed, with eight other persons, to convey to them

in trust for the inhabitants of a parish, to hold from the Lady-day then next ensuing, for the term of ninety-nine years, at a specified rent, payable half-yearly. The agreement then contained covenants by the lessees to pay the rent, taxes, &c., and to keep the premises in repair, and by the lessor for quiet enjoyment; and also a proviso for the execution of a lease containing the usual covenants, to be executed before a day specified; and another, that the lessees, or their successors, should have the option of purchasing the fee-simple in the soil:—Held, that this instrument amounted to an actual demise, and was not a mere agreement for a lease. *Alderman v. Neate*, 4 M. & W. 704; 1 H. & H. 869; 3 Jur. 171.

The plaintiff, by letter, offered to take a farm of the defendant at a certain specified term and rent; the crops to be valued, and a lease to be prepared at the plaintiff's expense; the whole to be subject to a certificate of the plaintiff's solvency. The defendant, having received the certificate, by letter accepted of the plaintiff as tenant, on the terms proposed; the valuation was deferred from time to time; but the plaintiff, on paying 100*l.* towards the amount, was let into possession:—Held, that the letters of the plaintiff and defendant (at all events, as explained by the above circumstances, and some admissions made by the plaintiff after a distress) constituted an actual demise, on which the defendant was authorized to distrain for rent in arrear, and not a mere agreement for a lease. *Chapman v. Bluck*, 4 Bing. N. C. 187; 5 Scott, 513; 1 Arn. 15; 3 Jur. 200.

A tenant being in possession under a demise for three years, ending Michaelmas, 1836, at a rent payable at Michaelmas, the landlord and tenant agreed as follows:—"Memorandum of agreement, made 18th December, 1834, P., the landlord, agrees to let the farm to B., the tenant, for fourteen years, determinable at the end of seven years, with twelve months' notice (not stating the commencement), at the yearly rent of 20*l.*, payable half-yearly; a lease to be drawn upon the usual terms by T., and B. agrees to take it upon the said terms:—"Held, a present lease, commencing on December 18th, 1834. *Doe d. Phillip v. Benjamin*, 9 A. & E. 644; 1 P. & D. 440; 2 W., W. & H. 96.

By an instrument under seal, and stamped with a lease stamp, W., in consideration of the rents, covenants and agreements reserved on the part of C., to be paid, performed and observed, covenanted, promised and agreed with C., that she, W., her heirs or assigns, should and would, at any time during the term thereafter agreed to be demised, upon request made to her or them in writing under the hand of C., for that purpose, grant and execute to C.; and C. consented and agreed to accept and execute a counterpart of a demise or lease of premises therein described, for the term of twenty-one years from a day past, determinable as thereafter mentioned, at a certain rent, payable quarterly; and C.

covenanted to lay out a sum in repairing, painting, &c.; and it was agreed, that there should be contained in the lease and counterpart, by and on the part of C., a covenant for payment of rent, to repair, &c.; and also a covenant for quiet enjoyment, and a power to C., to determine the tenancy on the lease at the end of the third, seventh or fourteenth year of the term of twenty-one years, on giving notice:—Held, an actual demise, and not a mere agreement for a future lease. *Curling v. Mills*, 7 Scott, N. R. 709; 6 M. & G. 173; 12 L. J., C. P. 316.

On the 28th of October, 1843, the plaintiff, the defendant, and M. entered into an agreement, by which, after reciting that M. was tenant to the defendant of a house at a rent of 25*l.* a year, and had agreed to let it to the plaintiff at a rent of 20*l.* a year from 24th of June, 1844, at which time the defendant agreed to exonerate M. from his tenancy on his paying all rent up to that day, and to accept the plaintiff as tenant from that period, at the rent of 20*l.* a year, M. agreed to let and the plaintiff to take the house from the date of the agreement of the 24th of June then next, at the rent of 20*l.* a year, and M. agreed to find all materials except lath, to put up a partition wall, the plaintiff finding lath and labor. And the plaintiff agreed to take the house of the defendant from the 24th of June, at the rent of 20*l.* a year, and to give or take six months' notice to quit, and the defendant agreed to exonerate M. from his tenancy on the 24th of June, on his paying up all rent due to that time. Immediately after the execution of this agreement M. let the plaintiff into possession. On the 4th of March, the defendant agreed to sell the house to the plaintiff, but this agreement was not carried into effect:—Held, first, that the instrument of 28th of October, 1843, amounted to a lease by the defendant to the plaintiff from 24th of June, 1844. *Tarte v. Darby*, 15 M. & W. 601; 15 L. J., Exch. 326.

Held, secondly, that it was not affected by the subsequent agreement for the sale of the premises. *Id.*

**Instances of instruments held to be agreements only, not constituting a demise.**—An instrument on an agreement stamp, reciting that A., in case it should turn out that he is entitled to certain premises on the death of B., would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a license to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe d. Coore v. Olave*, 2 T. R. 739. S. P., *Perring v. Brook*, 7 C. & P. 360—Coleridge.

An agreement, by which A. agreed to let her house to B. "during her life, supposing it to be occupied by B. or a tenant agreeable to A." and containing a stipulation that "a clause was to be added in the lease" for a particular purpose, is only an agreement for a lease, and not a perfect lease, the stipulation

clearly showing it to be executory. *Dee d. Bromfield v. Smith*, 6 East, 530; 2 Smith, 570.

The following letters constitute an agreement only, and not a demise. On the 21st February, 1825, the defendant wrote to the plaintiff: "I shall be happy to take a lease of your iron ore at a royalty of 1s. per ton, and I will engage to work the several veins of ironstone, limestone, ore, and manganese, in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores (which I believe to be about forty per cent.), the term to be about forty years from the 24th June next, and the sleeping rent 150*l.* per annum. The relative proportion of the iron ores in weight to be worked together, to be ascertained by a competent person." The plaintiff wrote to the defendant in answer: "I agree to the terms contained in your letter. I shall be ready to grant a lease conformable thereto." *Jones v. Reynolds*, 1 G. & D. 62; 1 Q. B. 506.

The following instrument is an agreement for a lease, and not a lease: "H. agrees to make and execute to E. a good and valid lease of all that messuage, &c., to hold to E., his executors and assigns, for the term of seven years, from the 24th day of June next, at and under the yearly rent of 105*l.*, clear of all taxes and assessments (except the land tax), payable half-yearly, the first half-yearly payment to be made on the 25th day of December next. And the lease shall contain a covenant on the part of E. to pay the rent, also to keep the premises in repair (damages by fire excepted); also a proviso for re-entry on non-payment of the rent by the space of twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed. And E. agrees to accept such lease, upon the terms and conditions above specified, and to execute a counterpart; and E. agrees (when and so soon as the messuages or dwelling-houses on either side of the messuage hereby agreed to be demised shall become tenanted and occupied) to pay to H. an additional yearly rent of 15*l.* during the remainder of the term of seven years. And H. agrees, on or before the 24th day of June next, to erect eight light panels in front of the drawing-room windows, and fence-blind to same windows, to paper the hall and staircase, and all the rooms, save those on the basement and attics. And it is agreed, that by the lease hereby agreed to be granted, the rent therein reserved shall be 120*l.*; and that by a separate deed, to bear date the next day after the indenture of lease, H. shall release to E., out of the annual rent of 120*l.*, the annual sum of 15*l.* E. to prepare lease at his own cost, to be approved of by lessor's solicitor." *Rawson v. Eicks*, 2 N. & P. 428; 7 A. & E. 451; W. & D. 675.

By articles, dated 2d May, 1838, the defendant agreed with the plaintiff that he would grant him a lease of a messuage, for twenty-one years from Midsummer-day then next, at the rent of 45*l.*, payable quarterly,

on the usual days of payment, in every year during the term, the first payment to commence on the 29th September then next: to be entered upon immediately by the plaintiff, he having, on the day of the date, paid 25*l.* to the defendant; and in the lease were to be contained covenants to pay the rent, to repair, &c., and all other usual and reasonable covenants, with a power to either party to determine the lease at the end of seven or fifteen years:—Held, that this instrument amounted to an agreement for a lease only, and not to an actual demise, and that the plaintiff was not entitled to recover as for the breach of an implied promise for quiet enjoyment. *Brashier v. Jackson*, 6 M. & W. 549; 8 D. P. C. 784.

By a memorandum, the plaintiff agreed to let to the defendant, and the defendant agreed to take a house, from the 24th June then next ensuing, for the term of twenty-one years, determinable at seven and fourteen years; that the lease to be granted was to contain a covenant on the part of the defendant to purchase the fee-simple for 600*l.*, at any time within the first seven years of the term to be granted, and a covenant on his part for payment of the rent of 35*l.*, quarterly, clear of all deductions for taxes whatsoever; and that the insurance on 500*l.* was to be paid by the plaintiff, and to be repaid by the defendant, as an increased rent: to lay out within twelve months 100*l.* on the premises to keep the premises in substantial repair, and all other usual covenants, as in leases of houses in B.; and that the defendant should execute a counterpart of the lease when tendered to him by the solicitor of the plaintiff, and that the expense of the lease and counterpart was to be borne and paid by the defendant:—Held, that this was an agreement for a lease, and not an actual demise, and that the defendant, having entered and paid rent under the agreement, became tenant from year to year, which tenancy could only be determined by a regular notice to quit, or a surrender in writing. *Chapman v. Towner*, 6 M. & W. 100.

A party possessed of the residue of a term of years in premises, entered into a written agreement with another to grant him a lease of the same, together with certain fixtures, for a definite period, at a certain rent, payable quarterly; the lease to contain certain covenants; and the agreement further contained a covenant by the lessor to execute such lease when required; and that, until then, it should be lawful for the lessor, at any time after the execution of the agreement, to distrain for any rent due in respect of the demised premises:—Held, that this instrument did not amount to an actual demise. *Bicknell v. Hood*, 5 M. & W. 104; 2 H. & H. 86; 3 Jur. 774.

Where A. agreed "that he would by indenture demise to B. a house for fourteen years, from the 25th day of December last past, at the yearly rent of 40*l.*, payable quarterly; but if B. should pay A. the 40*l.*

before the expiration of the first quarter, which would be at Lady-day then next, in that case the rent should be reduced to the rate of 33*l.* per annum, payable quarterly."—Held, that the agreement was no demise. *Hegan v. Johnson*, 2 Taunt. 148.

An agreement executed on the 24th November upon an agreement stamp, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant, that the term was to be from year to year, the lands to be entered upon on the 3d February, 1808, and the housing on the 12th May, and that a lease was to be made upon these conditions, with all usual covenants, at the foot of which the tenant wrote, "I agree to take lot 1 (the premises in question), at the rent, &c., subject to the covenants," is an agreement for a lease, and not a present demise, there being no present occupation, and an express stipulation for a future lease, as well as time given to prepare it. *Tempest v. Rawling*, 13 East, 18.

Where a lease was granted to one who afterwards took another into partnership, and both applied jointly to the landlord to enlarge the premises, agreeing to pay 10*l.* per cent. per annum on the money laid out, which was accordingly done, and the tenants afterwards dissolved partnership:—Held, that the agreement was only collateral to the lease, and not a new demise. *Hoby v. Roebuck*, 2 Marsh. 433; 7 Taunt. 157.

Where a tenant was in possession under a memorandum, whereby the lessor agreed to let a house on lease for twenty-one years at the net clear rent of 63*l.* per annum, the tenant to enter at any time on or before a particular day, on paying 50*l.* on entry; and there was a purchasing clause in the lease:—Held, that this only amounted to an agreement for a future lease, and that no lease had been executed. *Dunk v. Hunter*, 5 B. & A. 323.

Where A. agreed under seal to take and hire of B. a house and premises at a certain annual rent, but the instrument contained no words of demise, and there was nothing to show when the interest was to commence or determine:—Held, that it was no more than an agreement for a lease. *Clayton v. Burtenshaw*, 7 D. & R. 800; 5 B. & C. 41.

A landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for a letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent. The amount was not settled, the sureties were not given, nor was any rent ever paid:—Held, that the instrument, although it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John v. Jenkins*, 1 C. & M. 227; 3 Tyr. 170.

An agreement was, in substance, as follows:—"Proposals for letting the M. & G. farms in H.,—quantity, 180 acres,—term, 12 years determinable," &c. "Rent, 162*l.* To farm the arable land upon the four-course system," &c.

"All other covenants, except as above altered, contained in a draft lease dated December 1st, 1824, granted by W. P. to J. W."—

"June 8d, 1835: Agreed to the above rent, provided the house and buildings are put into tenantable repair on a plan to be mutually determined upon and finally settled within one month from the above date." The agreement was signed by the landlord and the party intending to take:—Held, that it did not constitute a present demise, because the terms were to take effect only upon the performance of a condition, and it was not ascertained when the tenancy was to commence. *Doe d. Wood v. Clarke*, 7 Q. B. 211; 9 Jur. 426; 14 L. J., Q. B. 233.

By a memorandum, dated the 23d of June, 1842, made between A., as agent for and on behalf of the churchwardens of the parish of St. M. (not naming them), of the one part, and B. of the other part, it was agreed (provided a license could be obtained from the lord of the manor, and upon B. putting the premises into repair) that the churchwardens should grant a lease to B. for twenty-one years from Midsummer-day then next, under the clear yearly rent of 30*l.*, such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, and all other usual and proper covenants, and B. agreed to accept such lease, and execute a counterpart, and that until such lease and counterpart should be granted the yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed:—Held, that this was properly stamped as an agreement. *Doe d. Bailey v. Foster*, 8 C. B. 215; 15 L. J., C. P. 263.

As to the distinction between agreements and leases or deeds, in respect of stamps required,—see this title, I., 4.

**Distinction between lease and license.]—**The property of the soil and bed of the Thames, and of moorings fixed to the soil of the river, is vested in the conservators. W. used certain moorings on the river for the purpose of mooring his hulk, as a floating coal depôt, under an agreement with the conservators, to the following effect: "The conservators of the Thames grant to W. W. liberty and license to fasten, and thenceforth keep fastened, his coal hulk to the moorings placed by the conservators in the river, until either party shall have given the other one calendar month's notice in writing. In consideration whereof W. W. shall pay the conservators, towards the expenses of placing and maintaining and repairing the moorings, the annual sum of 80*l.*" W. was assessed to the poor-rate as an occupier of part of the bed of the river:—Held, that the agreement did not constitute a demise, but only a license to use the moorings, and that W. was, therefore, not an occupier, and not liable to be rated. *Watkins v. Milton-next-Gravesend (Overseers)*, 16 W. R. 1059; 3 L. R., Q. B. 350; 37 L. J., M. C. 73; 18 L. T., N. S. 601.



**3. Statute of Frauds; and other Statutes requiring Leases or Agreements to be in Writing or by Deed.**

**The Statute of Frauds.**—[By 29 Car. 2, c. 3, s. 1, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates to the contrary notwithstanding.]

By s. 2, except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during each term, shall amount unto two-third parts at the least of the full improved value of the thing demised.]

**Operation of the statute, generally; and effect of parol demises.**—The first section of the Statute of Frauds, as construed by the second, is meant to vacate parol leases conveying a greater interest in land than for three years, and whereon a rent is reserved. *Crosby v. Wadsworth*, 6 East, 602; 2 Smith, 559.

Notwithstanding that section, a parol lease for more than three years will create a tenancy from year to year; the intention of the statute being satisfied by its not operating as a term. *Clayton v. Blakey*, 8 T. R. 3. S. P., *Doe d. Rigg v. Bell*, 5 T. R. 471.

If, under a parol demise for more than three years, void by the Statute of Frauds, the lessee enters and becomes tenant from year to year, he is bound by an undertaking to repair contained in such void demise. *Richardson v. Gifford*, 8 N. & M. 325; 1 A. & E. 52. S. P., *Beale v. Sanders*, 8 Bing. N. C. 850; 5 Scott, 58; 3 Hodges, 147; 1 Jur. 1083.

**What leases or agreements are within the statute.**—A parol lease for a term not exceeding three years, warranted by the second section of the Statute of Frauds, may be as special in its terms as a written one. *Bolton v. Tomlin*, 1 N. & P. 247; 5 A. & E. 856; 2 H. & W. 369.

A verbal agreement to take ready-furnished lodgings "for two or three years" is a contract for an interest in land, and valid as a lease for not exceeding three years. *Edge v. Stafford*, 1 Tyr. 298; 1 C. & J. 391.

A landlord, who had demised premises for a term of years at 50l. a year, agreed with his tenant to lay out 50l. in making certain improvements upon them, the tenant undertaking to pay him an increased rent of 5l. a year during the remainder of the term (of which several years were unexpired), to commence from the quarter preceding the completion of the work:—Held, that the landlord, having done the work, might recover arrears

of the 5l. a year against the tenant, though the agreement had not been signed by either party; for that it was not a contract for any interest in or concerning lands within the statute; nor was it, according to that statute, an agreement "not to be performed within one year from the making thereof," no time being fixed for the performance on the part of the landlord. *Donellan v. Read*, 3 B. & Ad. 899.

**Action on an indenture for rent.** Plea, that while the defendant was in the occupation of the premises, and before the rent became due, it was agreed that the plaintiff should make some alterations, and in consideration thereof the defendant should relinquish his interest under the indenture, and accept a fresh lease for seven years at an increased rent; and until such lease should be tendered to the defendant he should hold the premises as tenant from year to year, at the increased rent; that the plaintiff executed the alterations; that the defendant relinquished his interest under the indenture, and held the premises under the agreement; and that no new lease was executed; by means of which premises the defendant became tenant from year to year, and all his interest under the indenture was surrendered to the plaintiff by act and operation of law:—Held, first, that the plea could only be proved by an agreement in writing, since the stipulation as to the yearly tenancy was part of the agreement for a future lease, and such agreement was required by the Statute of Frauds to be in writing. *Forquet v. Moor*, 7 Exch. 870; 22 L. J., Exch. 35.

Held, secondly, that, under such an agreement, there would be no surrender of the existing lease by operation of law, until the new lease was granted. *Id.*

In consideration that A., who was tenant of premises under a parol agreement for a seven years' lease, would give up immediate possession to B., in order that B. might enter thereon as tenant, and also as a compensation for improvements made by A. on the premises, and for the value of articles left thereon by A., B. agreed to pay A. 100l. A. accordingly relinquished and gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A., and B. afterwards, in part performance of the agreement on his part, paid A. 51l. In an action by A. to recover the balance of the 100l.:—Held, that the contract, in respect of which he sued, was not a contract for the sale of an interest in or concerning lands. *Kelly v. Webster*, 12 C. B. 283; 16 Jur. 838; 21 L. J., C. P. 163.

A plaint in the county court stated that the plaintiff assigned to the defendant the agreement for a lease of certain premises, but it was alleged that there was a parol agreement that part of the premises was to be held by the defendant in trust for the plaintiff. Evidence was given on both sides, but the judge, being of opinion that actual fraud had not been proved against the defendant, and there

being no resulting trust in the assignment, decided that the Statute of Frauds was applicable, and dismissed the plaintiff, without coming to any distinct decision upon the evidence:—Held, that the judge ought to have decided that the Statute of Frauds had no application; and the court, upon a consideration of the evidence, decided that the plaintiff was entitled to relief, and reversed the decree. *Booth v. Turler*, 16 L. R., Eq. 182—V. C. M.

A. agreed, in writing, to let to B. premises, at a rent of 36l., payable quarterly; and not to raise the rent or give B. notice to quit so long as he continued to pay the rent when due. A., who had only a leasehold interest, to expire in 1881, had also agreed verbally with B. to let him remain in the premises for such term of years, not exceeding A.'s term therein, as B. might desire to continue tenant. A railway company contracted to purchase the interest of B. in the premises, which he described as "held for any term at tenant's option, but not beyond the term and interest of A., which term will expire in 1881." The company disputed B.'s title to the interest described, and paid the purchase-money into court:—Held, that the relation of landlord and tenant made B. a purchaser for valuable consideration to the extent of his lease; that the Statute of Frauds was no bar in equity to B.'s claim; that B. was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity; and that he was entitled to the purchase-money. *King, In re, East of London Railway Company, Ex parte*, 16 L. R., Eq. 521—V. C. M.

The owner of six leasehold houses agreed in writing to let one of them, numbered 737, to a tradesman, the agreement saying nothing about a restrictive covenant. On the same day he also agreed to let another of the houses, numbered 735, to a grocer, and he agreed with him that the business of a grocer should not be carried on in any of the other five houses. Afterwards he contracted to sell the house No. 737 and a third house numbered 739, to T., also a grocer; and the agreement, which was in writing and dated the 6th of July, 1870, contained nothing about a restrictive covenant, but an underlease was prepared and engrossed which did contain a covenant that the premises should not be used for a grocer's business. An appointment was made for the execution of the underlease and counterpart on a certain day; but on the previous evening T. died suddenly, intestate. It was stated, but on the plaintiff's evidence only, that after the written agreement of the 6th of July, and before T.'s death, T. verbally agreed to the insertion of the restriction, and there was other evidence that he was prepared to execute a counterpart of the engrossment. It having been shown that the insertion of such a restriction would considerably diminish the value of the property:—Held, that the administrator of the intestate could not be compelled to execute a counterpart of a lease

containing such a restriction. *Snelling v. Thomas*, 17 L. R., Eq. 803; 43 L. J., *Chanc.* 506—V. C. B.

The written agreement of the 6th of July stipulated that the property should be bought "subject to the existing tenancies." The plaintiff alleged that on the 6th of July the lessee of the house No. 737 was under an agreement to consent to a restrictive covenant, and in proof of this the counterpart of a lease, bearing date the day before the agreement of the 6th of July, was produced, containing such a covenant. It having been shown that the lease was antedated and was not in fact executed till after the 6th of July, 1870:—Held, that the administrator was not by this clause bound to execute the counterpart of a lease containing the restriction. *Id.*

A landlord demised to a tenant a message in an unfinished state, by a written agreement. Before and at the time of the tenant's signing the agreement, the landlord verbally promised the tenant to put the message into a condition fit for habitation. Among the things which he so undertook to do upon the message was the construction of a water-closet. In an action for the breach of his promise to put the message into a condition fit for habitation:—Held, that his verbal promise to finish the message was collateral to the written lease; that evidence of the promise was admissible at the trial; and that his undertaking to build a water-closet in the message was not a contract for an interest in land within the fourth section of the Statute of Frauds, and therefore need not be in writing. *Mann v. Nunn*, 43 L. J., C. P. 241; 80 L. T. N. S. 526. But see *Angell v. Duke*, cited *infra*.

A declaration alleged that before the making of the agreement thereafter mentioned, the plaintiff and the defendant had been negotiating for the letting by the defendant to the plaintiff of a message and premises, together with the use of the furniture therein; that the plaintiff had objected to becoming tenant on the ground that the message and premises were insufficiently furnished. It further alleged that the defendant, in order to induce, as he did in fact thereby induce, the plaintiff to become tenant, without requiring him to send in furniture previously to the commencement of the tenancy, verbally promised the plaintiff that he, the defendant, would, within a reasonable time after such commencement, send in such additional furniture as might be found necessary; and thereupon, in consideration that the plaintiff, at the request of the defendant, had become tenant, without requiring him previously to the plaintiff so becoming tenant to send in the furniture, the defendant promised the plaintiff that he would within a reasonable time send in such furniture. Breach, that he did not perform his last-mentioned promise:—Held, that the declaration was good; that the promise to send in the furniture was collateral to the agreement relating to the tenancy of the house; and that it

was not required by the 4th section of the Statute of Frauds to be in writing, as an agreement for an interest in land. *Angell v. Duke*, 44 L. J., Q. B. 78; 10 L. R., Q. B. 174; 23 W. R. 307, 548; 32 L. T., N. S. 25, 320.

A corporation, being the owner of a graving-dock, issued regulations for its use, that the dock would "be let to parties requiring the same for the repair of vessels" at certain rates; that a book would be kept by the borough treasurer for the entering of the names of vessels intended for repair, and that as far as practicable priority would be given to vessels in the order of entry. A sum of three guineas was to be paid to the borough treasurer on entering each vessel, which "entrance money, and the right of turn for the use of the dock," were to be forfeited if the vessel did not take her turn at the specified time; and the corporation was to have a lien for dockage upon the vessel, with a power to detain the vessel for the same. In an action by a ship-owner against the corporation for not allowing his vessel, for which the entrance fee had been paid, to enter such dock in her turn, according to these regulations:—Held, that the contract for the use of the dock did not amount to an interest in land within the 4th section of the Statute of Frauds, and that it did not require to be under seal. *Wells v. Kingston-upon-Hull (Mayor, &c.)*, 44 L. J., C. P. 257; 10 L. R., C. P. 402; 23 W. R. 562; 32 L. T., N. S. 615.

The plaintiffs agreed in writing with the defendant to let him a public-house from year to year, with an option for him to call on them to grant him a lease for twenty-eight years, and a stipulation that if he sold such lease for more than 1,200*l.* he should give the plaintiffs half the difference. The plaintiffs subsequently granted him a lease differing from that agreed to be granted in the following particulars:—It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* There was no covenant, as had been agreed, against assignment without the lessors' consent, nor binding the lessee to take his beer of the plaintiffs. Some other covenants, burdensome on the defendant, which had been agreed for, were omitted. These alterations were arranged by parol only. The defendant sold the lease for 2,500*l.* The plaintiffs sued upon the agreement for half the difference between that sum and 1,200*l.* The jury found that the stipulation as to dividing the surplus remained in force or was renewed:—Held, that the effect of the alteration of the original terms agreed upon between the parties was that the old agreement was dissolved, and a new one made, incorporating such parts of the old agreement as the parties did not choose to alter; and that as such new agreement related to land, and was not in writing within the 4th section of the Statute of Frauds, it could not be enforced by action. *Sanderson v. Graves*, 44 L. J.,

Exch. 210; 10 L. R., Exch. 284; 23 W. R. 797; 33 L. T., N. S. 260.

The plaintiff, in a letter, proposed to take a lease of the defendant's house for a term of years, if the defendant would carry out certain alterations. A correspondence and interviews followed, and it was ultimately agreed that the alterations should be made, the plaintiff to pay 75*l.* towards them. The plaintiff wished to have the drawing-room painted in a particular way, and the defendant consented that the plaintiff should send in his own workman to paint it, which he accordingly did, and also laid down gas pipes, with the defendant's consent. Ultimately the plaintiff was prevented from taking possession of the house owing to the default of the defendant in carrying out the alterations to be performed by him, and brought an action for breach of the agreement, with the common counts for work done. The correspondence disclosed no agreement sufficient to satisfy the Statute of Frauds:—Held, that the plaintiff could, under the common counts, recover for the value of the work done by the defendant's consent. *Pullbrook v. Lawes*, 1 L. R., Q. B. Div. 284; 34 L. T., N. S. 95; 45 L. J., Q. B. Div. 178; overruling *Hodgson v. Johnson*, El., Bl. & El. 696; 28 L. J., Q. B. 88.

**Sufficiency of the memorandum or note required by the statute.**—One paper, referring to another, in which the terms of an agreement are stated, will constitute a contract sufficiently executed according to the provisions of the Statute of Frauds; but where the first paper was in these words: "I agree to let the premises in G. L., containing three stables, &c., for the same rent, and subject to the same conditions that I hold them myself."—Held, that this paper, even though ratified by the proposed lessee, as it did not state the duration of the term, did not contain enough to constitute a memorandum of an agreement sufficient to satisfy the statute. *Pittemaurice v. Bayley*, 9 H. L. Cas. 78; 6 Jur., N. S. 1215; 8 W. R. 750; affirming judgment of Exchequer Chamber 8 El. & Bl. 664; 4 Jur., N. S. 506; 27 L. J., Q. B. 143.

The following letter was written by E. to the plaintiff (after taking the defendant over a house belonging to the plaintiff): "I have at length let Town Walls House, subject to certain alterations and repairs, at 40*l.* per annum. A list of the repairs I herewith send you. I think they are so absolutely necessary and reasonable that I have at once set Mr. B. upon the work, so as to bind the person who has taken it." The defendant had previously offered to take the house:—Held, that the letter was not such a memorandum of the bargain as to satisfy the 4th section of the Statute of Frauds, inasmuch as it was a mere proposal, and did not specify the commencement or the duration of the term, so as to amount to evidence of a contract. *Clarke v. Fuller*, 16 C. B., N. S. 24; 12 W. R. 671.

A., having agreed by parol to grant a lease to B., the lease, as agreed upon, was en-

grossed. A. was afterwards induced not to grant the lease, and his agent wrote to B., informing him that A. had gone away "without executing the lease," and that the matter must stand over; and in another letter A.'s agent wrote declining to carry out "the agreement to grant a lease which your client alleges he has entered into." The answer in the suit admitted the parol agreement and the engrossment of the lease, but insisted on the Statute of Frauds:—Held, that neither the expressions used in the letters of A.'s agent, nor the answer in the suit, constituted a memorandum of the contract in writing within the Statute of Frauds. *Jackson v. Oglunder*, 13 L. T., N. S. 16; 18 W. R. 936; 2 H. & M. 465.

Where the defendant agreed in writing to grant the plaintiff a lease at a specified rent and for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease under which he then held the property, and the plaintiff filed a claim for specific performance, stating the agreement, and that it was further agreed that he should pay a premium of 200*l.*, which by his claim he offered to do:—Held, that this additional term did not render the Statute of Frauds a valid defense to the claim. *Martin v. Pycroft*, 2 De G., M. & G. 785; 16 Jur. 1125; 22 L. J., Chanc. 94.

A tenant applied to the landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting a lease for fourteen years at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asking for a term of twenty-one years. No final agreement was come to, but some months afterwards, a negotiation having proceeded between the tenant and landlord without the intervention of the solicitors, the landlord wrote a letter promising the tenant a lease for fourteen years "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance:—Held, that parol evidence was admissible to connect the report and the tenant's previous letter with the subsequent letters; and that, it being conclusively established that there had never been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the Statute of Frauds. *Baumann v. James*, 3 L. R., Ch. 508; 16 W. R. 877; 18 L. T., N. S. 424.

The report provided for the tenant doing certain specified works and "other works" upon the property, and estimated the expense from 150*l.* to 200*l.* The specified works being such as must evidently cost nearly that sum:—Held, that there was no such uncertainty as to prevent specific performance. *Ib.*

The plaintiff, in a bill for specific performance of an agreement to take a lease of a house, alleged evidence of a verbal agreement, which was denied by the defendant. In order to take the case out of the Statute of Frauds, the plaintiff relied on a letter written

by the defendant, in which the defendant agreed to take the house for seven years on certain terms, but in which the day of the commencement of the lease was not mentioned; and on another letter from the defendant, mentioning the day of commencement, and adding terms to which the plaintiff did not agree:—Held, that there was no memorandum of agreement sufficient to satisfy the requirements of the Statute of Frauds. *Nesham v. Selby*, 13 L. R., Eq. 191; 41 L. J., Chanc. 173; 26 L. T., N. S. 145—R.; affirmed on appeal, 7 L. R., Ch. 406; 41 L. J., Chanc. 551; 26 L. T., N. S. 568.

An offer in writing to take a lease of a theater, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing, is not an agreement in writing within the Statute of Frauds so as to entitle the lessor to have the same specifically performed. *Williams v. Jordan*, 6 L. R., Ch. Div. 517—R.

A memorandum of agreement to grant a lease, not stating any time for the commencement of the lease, construed as an agreement for a lease to commence immediately from the date of the agreement, and held sufficient under the Statute of Frauds. *Jague v. Millar*, 6 L. R., Ch. Div. 153; 37 L. T., N. S. 151; 25 W. R. 846—Fry, J.

Action for specific performance of an agreement to take a lease of a house. In order to take the case out of the Statute of Frauds the plaintiff relied on a letter, written by the defendant, in which "the term" was stated "to be for twelve years," but the day of the commencement of the term was not mentioned; and in the same letter, referring to certain covenants, the defendant "suggested that they be similar to those contained in A.'s lease":—Held, first, that there never was any concluded agreement between the parties. *Cartwright v. Miller*, 36 L. T., N. S. 898—V. C. M.

Held, secondly, that if there had been an agreement, there was no memorandum of the agreement, in writing, sufficient to satisfy the Statute of Frauds, as the commencement of the term was not stated. *Ib.*

As to necessity of expressing the proper consideration,—see this title, I., 4.

**What signature sufficient to satisfy the statute.**—An indorsement on the draft of a lease, signed by the lessee, and stating, that as circumstances prevented him from performing his agreement, he wished the lessor to let the premises, will satisfy the statute. *Shippey v. Derrison*, 5 Esp. 190—Ellenborough.

The mere circumstance of the name of the party being written by himself in the body of a memorandum of agreement for a lease, will not constitute a signature within the mean-

ing of the statute. *Stokes v. Moore*, 1 Cox, 219.

A memorandum of agreement for a lease was signed by the lessee, but the name of the lessor did not appear in any part of the memorandum:—Held, that a letter written by the lessee subsequently to the memorandum, referring to the lessor by name, was sufficient to satisfy the statute. *Warner v. Willington*, 8 Drew. 523; 2 Jur., N. S. 433; 25 L. J., Chanc. 662.

As to the effect of the analogous provisions of the Statute of Frauds in respect of contracts between vendor and purchaser,—see SALE.

**Necessity of deed; under the repealed statute, 7 & 8 Vict. c. 76.**—[By s. 4 of this statute (repealed from the 1st of October, 1845, by 8 & 9 Vict. c. 106), *no lease in writing of any freehold, copyhold, or leasehold land, or surrender in writing of any freehold or leasehold land, shall be valid as a lease or surrender unless the same shall be made by deed, but any agreement in writing to let or to surrender any such land shall be valid, and take effect as an agreement to execute a lease or surrender, and the person who shall be in the possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year.*]

While the act was in force, A. and B. entered into a written agreement, not under seal, that A. should let and B. should take premises from a certain day for the monthly rent of 86s., to be paid every four weeks:—Held, that the 4th section prevented this document from taking effect as a lease. *Burton v. Reetell*, 16 M. & W. 307; 11 Jur. 71; 16 L. J., Exch. 85.

A., who held a long lease of premises, and B., by writing, agreed, by words of present demise, for a lease of three years from the 20th of September, 1845, by A. to B., and that if B. should, at the end of the term of three years, desire to renew his tenancy, then, on notice given by B. six months before the end of such term, A. should renew the tenancy for a further term of three years, or grant an underlease of A.'s term, at the option of B. B. was let into possession, and paid rent, and afterwards gave notice that he desired a renewal of the tenancy, but the renewal was not agreed upon, and the original term of three years expired. A., without giving notice to quit, brought ejectment, laying the demise on the 30th of September, 1848. The 7 & 8 Vict. c. 76, was in force from the 1st of January, 1844, to the 1st of October, 1845:—Held, that the demise, not being under seal, operated as an agreement for a lease, and that by the payment of rent B. became tenant from year to year, subject to the terms of the agreement; that his interest expired of itself at the end of the term of three years first mentioned in the agreement, without any notice to quit; and that his having exercised his option to take a renewed term, and given notice accordingly,

gave him no interest in the land. *Doe d. Davenish v. Moffatt*, 15 Q. B. 267; 14 Jur. 935; 19 L. J., Q. B. 498.

In an action by A. against B. for rent on a demise from quarter to quarter, with the rent payable one quarter in advance, a written agreement for this quarterly letting, made while the 7 & 8 Vict. c. 76, s. 4, was in force, was put in, which was signed by B., but not by A.:—Held, that this was evidence of a parol demise by A., and that it was put an end to by a parol notice to quit. *Bird v. Debonville*, 2 C. & K. 415—Erle.

An agreement of demise for three years, executed in March, 1845, in writing, but not by deed, was prevented from operating as a lease by 7 & 8 Vict. c. 76, and was not re-established as a lease by 8 & 9 Vict. c. 106, which repealed the former act, but took effect only as from October, 1845. *Arden v. Sullivan*, 14 Q. B. 832; 14 Jur. 712; 19 L. J., Q. B. 268.

—under 8 & 9 Vict. c. 106, s. 3.—[By 8 & 9 Vict. c. 106, s. 3, *a lease required by law to be in writing of any tenements or hereditaments, made after the 1st October, 1845, shall be void at law, unless made by deed.*]

This statute is retrospective in its operation. *Upton v. Towend*, 17 C. B. 50.

But it does not apply to agreements for letting turnpike tolls under 3 Geo. 4, c. 128. *Shepherd v. Hodsman*, 21 L. J., Q. B. 63; 18 Q. B. 316.

A. and B., after 8 & 9 Vict. c. 106, came into operation, executed a written instrument, by which A. agreed to let and B. to hire land for a term exceeding three years, at a rent payable monthly. B. entered; and it was afterwards orally agreed that the rent should be paid quarterly:—Held, that 8 & 9 Vict. c. 106, s. 3, though rendering the lease void, as not being by deed, still made it void only as a lease, and did not prevent it from indicating the terms on which B. held as tenant from year to year; and that consequently B.'s tenancy might be determined, during the term, by a half-year's notice, but, at the end of the term, expired without notice. *Tress v. Savage*, 4 El. & Bl. 36; 18 Jur. 680; 23 L. J., Q. B. 339; 2 C. L. R. 1315.

A lessee of premises from May till the 18th December, let them by parol to the defendant till the latter day, reserving a weekly rent. The parties intended to create the relation of landlord and tenant, and to pass the interest by lease. The defendant occupied and paid rent till June, and then gave a week's notice to quit, and, at the expiration thereof, left the premises. In an action to recover subsequent rent:—Held, that this might operate as a lease, though it passed all the lessor's interest, notwithstanding 8 & 9 Vict. c. 106, and, therefore, the lessee was entitled to recover. *Pollock v. Stacey*, 9 Q. B. 1033; 11 Jur. 267; 16 L. J., Q. B. 133.

By a writing, not under seal, signed by the plaintiff and the defendant, the plaintiff agreed to take of the defendant a farm at a

yearly rental, "the tenancy to commence from the 29th day of September next, for a term of eight years, subject to a lease," to be drawn up by the defendant:—Held, that there was no contract by the defendant to give the plaintiff possession of the farm on the day named; for that possession was to be given only on the commencement of a tenancy under a lease for eight years, and this agreement was void as a lease, under 8 & 9 Vict. c. 106, s. 3. *Drury v. Macnamara*, 5 El. & Bl. 612; 1 Jur., N. S. 1163; 25 L. J., Q. B. 5.

But the statute does not prevent an instrument which (as containing words of present demise, and not being under seal) is void as a lease from being enforced as an agreement in equity. *Parker v. Taswell*, 2 De G. & J. 559; 4 Jur., N. S. 1006; 27 L. J., Chanc. 812.

An agreement creating a present demise, void as a lease, by the above statute, may still inure as an agreement. *Hayne v. Cummings*, 10 C. B., N. S. 421; 10 Jur., N. S. 773; 10 L. T., N. S. 341. S. P., *Tidey v. Mollett*, 10 C. B., N. S. 208; 10 Jur., N. S. 800; 83 L. J., C. P. 235; 12 W. R. 802; 10 L. T., N. S. 380; *Bond v. Roeling*, 1 B. & S. 371; 8 Jur., N. S. 78; 30 L. J., Q. B. 227; 9 W. R. 746; 4 L. T., N. S. 442.

The following agreement, made in 1861:—"L. agrees to let, and R. agrees to take, the wood-mill, with the house and land adjoining, for the period of three years from Lady-day then next, at the rent of 120*l.* per annum. A lease for the same to be executed and signed as soon as possible, subject to the permission of the landlord of the mill. L. also agrees to let, and R. agrees to take, the mill, house, land, &c., from this date up to Lady-day then next, on the same terms, and at the same rate of rent; R. to have the sole use of the mill, house, and land, and all machinery and utensils therein contained," operates as an actual demise from its date up to Lady-day, and as an agreement for a lease from that time for a term of three years, and consequently is not void for not being under seal. *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Exch. 96; 7 Jur., N. S. 808.

An agreement to let land at a yearly rent, determinable by six months' notice to quit (no term being mentioned), provided that, in case A. and B. erected any buildings upon the land, they were to have the privilege of removing them at any time during their occupation, or otherwise they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of the buildings, such beneficial interest to extend over a period of twenty years; that is to say, if A. and B. were required to give up possession of the piece of ground before the expiration of the term of twenty years, they were to be allowed one-twentieth part of the amount expended for each remaining year of the unexpired term of twenty years:—Held, that this agreement conferred on A. and B. such a beneficial interest in the land as constituted them owners within the interpretation clause of the Lands Clauses Act (8 & 9 Vict. c. 18),

and that, therefore, the company was not entitled to enter on the land until it had satisfied A. and B.'s claim, as provided by s. 84. *Rogers v. Hull Dock Company*, 12 W. R. 1101; 11 L. T., N. S. 42—V. C. W.; affirmed on appeal, 10 Jur., N. S. 1245; 13 W. R. 217; 11 L. T., N. S. 463; 34 L. J., Chanc. 165—C.

Hand and Hall entered into the following agreement not under seal: "Jan. 26. Hand agrees to let, and Hall agrees to take, the large room, &c., from 14 February next until the following Midsummer twelve months, and with right at end of that term for the tenant, by a month's previous notice, to remain on for three years and a half more:—"Held, that the agreement was divisible, and contained an actual demise for a term less than three years, with a superadded stipulation, that Hall at his option should have a renewal of the tenancy, and that, as to the actual demise, it need not be under seal pursuant to 8 & 9 Vict. c. 106, s. 3. *Hand v. Hall*, 2 L. R., Exch. Div. 355; 46 L. J., Exch. Div. 603; 25 W. R. 734—C. A.; reversing the judgment of the Exchequer Division, 2 L. R., Exch. Div. 318; 46 L. J., Exch. Div. 242; 36 L. T., N. S. 765; 25 W. R. 512.

By a written instrument not under seal, and dated the 28th of February, 1872, W. purported to demise a messuage to the defendant as tenant from year to year, for so long as he should keep the rent paid, and as W. should have "power to let the premises;" the rent reserved by the instrument was less than two-thirds of the annual value of the messuage. The defendant entered and paid rent quarterly:—Held, that the instrument was void as a lease, first, on the ground of uncertainty; and secondly, on the ground that, not being within the terms of s. 2 of the Statute of Frauds, it ought to have been under seal, pursuant to 8 & 9 Vict. c. 106, ss. 2, 3. *Wood v. Beard*, 2 L. R., Exch. Div. 30; 46 L. J., Q. B. Div. 100; 35 L. T., N. S. 866—D. C. A. See *Holmes v. Day*, 8 Ir. R., C. L. 235—C. P.

Held, also, that the only estate vested in the defendant was a tenancy from year to year. *Ib.*

A lease in writing, not by deed, void under the 8 & 9 Vict. c. 106, s. 3, does not require a stamp. *Mott v. Turnage*, 1 F. & F. 6—Cresswell.

#### 4. Stamping.

**Statutes.**—[The former statutes imposing duties upon leases, &c., were the 55 Geo. 3, c. 184 (see Schedule, Tit. "Leases"), repealed in 1850 by 13 & 14 Vict. c. 97, which enacted a new scale of duties. The duties imposed by the latter act, and by 16 & 17 Vict. c. 59; 17 & 18 Vict. c. 83; 23 Vict. c. 15; 23 & 24 Vict. c. 111; 24 & 25 Vict. c. 21; and 28 & 29 Vict. c. 96, continued in force until the taking effect of the 33 & 34 Vict. c. 97, in 1870.

By 33 & 34 Vict. c. 97, Schedule, the following duties are chargeable:—upon any lease or tack—

(1.) For any definite term less than a year : £ s. d.

(a.) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10l. per annum . . . . . 0 0 1

(b.) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25l. . . . . 0 2 6

(c.) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid, the same duty as a lease for a year at the rent reserved for the definite term.

(2.) For any other definite term or for any indefinite term :

Of any lands, tenements or heritable subjects—

Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock or security :

In respect of such consideration the same duty as a conveyance on a sale for the same consideration.

Where the consideration or any part of the consideration is any rent :

In respect of such consideration :

If the term is definite, and does not exceed 35 years, or is indefinite :

If the rent, whether reserved as a yearly rent or otherwise is at a rate or average rate :

Not exceeding 5l. per annum . . . . . 0 0 0

Exceeding—

5l. and not exceeding 10l. 0 1 0

10l. " " 15l. 0 1 6

15l. " " 20l. 0 2 0

20l. " " 25l. 0 2 6

25l. " " 50l. 0 5 0

50l. " " 75l. 0 7 6

75l. " " 100l. 0 10 0

100l.

For every full sum of 50l., and also for any fractional part of 50l. thereof . . . . . 0 5 0

If the term being definite exceeds 35 years, but does not exceed 100 years, six times the several amounts above fixed

for the respective rates of rent.

If the term being definite exceeds 100 years, twelve times the several amounts above fixed for the respective rates of rent.

(3.) Of any other kind whatsoever not hereinbefore described . . . 0 10 0

Upon the duplicate or counterpart of any instrument chargeable with any duty—

£ s. d.

Where such duty does not amount to 5s., the same duty as the original instrument.

In any other case . . . 0 5 0

By s. 93, the duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

By s. 96 (1.), an agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects, for any term not exceeding 35 years, is to be charged with the same duty as if it were an actual lease or tack, made for the term and consideration mentioned in the agreement.

(2.) A lease or tack made subsequently to and in conformity with such an agreement duly stamped, is to be charged with the duty of 6d. only.

(3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding 21 years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than 35s.

By s. 97 (1.), where the consideration, or any part of the consideration, for which any lease or tack is granted or agreed to be granted, does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with ad valorem duty, and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed a given sum, or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the ad valorem duty, to be estimated at such given sum, or according to such permanent rate.

(2.) A lease or tack or agreement made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject

matter of such statement, to be deemed duly stamped, unless or until it is otherwise shown that such statement is incorrect, and that it is in fact in duly stamped.

By s. 98 (1.), a lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack or agreement of or relating to the same subject-matter.

(2.) No lease made for any consideration or considerations, in respect whereof it is chargeable with ad valorem duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such further consideration.

By s. 99, the duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of—

(1.) Any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum;

(2.) Any furnished dwelling-house or apartments;

Or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be canceled by the person by whom the instrument is first executed.

By s. 100 (1.), every person who executes, or prepares or is employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit 5*l.*

(2.) Provided that nothing in this section contained shall render any person liable to the said penalty of 5*l.* in respect of any letters or correspondence.

By 39 Vict. c. 16, s. 11, an instrument whereby the rent reserved by any other instrument chargeable with stamp duty as a lease or tack and duly stamped accordingly is increased, shall not be chargeable with stamp duty otherwise than as a lease or tack, in consideration of the additional rent thereby made payable.]

**What instruments require to be stamped as agreements for leases.**—A written paper, signed by an auctioneer, and delivered to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, was required to be stamped, under 43 Geo. 3, c. 149. *Ramsbottom v. Mortley*, 2 M. & S. 445.

But a similar paper, not signed by the auctioneer nor any of the parties, is not such a minute of the agreement as was required to be stamped by the same statute, nor such

a writing as would exclude parol evidence. *Ramsbottom v. Tunbridge*, 5 M. & S. 434.

Where there was a parol agreement to demise certain premises upon the terms and conditions contained in a lease of the same premises, granted by the lessor to another person:—Held, that in an action by the lessor against the lessee for rent and non-repairs, the lease could not be read in evidence unless it was stamped. *Turner v. Power*, 7 B. & C. 625; M. & M. 181.

A memorandum, by which, in consideration that A. will withdraw a distress for a sum exceeding 20*l.*, which B. admits to be due from him as tenant to A., until a future day, B. declares, that, in case of default, it shall be lawful for A. to enter and distrain, and to pursue all remedies for the recovery of the rent, as if no distress had been taken, is admissible to prove the tenancy, without a stamp. *Hill v. Ramm*, 5 M. & G. 789; 6 Scott, N. R. 571.

To prove a settlement by renting a tenement, a witness produced a book containing the entry of an agreement for a present demise of a house, at 11*l.* per annum. The witness stated that he let the house as agent to his father, who was present, and that the terms were reduced to writing, to prevent mistake, and signed by the wife of the pauper, on purpose to bind her husband, the husband not being present; but that the entry was not signed by the witness or his father, nor did their name appear in any part. He further stated, that he had no memory of these things but from the book, without which he could not of his own knowledge be able to speak to the fact; but, on reading the entry, he had no doubt that the fact really happened:—Held, that the entry was neither a lease nor an agreement for a lease within the Stamp Act. *Rex v. St. Martin, Leicester*, 4 N. & M. 202; 2 A. & E. 210.

An agreement of demise, the terms of which have been assented to by the parties to it, although it has not been signed by them, is not admissible unstamped. *Chadwick v. Clarke*, 1 C. B. 700; 9 Jur. 539; 14 L. J., C. P. 233.

An instrument in these terms, "I hereby certify that I remain in the house, No. 3 Swinton Street, belonging to W. G., on sufferance only, and agree to give him immediate possession at any time he may require," does not amount to an agreement for a tenancy, so as to require a stamp. *Barry v. Goodman*, 2 M. & W. 768; M. & H. 108.

A., being tenant of premises under an indenture of lease granted by B., a sequestration issued out of the Court of Chancery against the latter. A. then signed the following instrument: "I hereby attorn and become tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and to hold the same for such time and on such conditions as may be subsequently agreed upon:—"Held, that this was an agreement to



become tenant, and required a stamp. *Cor-nish v. Searrell*, 8 B. & C. 471; 1 M. & R. 703.

The following letter was produced in an action for the hire of furnished apartments, stamped with a 30s. stamp: "I hereby agree (according to our conversation of last evening) to pay you for the occupation of your first floor, furnished, from Monday, March 4, 1839, to September the 4th, 1839, 52l. 10s. I also agree either to occupy the rooms from 4th September to the 4th December, furnished, on the same terms, viz., 26l. 5s. for three months, or take them unfurnished, at the rate of 84l. per annum." In order to explain, as he contended, that letter, the defendant put in a second, which was not stamped:—Held, inadmissible; for, if treated as a separate and an independent agreement, it should have had a 30s. stamp; and if the terms of the agreement were to be collected from the two letters, a 35s. stamp would be requisite on one of them, by virtue of the 55 Geo. 3, c. 184. *Atherstone v. Bontock*, 2 Scott, N. R. 637; 2 M. & G. 511.

The provision of 55 Geo. 3, c. 184, Schedule, tit. "Agreement," that a memorandum or agreement for granting a lease or tack, at rack-rent, of any messuage, land, or tenement, under the yearly rent of 5l., shall be exempted from duty, does not apply to an agreement for a lease of premises, though under 5l. per annum, if the interest agreed for is a beneficial one, as a building lease. *Doe d. Hunter v. Boulcot*, 2 Esp. 595—Eyre.

An agreement in the following form:—"I, J. T., hereby agree with W. M. to retake of him two acres of land, from the 10th of October, 1840, at which time my tenancy expires, until the 25th of March, 1841, for 10l.;" with a promise by J. T. to allow W. M. to plant fruit-trees, and to deliver up possession at the end of the time; signed by J. T., but not by W. M., is neither a lease nor an agreement in which the matter is of the value of 20l.; and, therefore, requires no stamp. *Doe d. Marlow v. Wiggins*, 3 G. & D. 504; 4 Q. B. 367; 7 Jur. 529; 12 L. J., Q. B. 177.

An agreement dated April 14th, 1804, not under seal, was made between M. and N., by which N. was to rent of M. the ferry called D. for 6l. 6s. per annum, to be paid half-yearly, for which N. was to have the sole use of the ferry and whatever profit might accrue from it for the time he should hold the same. "Be it also remembered, that N. has this day bought of M. the great ferry-boat for 20l., of which 5l. shall be paid," by installments of 5l., yearly, on April 6th, the first in 1805:—Held, first, that the instrument purporting to convey an incorporeal hereditament was not a lease, because not under seal, and therefore did not require a lease stamp. *Mayfield v. Robinson*, 7 Q. B. 486; 9 Jur. 826.

Held, secondly, that, as an agreement for a lease, it was not subjected to duty by the clause of 55 Geo. 3, c. 184, exempting agreements for leases under the yearly rent of 5l., for that a duty could not be imposed by implication from this exempting clause. *Id.*

Held, thirdly, that, if the rent only was considered, the subject-matter of the agreement was not of the value of 20l., and therefore no stamp was necessary. *Id.*

Held, fourthly, that the price of the boat could not be taken into consideration, the agreement as to that not being ancillary to the contract for letting, but being a distinct and separate memorandum of a bygone purchase of goods, and in itself subject to no stamp duty. *Id.*

— as leases.]—A lease from the Board of Ordnance, which purported to be signed, sealed and delivered, being first duly stamped, was not stamped:—Held, that being a lease from the crown, it was not necessary that it should be stamped. *Petrie v. Lamont*, Car. & M. 98—Tindal.

A lease in writing, not by deed, void under the 8 & 9 Vict. c. 106, s. 3, does not require a stamp. *Mott v. Turnage*, 1 F. & F. 6—Cresswell.

A lease for years in consideration of a sum certain, and at a peppercorn rent, does not require an ad valorem stamp. *Ros d. Larkin v. Chenhalls*, 4 M. & S. 23.

A lease for a term of forty-five years at a substantial rent for the first twenty-three years, and a peppercorn during the remaining twenty-two, is not a lease, "exceeding thirty-five years at a yearly rent" within the meaning of 17 & 18 Vict. c. 83, Sched., tit. Lease, and is not liable to the duty imposed by that statute. *Pearson v. Commissioners of Inland Revenue*, 3 L. R., Exch. 242; 37 L. J., Exch. 171; 18 L. T., N. S. 570.

As to the distinction between agreements and leases,—see also this title, L. 2.

— as counterparts of leases.]—A lessee who has executed a counterpart of a lease cannot object to its admissibility in evidence on the ground that the lease itself is not stamped. *Paul v. Meek*, 2 Y. & J. 116.

In an action for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant:—Held, that, although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart. *Hughes v. Clark*, 10 C. B. 905; 15 Jur. 430.

— as assignments or surrenders of leases.]—A deed, purporting to be a surrender of a lease, and made in consideration of 120l., and of a new lease to be granted of the premises at an increased rent, was stamped with a 1l. 15s. stamp:—Held, that it did not also require an agreement stamp, as the agreement for the new lease was part of the conveyance, and incident thereto. *Doe d. Phillips v. Phillips*, 3 P. & D. 603; 11 A. & E. 706.

Where an instrument which was offered in evidence to show a disclaimer, contained terms amounting to a surrender:—Held, that it re-

quired a stamp. *Doe d. Wyatt v. Stagg*, 5 Bing. N. C. 564; 7 Scott, 690; 3 Jur. 1127.

A deed executed by the defendant only, was intended by the parties when executed to be the counterpart of a lease, and was stamped with a duty of 1*l.* 10*s.*; but the grantor having thereby parted with all his interest in the premises, the original deed became by operation of law an assignment:—Held, that the deed so tendered was not admissible for the purpose of proving an assignment, the proper stamp being 1*l.* 15*s.*, under the general clause to the 55 Geo. 3, c. 184, applicable to “deeds of any kind, not otherwise charged, or expressly exempted from stamp duty.” *Baker v. Gosling*, 1 Scott, 58; 1 Bing. N. C. 246.

**Amount of stamp duty, as dependent upon character of instrument, as agreement, lease or deed.**—The proper stamp to be borne by a written instrument must depend upon what is the leading character of such instrument. *Price v. Thomas*, 2 B. & Ad. 218; *S. C.*, nom. *Pratt v. Thomas*, 4 C. & P. 554.

By an indenture, in the form and containing the usual covenants of a lease, A. demised premises to B., and B. and C. covenanted to pay the rent, but C. was not otherwise referred to in the instrument. In an action against C. on the covenant to pay rent:—Held, that the indenture was available against him, though stamped as a lease only, and that a deed stamp was unnecessary. *Id.*

Under 23 Geo. 3, c. 58, a lease must be stamped as a lease by deed, though it was not by deed; for, though not by deed, it fell within the words of the act which required a stamp to leases, enumerated among other specialties. *Goodtitle d. Estwick v. Way*, 1 T. R. 737. *S. P.*, *Harker v. Birkbeck*, 3 Burr. 1556; 1 W. Bl. 482.

An instrument which is sealed, but which merely amounts to an agreement for a lease, requires a 1*l.* 15*s.* stamp, as a deed not otherwise charged. *Clayton v. Burtenshaw*, 7 D. & R. 809; 5 B. & C. 41.

Where an instrument contains a written contract of demise in its general terms, with a several operation with respect to the different tenants who sign it for different estates at the different rents, set against their signatures, and one stamp only appears upon the paper, it is matter of evidence to which contract such stamp applies. *Doe d. Copley v. Day*, 13 East, 241.

If a lease in writing contains a contract for the purchase of goods, it cannot be given in evidence to prove the sale of the goods, unless it has a lease stamp, although it has an agreement stamp. *Corder v. Drakeford*, 3 Taunt. 382.

By articles of agreement, signed by the plaintiff, W., and the defendant, the plaintiff let to W. a public-house, from year to year, at a certain rent, and W. agreed to buy of the plaintiff all the beer, &c., which should be consumed on the premises during the time, or to pay 80*l.* in liquidated damages for every

barrel bought from any other person, and to pay monthly for the beer, &c., bought from the plaintiff; and the defendant agreed “to hold himself responsible for any account of money which might become due from W. to the amount of 36*l.*.”—Held, that an agreement stamp was necessary, in addition to a lease stamp. *Wharton v. Walton*, 7 Q. B. 474; 14 L. J., Q. B. 821.

An agreement which might amount to a lease, not stamped as such, is an admission by the tenant on a matter collateral to the lease, and relating to a valuation, the subject of the action. *Walker v. Atkinson*, 1 F. & F. 465—Crowder.

Where a document, void as a lease, is tendered to show the terms of a collateral agreement, it requires a stamp as an agreement. *Golden v. Taylor*, 2 F. & F. 110—Byles.

An agreement that A. is to have a tenement for life, does not require a lease stamp, the document not being under seal, and therefore not operating to pass an estate for life. *Stone v. Rogers*, 2 M. & W. 443; M. & H. 146; 1 Jur. 455.

A., being owner of a farm, let it for seven years to B.; and by a written agreement of the same date it was agreed, “that A. should manage the farm for B., B. allowing A. 12*s.* a week, and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent,” and this agreement was to be put an end to by three months’ notice, or three months’ wages:—Held, that this agreement did not require a lease stamp, as it did not contain a demise of the house, the occupation of it being a mere remuneration for services. *Doe d. Hughes v. Derry*, 9 C. & P. 494—Parke.

The following document is a mere agreement for a future tenancy, not an actual demise, under 55 Geo. 3, c. 184, and, therefore, properly stamped with a 1*l.* stamp:—“Memorandum of an agreement entered into this 31st of January, 1840, between B. and J. J. agrees to become the tenant of G. farm, at the customary time of entry, under the following conditions: viz. that 260*l.*, annual rent, shall be paid at the usual time for the house, premises and lands as agreed upon; and B. agrees to lay out, in the improvement and alteration of the farm-house and new sheds, a sum not exceeding 200*l.*, with the understanding that spars for rafters shall be found from the estate. Cartage for all materials, except stones for walls, to be done or found by J.” *Gore v. Lloyd*, 12 M. & W. 463; 13 L. J., Exch. 366.

Agreement as follows:—“I, W. E., acknowledge that I am indebted to B., as agent of S., my landlord, in 22*l.*, for arrears of rent for the cottage in my occupation; and I now pay B. 5*l.* on account and in part of such rent, and undertake to pay him 8*l.* per annum, by quarterly payments,” does not require a lease stamp. *Eagleton v. Gutteridge*, 2 D., N. S. 1053; 11 M. & W. 465; 12 L. J., Exch. 359.

A. and B. entered into the following

agreement with C.:—"We agree to hire your cottages and premises, from the 27th of September next, at the rent of 40*l.* per annum, payable quarterly, free from all deductions, and agree to pay 10*l.* on the 30th of October; and in case any quarter's rent shall be in arrear, and unpaid for fourteen days, we engage to quit possession, upon a notice to that effect, giving us seven days further time, being left upon the premises: and in the event of our non-compliance with such notice, we authorize you or your agent to clear the premises, as if you were the occupier, and to resume the possession accordingly, without the aid of legal authority; this right to be without prejudice to any remedy for enforcing payment of the rent that may be in arrear; and further, we engage to preserve the mills, cottages and premises from damage, and to deliver them up in good condition, together with all fixtures belonging to you, when our tenancy expires, reasonable wear and tear being allowed us." In an action for rent due under this agreement:—Held, that it did not require a lease stamp. *Glen v. Dungey*, 4 Exch. 61; 18 L. J., Exch. 359.

A lease made in consideration of a rent, and also of a covenant to complete houses, was a lease made "for a further or other valuable consideration" besides the rent, within 17 & 18 Vict. c. 83, s. 16. and was chargeable with a deed stamp beyond the ad valorem duty. *Bolton, In re*, 5 L. R., Exch. 82; 39 L. J., Exch. 51; 18 W. R. 351; 21 L. T., N. S. 720. But by 83 & 84 Vict. c. 44, the holders of such leases made previously to the date of this decision are relieved from the payment of the additional duty, and such leases shall not in future be chargeable with such additional duty.

— as dependent upon amount of consideration.]—The stamp required by 55 Geo. 3, c. 184, for a lease, is regulated by the consideration (whether fine or rent) expressed to be paid, and not by that which is actually paid. *Doe d. Kettle v. Lewis*, 10 B. & C. 673.

Where a piece of land was demised for ninety-nine years, at an annual rent of 8*l.*, and the lease contained a covenant that the lessee should, within a year from the granting of the lease, build a dwelling-house on the land, and expend 150*l.* at the least upon it:—Held, that a stamp of 1*l.* was sufficient under 55 Geo. 3, c. 184. *Nicholls v. Cross*, 14 M. & W. 42; 14 L. J., Exch. 244.

A person became the purchaser at an auction, for 45*l.*, of certain grass herbage for a certain time, under certain conditions in a printed catalogue, which were signed by him and which were held to amount to a lease. By one of the conditions the highest bidder was to pay a deposit of 10*l.*, and give a note for the residue, payable on a subsequent day, and to be entitled to immediate possession. The defendant paid the deposit of 10*l.*:—Held, that the purchase-money was in the nature of a fine or premium, though not payable at once, and fell within the first head of the

schedule in 55 Geo. 3, c. 184, tit. "Lease," and, therefore, a 1*l.* stamp was sufficient. *Cattle v. Gamble*, 5 Bing. N. C. 46; 7 D. P. C. 98; 6 Scott, 733; 1 Arn. 405; 2 Jur. 922.

By an instrument in writing, not under seal, reciting that D. had purchased a piece of ground with four messuages built thereon, in one of which the plaintiff resided, it was agreed that the plaintiff should continue to reside therein during the residue of D.'s interest therein, provided the plaintiff should so long live, at the annual rent of one shilling; and in the event of his dying during the term, his widow should reside there on the same terms; and D. further agreed to assign all his interest in the premises so purchased to the plaintiff, on payment within seven years of 140*l.*, together with all expenses:—Held, that the instrument required an agreement stamp as well as a lease stamp. *Lovelock v. Frankland*, 8 Q. B. 371; 11 Jur. 1035; 16 L. J., Q. B. 182.

It was stated, in an agreement which amounted to a lease, that A. agreed to let premises to B. for two years, at the rent of 50*l.* a year; that B. shall have the right of purchasing the premises at any time during the term, it being understood that A. is possessed of the same premises for his own life and the life of M., and the survivor of them:—Held, that a 30*s.* stamp was sufficient. *Worthington v. Warrington*, 5 C. B. 635; 17 L. J., C. P. 117.

The plaintiff demised a slate pit at S. and stone quarries at M. to the defendant, under an indenture of lease, to hold the one from Lady-day, 1815, and the other from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 130*l.* for the quarries:—Held, that all the premises might be demised by one indenture of lease, and that one ad valorem stamp on the aggregate amount was sufficient under 55 Geo. 3, c. 184, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue. *Boase v. Jackson*, 6 Moore, 480; 3 B. & B. 185.

A lease contained a demise of two separate farms, with two habendums, differing from each other; a reservation of a separate rent in respect of each farm, and separate covenants, some applying to one farm, some to the other. The lessee entered on the whole at one time:—Held, that one ad valorem stamp for the amount of both rents was sufficient. *Blount v. Pearman*, 1 Scott, 55; 1 Bing. N. C. 408.

Where an instrument demises several matters consisting of lands and other interests (some of which are incorporeal tenements), at one fixed rent, one ad valorem stamp is sufficient. *Reg. v. Hockworthy*, 2 N. & P. 383; W., W. & D. 707; 7 A. & E. 492.

A lease which demised a dwelling-house and land at a rent certain, and then demised two fields, from the succeeding Michaelmas, at the same rent which the lessor received from the persons who then occupied them,

does not require, on account of the latter demise, a stamp of 1*l.* 10*s.* It is sufficient if such an ad valorem stamp is affixed as will cover the whole amount of rent to be paid. *Pary v. Deere*, 1 N. & P. 47; 5 A. & E. 551; 2 H. & W. 895.

The ad valorem stamp duty on a lease is to be regulated by the consideration appearing on the face of it, although it may not be that which is actually paid. *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

An instrument, which operated as a lease, reserved a rent of 50*l.*, but contained a stipulation, that the landlord should insure the premises for 1,000*l.*, and that the premiums of insurance should be added to the rent of 50*l.*, and become due and payable in like manner as the rent:—Held, that this was not a "deed not otherwise charged" within 55 Geo. 3, c. 184, tit. "Deed," but was properly stamped with an ad valorem lease stamp of 1*l.* 10*s.*, as on a rent exceeding 20*l.*, and not exceeding 100*l.*; and that, if the premiums of insurance, added to the rent, exceeded 100*l.*, it lay upon the party seeking to impeach the instrument to show that they did so. *Wilson v. Smith*, 12 M. & W. 401; 1 D. & L. 633; 13 L. J., Exch. 113.

Where a lease had two distinct reservations of rent, one 378*l.*, in respect of house and land, and the other 50*l.* for furniture and fixtures, a stamp of 3*l.*, sufficient to cover the former, but not sufficient for both, was not enough. *Coster v. Cowling*, 7 Bing. 456; 5 M. & P. 399.

By a lease between W. and S., indorsed on a prior lease between the same parties, reciting that, in consideration of money laid out upon the premises by W., S. had agreed to pay a further rent, it was witnessed that, in consideration of the rent reserved by the within-written indenture, and of the covenants, provisos and agreements therein contained, and also in consideration of the further yearly rent, W. demised to S. the premises for the residue of the term granted by the within-written indenture, subject to the provisos, covenants and agreements therein contained, yielding the rent, in addition to the rent reserved by the same indenture:—Held, that the original lease did not require an additional stamp on account of the lease indorsed upon it, and that the indorsed lease did not require a progressive duty, within 55 Geo. 3, c. 184, Sched., Part 1, Deed. *Weedon v. Woodbridge*, 13 Jur. 630, n.—Q. B.

**Necessity of setting forth proper consideration in the instrument.**—A lease was not void by 48 Geo. 3, c. 149, s. 22, for omitting to set out truly the whole consideration directly or indirectly paid or agreed to be paid, and consequently such a fact would form no defense in an ejectment for a forfeiture. *Doe d. Higginbotham v. Hobson*, 3 D. & R. 186.

The plaintiff granted a lease to the defendant, in consideration of a premium of 40*l.*, and being indebted to the defendant in that amount for work done, a settlement of ac-

counts took place between them, when the defendant was allowed the 40*l.* in account, but no moneys in fact passed. The plaintiff having afterwards sued the defendant for 37*l.* 4*s.* for rent and goods sold, the defendant claimed to set off the 40*l.* as money received for his use, on the ground that it was not expressed in the lease, and therefore he was entitled under 48 Geo. 3, c. 149, s. 24, and 55 Geo. 3, c. 184, to recover it:—Held, that the effect of those statutes is to put leases for a premium on the same footing as conveyances upon a sale, so that in all cases where the consideration is not expressed in the lease, the amount may be recovered back. *Gingell v. Parkins*, 4 Exch. 720; 19 L. J., Exch. 129.

A., being seized in fee of land, contracted with B. to execute to him a lease of the land and a house to be built thereon by B., for ninety-nine years, at a rent of 9*l.* 5*s.* The house having been built, B. contracted with C. to sell him his (B.'s) interest in the land and house for 850*l.*, which was accordingly paid. In order to effect this contract B. procured an indenture to be made between himself, A. and C., whereby A. demised to C. the house and land for ninety-nine years, at the same rent. No mention was made in this instrument of the purchase-money:—Held, that the lease was a conveyance, and that B. was liable to the penalties imposed by 48 Geo. 3, c. 149, s. 22, for omitting to set forth the purchase-money. *Att. Gen. v. Brown*, 3 Exch. 602; 18 L. J., Exch. 336. See *Boons v. Mitchell*, 1 B. & C. 18.

#### **Failure to stamp; and payment of penalty.]**

—If an instrument of demise in writing of apartments for a period of three months certain requires either an agreement or a lease stamp, it is not necessary that it should be stamped before the rule is granted under 1 Geo. 4, c. 87; it is sufficient if the stamp is affixed at any time before the trial of the ejectment. *Doe d. Phillippa v. Roe*, 1 D. & R. 443; 5 B. & A. 766.

Where an instrument, which was in reality a lease, but which bore an agreement stamp for 15*s.*, was executed in 1805, at which period the amount of the stamp on a lease, according to the act then in force, was 1*l.* 10*s.*, but was stamped in 1834, under 37 Geo. 3, c. 136, s. 2, with a stamp of 1*l.*, being the amount of the stamp then in force:—Held, that the proper duty had been paid. *Buckworth v. Simpson*, 1 C., M. & R. 834; 5 Tyr. 344; 1 Gale, 88.

An agreement to let a furnished house was drawn up by the plaintiff and sent to the defendant, who returned it unsigned, and sent a letter, in which he wrote, "I approve of the agreement and will sign it;" but, before it was signed, refused to carry it out, on the ground that she found the plaintiff—while assuring her that he meant to use the house as a private residence—was actually advertising it as a boarding-house:—Held, first, that the agreement required a 2*s.* 6*d.* stamp, but might be admitted on payment of the penalty.

**Cavaleiro v. Puget**, 4 F. & F. 537—Crompton.

Held, secondly, that if the letter amounted to an adoption of it as a final agreement, it would be sufficient within the Statute of Frauds. *Ib.*

Held, thirdly, that if the defendant was deceived into adopting it, by a willful misstatement as to the plaintiff's object, that would support a plea of fraud. *Ib.*

##### 5. Contracts for Leases.

###### (n) How made; Interpretation and Effect.

**When agreement to give lease is finally concluded.**—A paper sent to a solicitor as instructions to prepare a lease, may be treated as the final agreement for the lease, if the evidence shows that it was only so sent to be put into a formal shape; but the act of so sending it is evidence to raise a *prima facie* presumption that it did not contain all that the parties meant, but might afterwards be modified by either of them. *Ridgway v. Wharton*, 6 H. L. Cas. 288; 27 L. J., Chanc. 46; 4 Jur., N. S. 173.

If contracting parties agree on terms, of which there is sufficient evidence, but contemplate in addition a more formal document, it becomes a question of intention merely whether they intend it as a memorial of the terms already agreed on, or as the instrument by which alone they mean to be bound. *Ib.*

Negotiations having commenced between the plaintiffs and the defendant respecting a lease of a house by the plaintiffs to the defendant, they forwarded a draft lease, which defendant sent to his solicitors, intimating that he would leave the matter in their hands. After a correspondence between the solicitors of each party with reference to the terms of the lease, the defendant's solicitors wrote to the plaintiffs' solicitors. "We have just seen our client, and have altered this draft lease in accordance with his instructions. We trust there will be now no impediment to prevent an early completion; and we shall be glad to receive the draft as soon as you can, that we may engross the counterpart. R. & B." To this the plaintiffs' solicitors replied by letter, forwarding the draft and engrossment of lease and counterpart, claiming, as solicitors to the lessors, to be entitled to engross both at the expense of the lessee, and requesting the defendant's solicitors, when they had compared, to return the engrossments of the lease and counterpart, when they (the plaintiffs' solicitors) would be prepared to exchange. The defendant's solicitors objected to this, and the negotiation went off. The plaintiffs having brought an action against the defendant for the breach of an agreement to accept a lease on terms previously agreed upon:—Held, that there was no evidence of an authority from the defendant to his solicitors to sign an agreement to accept a lease on terms previously agreed upon; and that, supposing there had been such authority, the letter of

the defendant's solicitors was only a proposal, which was not accepted in its entirety, the claim to engross the counterpart lease being a substantial part, and not a consequence of the agreement, and that, therefore, there was no signed agreement or memorandum thereof to satisfy the fourth section of the Statute of Frauds. *Forster v. Rowland*, 80 L. J., Exch. 396.

**Conditional agreements.**—On the 4th of November, 1858, A. let premises to B. for a term of four years, from Michaelmas preceding, at a yearly rent, payable quarterly, the agreement containing the following condition: "The condition of this agreement being binding on B. is, that A. shall make good and support the floor of the warehouse of the premises within twenty-eight days of the date of this agreement; if not done, this agreement to be void." Within the twenty-eight days A. entered with workmen, and afterwards departed, stating that he had made all secure. B. paid rent at Christmas, and at Lady-day. Early in April, 1859, the warehouse floor having broken in, the attention of the commissioners of sewers was called to the state of the premises, and the result was that in May an order was made upon A., under 18 & 19 Vict. c. 122, directing him to secure and repair the same. At the end of April A. informed B. that he was about to pull down the premises, and offered to assist B. in removing his printing presses and plant. After the date of the commissioners' order A. entered the premises, and pulled down the ground floor story (including the warehouse-floor) and took no steps to replace or repair it. B. thereupon obtained other premises, and he and his under-tenants went out, and on the 23d of June B. sent A. the key, with a letter, stating that he had been forced out of the premises by A.'s willful and unnecessary destruction of the warehouse-floor, &c. A. received the key, read the letter, and said nothing, and a few days afterwards entered and pulled down the whole house for the purpose of re-building it:—Held, that these facts showed an agreement for a determination of the tenancy on the 23d of June, and consequently that A. could not sue for the quarter's rent. *Furnivall v. Grove*, 8 C. B., N. S. 406; 30 L. J., C. P. 3.

The following words in an agreement for letting do not create a condition:—"A. (the tenant) hereby agrees that he will not underlet the premises without the consent in writing of the landlord." *Shaw v. Coffin*, 14 C. B., N. S. 372.

An agreement for a tenancy was in these terms: "Mr. T. engages to complete the whole work necessary by the 14th June next." Then followed an enumeration of the matters to be done by T.; and the agreement concluded: "In consideration of these conditions being fulfilled, Mr. M. engages to take the house, No. 51 B. park, for three years, at the annual rent of 130*l.*, to be paid quarterly. Rent to begin from Midsummer next:"—Held, that

the completion of the "work necessary" by the day named for that purpose was a condition precedent to the landlord's right to sue M. for not becoming tenant. *Tidey v. Mollett*, 10 C. B., N. S. 298; 10 Jur., N. S. 800; 33 L. J., C. P. 235; 10 L. T., N. S. 380.

On a contract in a letter of the defendant assented to by the plaintiffs, to take a farm off their hands, provided he was accepted by their landlord on the covenants in their lease:—Held, that they were bound to procure and deliver to him the lease, and it having been deposited as security for a loan, and they not having procured it, the plaintiffs were nonsuited. *Barton v. Banks*, 2 F. & F. 213—Blackburn.

A lease of a house was granted by S. to the lessee for twenty-one years from Christmas, 1856, determinable at the end of the first seven or fourteen years upon six months' notice by either party, with power of re-entry if the lessee assigned possession without the lessor's consent. In October, 1861, the lessee agreed in writing, without the lessor's consent, to sell his interest in the premises to the plaintiff, the terms of which were, that he was to pay 1,800*l.* for the lessee's improvements, which sum was to be repaid to the plaintiff if he was ejected by the lessee in the first instance; and "if the lessor exercised the power of determining the lease at Christmas, 1863, and if the plaintiff then leaves the house," the sum of 1,100*l.*, part of the 1,800*l.*, was to be returned to the plaintiff. The lessor gave notice of determining the lease at Christmas, 1863, and subsequently granted a new lease at a largely increased rent to C., the aunt of the plaintiff, who had resided with him in the house since October, 1861, and with whom the plaintiff continued to reside in the house under the new lease, so that he did not actually and as a matter of fact leave the house:—Held, that the plaintiff was entitled to recover the 1,100*l.*, inasmuch as the lease to C. was a new lease to a different person for a different term, and at a different rent from the original lease, and the plaintiff had not got the equivalent for which he bargained as a consideration for the 1,100*l.*, as he had lost his interest in the house as tenant, which, by a reasonable construction, amounted to leaving the house. *Rideout v. Lucas*, 14 L. T., N. S. 738—Exch. Cham.

On a contract for a lease conditional on the lessor's ability to grant it, a bill for specific performance by the lessee is premature if filed before he can show that the lessor is able to grant the lease. *Abbott v. Blair*, 8 W. R. 672—C.

But the lessor's acceptance of a deposit on a premium for the lease, and subsequent interest on the balance, sufficiently removes the condition, so as to entitle the lessee to file a bill, and is so far an estoppel. *Id.*

As to what agreements are sufficiently certain to be enforced specifically,—see this title, L, 5, b.

**Stipulations as to covenants to be inserted in lease.**—If an agreement for a lease contains no stipulation as to covenants, the party agreeing to take the lease has a right to a lease containing only usual covenants, and a restriction against particular trades, not being a usual covenant, cannot be introduced into the lease. *Proper v. Parker*, 3 Mylne & K. 280.

Where in an agreement for the lease of a house, to be granted by the defendant to the plaintiff, it was stipulated that the lease should contain the usual covenants between landlord and tenant, and that the house should not be converted into a school, it is immaterial whether the plaintiff had or had not notice that the defendant derived his title under a lease from another person; because the agreement amounts to a representation on the part of the defendant, that he was at liberty to grant a lease conformably to the terms of the agreement. *Van v. Corpe*, 3 Mylne & K. 289.

Under a power to make leases for years, determinable on lives, of premises usually so leased, reserving the usual rents and heriots, and so as there should be contained usual and reasonable covenants, a lease was granted in 1831. This lease contained a covenant to do suit and service at the courts of the manor of W., but no covenant to pay fines. In what was taken as the pattern lease, executed in 1749, there was a covenant to pay fines, as well as to do suit and service. It appeared, that, from a date prior to 1749, there had been no courts baron or customary courts held for the manor, and no evidence was given of the existence of any freehold or copyhold tenants:—Held, that the covenant to pay fines was not a usual or reasonable covenant, the omission of which avoided the lease. *Doe d. Egremont v. Williams*, 11 Q. B. 688; 12 Jur. 455; 17 L. J., Q. B. 154.

A. agreed to let, and B. to take, a piece of land, with liberty to build thereon such warehouses, glasshouses, kilns, houses for workmen, and erections necessary for carrying on the business of a glass manufactory, as he should think fit, for sixty-one years, at a certain rent; and B. agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than a glass manufactory during the term; a lease and counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants:—Held, that this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee that he would carry on the business of a glass manufactory on the premises during the term. *Doe d. Bute v. Guest*, 15 M. & W. 160.

Under a contract for a lease of a mill, to contain "all usual and necessary covenants and provisos," and particularly a covenant on the part of the lessee to keep the mill in good tenantable repair:—Held, that the lessee was not entitled to have introduced into the covenant the words, "damages by fire or tempest only excepted." *Sharp v. Milligan*, 23 Beav. 419.

There is nothing unreasonable in a covenant not to sublet without license, or in a proviso for re-entry on the whole premises on breach of any covenant in the lease. *Haberdashers' Company v. Isaac*, 3 Jur., N. S. 64—V. C. W.

Under an executory agreement to grant a lease of an hotel, with general and usual covenants:—Held, under the circumstances, that the lease ought to contain a power of re-entry on the lessee's becoming bankrupt or taking the benefit of the Insolvent Debtors' Act. *Haines v. Burnett*, 27 Beav. 500; 29 L. J., Chanc. 289; 5 Jur., N. S. 1279; 1 L. T., N. S. 18.

A., who was under an agreement to take the lease of a house, the lease to contain all "usual covenants," agreed to assign all his interest to B., and forwarded him a copy of the agreement for a lease. In answer to inquiries by B., A. stated that the lessee would not have to do substantial repairs:—Held, first, that A.'s statement was a misrepresentation of a matter of law, and not of fact, and that A. was not bound by it. *Kendall v. Hill*, 6 Jur., N. S. 968—R.

Held, secondly, that, upon the facts in the case, B. was bound to repair the house in the event of damage by fire. *Ib.*

Covenants in restraint of trade in a trading locality are not considered usual covenants. *Wilbraham v. Linsley*, 18 Beav. 200.

A covenant not to assign without the leave of the landlord, is a fair and usual covenant. *Morgan v. Slaughter*, 1 Esp. 8—Kenyon.

Under a power to a tenant for life to lease for years, reserving the usual covenants, a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the court finding that such covenant is unusual. *Doe d. Ellis v. Sandham*, 1 T. R. 705.

The reasonableness of a covenant by a lessee, in a lease of lands renewable forever, that he and his heirs shall always live upon the lands, or pay an additional rent, with remedies by distress and entry, is properly triable at law; and a court of equity ought not to interpose or give relief against it. *Ponsonby v. Adams*, 2 Bro. P. C. 431.

A party contracted for an assignment of a lease of a public-house, which in the agreement was described as holden at a certain net annual rent under usual and common covenants. And the lease contained a covenant by the tenant to pay land-tax, sewers'-rate, and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house; and it was proved that a considerable majority of public-house leases contained such a proviso:—Held, that the covenant to pay land-tax, sewers'-rate, and other taxes, was a common covenant in a lease, reserving a net rent; and that the proviso for re-entry must, with reference to a lease of a public-house, also be considered usual and common. *Bennett v. Wonnack*, 7 B. & C. 627; 1 M. & R. 644; 3 C. & P. 96.

What are usual covenants is a question of fact, and not of law. *Ib.*

Upon a negotiation between A. and B. for the grant of a lease, B., the proposed lessee, informed the agent of A. that he wanted the premises for the purpose of carrying on therein the business of a retailer of beer, and inquired whether there was anything in the original lease to restrain the tenant from carrying on such business therein, to which inquiry the agent, being ignorant of the contents of the lease, but knowing that such trade had been carried on upon the premises for some years, replied that there was nothing, so far as he knew, to prevent the tenant from carrying on the proposed trade. B. therefore consented to take a lease, and a memorandum to the following effect was drawn up and signed by the parties:—"Lease, twenty-one years from Lady-day, 1853. Lease and counterpart to contain all usual and proper covenants, and particularly those contained in the lease under which the premises are held, so that the same in no way restricts the trade of a retailer of beer. Lessee not to require production of the lessor's title:"—Held, that A. duly performed his contract by being ready to grant a lease without a covenant to restrict the lessee from using the premises as a beer-shop, notwithstanding that there were such restrictive words in the lease under which he himself held. *Hayward v. Parke*, 16 C. B. 295; 1 Jur., N. S. 781; 24 L. J., C. P. 217.

Under an agreement for a lease to contain "all usual and customary mining clauses," the landlord is not entitled to have inserted in the lease a proviso for re-entry on breach of any of the covenants by the lessee, or otherwise than on non-payment of rent. *Hodgkinson v. Crowe*, 44 L. J., Chanc. 680; 10 L. R., Ch. 622; 23 W. R. 885; 33 L. T., N. S. 388; reversing the decision of Bacon, V. C., 19 L. R., Eq. 591; 33 L. T., N. S. 122; 44 L. J., Chanc. 238.

Semble, that the rule is not limited to mining leases. *Ib.*

**Stipulations as to term.**—It is a settled rule of law that an agreement for a lease for seven or fourteen years means a lease for fourteen years, determinable by the lessee, but not by the lessor, at the end of seven years. *Powell v. Smith*, 14 L. R., Eq. 85; 41 L. J., Chanc. 734; 20 W. R. 602—R.

An agreement for a lease for seven, fourteen or — years entitles the lessee, in the absence of other stipulations, to a lease for fourteen years, determinable at the end of seven years at his option only, though the lessor proves that he supposed such an agreement gave to him, as well as to the lessee, the option of determining it at that time. *Ib.*

A land agent having no power to grant leases without reserving to his principal the power of determining them at the expiration of every seven years, entered into an agreement for a grant to an intending tenant of a lease for seven or fourteen years. The tenant

was put into possession of the farm, and took the stock on it from the outgoing tenant at a valuation. The lessor, who did not know the rule of law above mentioned, refused to grant a lease without reserving to himself the right to terminate it at the end of seven years, as well as giving such right to the tenant:—Held, that the lessor was not entitled to have a power of determining the lease at the end of seven years; for his ignorance of the law was no excuse, and he could not repudiate his agent's act after letting the tenant take possession of the farm on the faith of it. *Id.*

As to commencement and duration of term, —see this title, II., 2.

**Implied undertaking of lessor for title.]—**By agreeing to grant a lease, a party does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title. *Gwillim v. Stone*, 3 Taunt. 433.

Nor that he has a good title to the fee-simple, and will deliver a written abstract. *Temp's v. Brown*, 6 Taunt. 60.

An agreement to grant a lease contains an implied undertaking on the part of the intended lessor that he has title to grant such lease; and if he has not, he is liable to an action at the suit of the intended lessee. *Stranks v. St. John*, 30 L. J., C. P. 118; 2 L. R., C. P. 376; 15 W. R. 678; 16 L. T., N. S. 283.

Upon a contract for the sale of an agreement for a lease, it is not an implied condition that the lessor has power to grant the lease. *Kintrea v. Perston*, 1 H. & N. 357; 25 L. J., Exch. 287.

Under a parol demise, the law implies an agreement for quiet enjoyment, but not of good title. *Bundy v. Cartwright*, 8 Exch. 913; 22 L. J., Exch. 285.

A declaration that the defendant had agreed to let premises to the plaintiff on certain terms, and that, in consideration that the plaintiff, at the request of the defendant, had promised to perform all things in the agreement contained on his part to be performed, the defendant promised the plaintiff that he had good right and title, and full and lawful power and authority, to let the premises to the plaintiff without restriction as to the purpose for which the same should be occupied:—Held, bad, inasmuch as the promise alleged could not be implied from the relation of landlord and tenant, and was without consideration to support it. *Jackson v. Cobbin*, 1 D., N. S. 96; 8 M. & W. 790.

By a memorandum A. agreed to let premises to B. for two years at a certain rent; and that B. should have the right of purchasing the premises at the end of or at any time during the term for a given sum; "it being understood that A. was possessed of the premises for his own life and the life of M., and of the survivor of them:"—Held, that by this agreement A. bound himself to make title to the premises, for the lives of himself and M. and the life of the survivor. *Worthington v.*

*Warrington*, 5 C. B. 635; 17 L. J., C. P. 117.

As to effect of want of title of lessor, —see this title, I., 2.

As to estoppel of tenant to dispute title of landlord, see this title, X.

**Agreements for under-leases.]—**A party who enters into an agreement for an under-lease, without inquiring into the covenants of the original lease, has constructive notice of all usual covenants in the original lease. *Flight v. Barton*, 3 Mylne & K. 282.

But where a party entered into an agreement under a lease for an under-lease, and informed the lessee of the nature of the business which he meant to carry on in the premises, and the lessee did not apprise him that there was a covenant in the original lease prohibiting such business:—Held, that the silence of the lessee was equivalent to a representation that there was no such prohibitory covenant. *Id.*

It is the duty of a person contracting for an under-lease to inform himself of the covenants contained in the original lease, and if he enters and takes possession of the property he will be bound by those covenants. *Cosser v. Collinge*, 3 Mylne & K. 283.

Where an under-lessee covenants to observe the covenants of the original lease, it is the same as if those covenants had been inserted at length in the under-lease. *Piggott v. Stratton*, 29 L. J., Chanc. 1; 1 De G., F. & J. 33; 6 Jur., N. S. 129.

The principle that a person who contracts to take an under-lease and takes possession is bound by the provisions of the original lease, applies only where there has been a fair opportunity of ascertaining what such provisions are. *Hyde v. Warden*, 37 L. T., N. S. 567—C. A.

**Obligation to accept lease.]—**By an agreement to take a lease, the landlord was to put the premises in repair. The tenant took possession, and on his application the repairs were made after delay. A lease was then tendered containing certain covenants in the landlord's lease:—Held, that the delay in doing the repairs, and the tenant's previous ignorance of the covenants, would not excuse him from accepting the lease. *Nash v. Cockrane*, 3 Jur. 973—C.

The tenant of business premises covenanted by a deed of arrangement, made between himself and the administrator of his deceased partner, in whom the premises were vested, to accept a lease of the premises for a term at a rent named in the deed, and it was stipulated that the lease should contain a covenant by him to keep the premises in repair, and other covenants usual in leases of a like nature. He retained possession of the premises till his death, but was never called upon to execute a lease:—Held, that the administrator was entitled to rank as a specialty creditor in respect of his claim for rent and dilapidations in the same manner as if a lease had been executed in pursuance of the deed



On the day of the date thereof. *Kidd v. Boone*, 40 L. J., Chanc. 531; 12 L. R., Eq. 89; 24 L. T., N. S. 356—V. C. B.

As part of the same arrangement the tenant gave to the administrator a bond to secure part of a sum due from him to the partnership, and thereby bound himself, in case he should not punctually pay the installments therein mentioned, to pay the remainder of the sum due. The installments were not paid regularly:—Held, that the administrator was entitled to claim as a specialty creditor for the whole sum. *Id.*

(b) When and how Specific Performance may be compelled.

**Enforcing by bill in equity, generally.]**—A tenant having committed breaches of covenant by waste, or treating the land in an unhusband-like manner, is not entitled to a specific performance of an agreement for a lease. *Hill v. Barclay*, 18 Ves. 63.

When the conditions of an agreement between landlord and builder, whereby the landlord agrees to grant leases of successive plots of land as the houses upon each of them are built to a certain stage, are by the terms of the contract separable, there is no rule of equity to prevent them from being separately enforced by way of specific performance. Therefore, where the assignee of the builder's interest had completed the houses upon some only of the plots agreed to be built upon:—Held, upon a bill for specific performance, that he was entitled to the leases of those plots, even though disclaiming all interest in the remaining plots. *Wilkinson v. Clements*, 42 L. J., Chanc. 38; 8 L. R., Ch. 96; 27 L. T., N. S. 834; 21 W. R. 90.

A lessee of premises covenanted with his under-lessees of part, that in case he obtained an extension of the term or a renewal of his lease, he would give to the under-lessees a like renewal or extension of his under-term. A lease was subsequently taken from the ground landlord for an extended term, in the name of a trustee, for the separate use of the lessee's wife. The under-lessees filed a bill against the lessee, his wife, and her trustee, charging that the extended lease had been taken in a trustee's name, in order to defeat their rights under the lessee's covenant, and praying that the wife and her trustee might be decreed to grant an under-lease to the plaintiffs for the extended term:—Held, that the relief sought could not be given, as the suit was virtually one for specific performance against persons who were not parties to the original covenant or contract to renew the under-lease. *Lumley v. Timms*, 28 L. T., N. S. 157; 21 W. R. 819—R.

To a suit for specific performance, by the purchaser against the vendor of a leasehold interest, it is not a defense that the lease contains a covenant against alienation without the consent of the landlord, and that it does not appear that the consent of the landlord

has been obtained. *Leitch v. Simpson*, 5 Ir. R., Eq. 613—V. C.

A lessee of a house agreed to sublet two rooms for a part of his term, taking a fine; he afterwards became bankrupt and his trustee disclaimed the lease. The landlord commenced an action of ejectment against the sub-lessee. The sub-lessee filed his bill to restrain the action, and to compel the landlord to grant him a lease according to the terms of his agreement with the first lessee. The provisions of the agreement differed from those of the lease:—Held, that the sub-lessee had no equity to enforce the provisions of the agreement against the landlord. *Taylor v. Gillott*, 32 L. T., N. S. 795; 24 W. R. 65; 20 L. R., Eq. 682; 44 L. J., Chanc. 740—V. C. H.

**— where terms of agreement are uncertain or indefinite.]**—An agreement to take a lease of a house, if put into thorough repair, and the drawing-rooms "handsomely decorated according to the present style," is too uncertain for the court to enforce. *Taylor v. Portington*, 7 De G., M. & G. 328.

Where terms for letting farms provided that all materials required for building proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant lending tiles; that gates, buildings, "&c." should be left in repair by the tenant, the landlord finding new gates when required; that the landlord reserved to himself all customary rights and reservations, such as liberty to cut and plant timber, search for and work mines or minerals, "&c." allowing the tenant for any reasonable damages:—Held, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically. *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Chanc. 812; 4 Jur., N. S. 1006.

A., by contract in writing, agreed with B. to take a lease of "those two seams of coal, known as the two-feet coal and the three-feet coal, lying under lands hereafter to be defined in the Bank End estate," and B. agreed to let to A., "the before-mentioned seams of coal":—Held, that the contract was sufficiently definite to enforce, and that the true construction of it was, that the boundaries of the estate, which consisted of about twenty-seven acres, were to be thereafter defined. *Ileywood v. Cope*, 25 Beav. 140; 27 L. J., Chanc. 468.

**—in cases of mistake.]**—The court will not refuse to decree the specific performance of an agreement, on the ground that one of the contracting parties has mistaken its legal effect. *Powell v. Smith*, 14 L. R., Eq. 85; 41 L. J., Chanc. 734; 20 W. R. 602—R.

Therefore, when a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority:—Held, that the lessee was entitled to have the agreement specifically performed,

and to have a lease for fourteen years, determinable at his own option at the end of seven years. *Ib.*

Held, also that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority. *Ib.*

Contract by a railway company to grant a lease of the whole of a house No. 1, and part of a house No. 2:—Held, part of the house No. 1 being evidently intended to be retained by the company, that only that other part of it designated in a plan was meant to be included in the lease, and a bill to compel a lease of the whole house was dismissed. *Richards v. North London Railway Company*, 20 W. R. 194—R.

Where a tender for a lease of a farm was accepted under the mistaken impression that the quantity of land inserted therein by the person making the tender was the same as that intended to be let, and it was subsequently discovered that the quantity of land inserted in the accepted tender was of larger amount than was intended to be let:—Held, that as the mistake was one which related to quantity only it did not touch the essential terms of the contract, and that specific performance could be granted with an abatement. *McKenzie v. Hesketh*, 26 W. R. 189—Fry, J.

**Effect of part performance of agreement by possession, expenditures, &c.]**—A parol agreement was entered into for a lease, on terms which, by direction of the proposed lessor, the proposed tenant instructed a solicitor to reduce to writing. The solicitor took down the terms as stated by the tenant, and afterwards prepared from them a draft agreement, embodying these and other terms, and sent it to the lessor, who afterwards, and without objecting to it, let the tenant into possession, and directed the solicitor to prepare a lease in conformity with the draft agreement, but subsequently objected to the lease so proposed, and gave the tenant notice to quit:—Held, that the delivery and taking of possession were a sufficient part performance of the agreement, as expressed in the draft, to exclude a defense founded on the Statute of Frauds. *Pain v. Coombs*, 1 De G. & J. 34; 3 Jur., N. S. 847.

A landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate:—Held, that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed. *Nunn v. Fubian*, 1 L. R., Ch. 35; 35 L. J., Chanc. 140—C.

It was part of an agreement to purchase a farm that the vendor should, for twelve years from the completion, be at liberty to require, at his own expense, and the purchaser agreed to grant him, a lease of the

farm, at a rent to be estimated at a specified percentage on the outlay in making the purchase. The vendor, just before the completion, wrote a letter to the purchaser, agreeing to pay the percentage on the amount of the purchase-money (which had been already paid), but stating that the letter was a temporary thing until the completion of the purchase, and the execution of an agreement already prepared and intended to be executed. The agreement referred to had been engrossed, and provided for the payment of a rent calculated on the aggregate amount of the purchase-money and expenses of the purchase and of repairs, but left the amount in blank. It was never signed, but the vendor remained in possession, and paid rent calculated on the aggregate amount:—Held, that there was a sufficient part performance to exclude a defense founded on the Statute of Frauds, to a bill for specific performance of the agreement to take a lease. *Powell v. Lovegrove*, 8 De G., M. & G. 357.

A tenant having entered into possession of a farm, and expended moneys under an agreement that the landlord would grant a lease for twenty-one years, and make such improvements and repairs as he and the landlord should jointly agree:—Held, that the stipulation as to repairs was not of the essence of the agreement; and that the impossibility of the strict performance of that stipulation, in consequence of the death of the landlord, was no sufficient reason for allowing a demurrer to a bill for specific performance, where the tenant had so long a possession, and had expended money on the faith of the agreement. *Norris v. Jackson*, 3 Giff. 396; 8 Jur., N. S. 930; 10 W. R. 228; 5 L. T., N. S. 576.

Possession and expenditure on the faith of a parol agreement to grant a lease of a farm, are sufficient to entitle the tenant to a lease, although the agreement is denied by the landlord. *Farrall v. Davenport*, 8 Giff. 863; 8 Jur., N. S. 863; affirmed on appeal, 8 Jur., N. S. 1043—C.

A., a tenant in possession, filed a bill against B. for the specific performance of a parol agreement for a lease of thirty years. A. had contracted to sub-let, and his sub-lessee had expended money in alterations and repairs, with the knowledge and approval of B.:—Held, that the outlay by the sub-lessee was as much a part performance of the agreement as if made by A., who was therefore entitled to specific performance. *Williams v. Evans*, 19 L. R., Eq. 547; 44 L. J., Chanc. 319; 23 W. R. 466; 33 L. T., N. S. 359—V. C. M.

The Statute of Frauds cannot be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground rent, rates, and taxes, if there has been a part performance by possession under the agreement and the agreement has affected the mode of living of the occupying party. *Coles v. Pilkington*, 19 L. R., Eq. 174—V. C. M.

**Effect of delay, laches, &c.**—Agreement for a lease for five years, from the 1st April, 1840, the landlord undertaking to erect, by that time, a new warehouse on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired, on the 1st April; but no objection was made by the intended lessee, who then occupied part of the premises under a former agreement, and shortly afterwards the whole premises were destroyed by fire:—Held, upon a bill filed in equity by the landlord for specific performance of the agreement, and for the defendant to rebuild the premises, and to accept a lease, that it was a condition precedent, that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the contract could not be enforced in equity. *Counter v. Macpherson*, 5 Moore P. C. C. 88.

A plaintiff filed a bill for specific performance of an agreement to grant a lease of certain coal mines, entered into on the 28th February, 1872. A dispute arose as to the terms of the agreement, and on the 26th September, 1872, the defendant gave the plaintiff notice that, unless he acquiesced in his views he should rescind the contract, and on the 29th October, following, the defendant stated his intention of abiding by that notice. On the 4th November, 1872, the plaintiff's solicitor wrote to the defendant's solicitor that he was instructed to file a bill for specific performance of the contract. The bill was not filed until the 2d April, 1873:—Held, that the effect of the notice of September, 1872, was to put the parties at arms' length, and that the plaintiff, if he intended to insist on his rights, ought to have proceeded at once; that the delay in filing the bill was fatal to the application for specific performance. *Husham v. Llewellyn*, 28 L. T., N. S. 577; 21 W. R. 570—R.

At the expiration, in July, 1857, of a lease under which by assignment he was in possession of property, B. signed an agreement to accept from A. a new lease for thirty-one years, at the same rent as was reserved by the old lease, and payment of 600*l.* on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B. for his approval, but was not returned, and no steps were taken by A. to press for completion. B. remained in possession and paid rent, but no payment of the 600*l.* or interest was ever made or demanded. In 1871 A. died. On a bill by her legal personal representative:—Held, that as B.'s possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the 600*l.* from the 1st of

August, 1857. *Shepherd v. Walker*, 20 L. R., Eq. 659; 44 L. J., Chanc. 648; 23 W. R. 903; 33 L. T., N. S. 47—V. C. B.

In 1855 A. agreed with B. that, "in the event of B. marrying his daughter," he would grant him a ninety-nine years' lease of a shop at C. "should he at any time require it," at a rent of 80*l.* per annum. B. was let into possession of the shop and married A.'s daughter, and duly paid the rent to A. and his assigns until March, 1874, when his then landlord gave him notice to quit. On a bill for specific performance of the agreement:—Held, that B. by his laches and his acts had precluded himself from the relief to which he might have been entitled. *Davenport v. Walker*, 34 L. T., N. S. 168—V. C. B.

The fixed rule of equity that specific performance of an agreement for a lease will not be granted after a long lapse of time will not be relaxed merely on account of possession and payment of rent during the whole of such time. *Powis v. Lord Dynvor*, 35 L. T., N. S. 940—Q. B. Div.

In 1844 the plaintiff verbally agreed with the agent of a predecessor in title of D., to build a shop, and hold the same on lease at a rent of 5*s.* per annum. The plaintiff built the shop and occupied and paid rent for it up to the time of action brought, but no lease was executed, nor were negotiations for a lease had. In 1876 the plaintiff sued D. for specific performance:—Held, that specific performance ought not to be decreed. *Id.*

**Effect of insolvency or bankruptcy of parties.**—It is no defense to a bill filed against a landlord for specific performance of an agreement for a farming lease, by a person to whom the benefit of the agreement has been assigned, that the party with whom the landlord contracted has become insolvent, provided the assignee is solvent, and in a condition to enter into the usual covenants, and there is no evidence that the contract was entered into upon considerations personal to the assignor. *Crosbie v. Tooke*, 1 Mylne & K. 481.

When a landlord agrees to grant a lease to A., his executors and assigns, upon certain conditions, and A. assigns his interest in the contract to B., and then becomes bankrupt, B., on performing the conditions, has a right to enforce the agreement specifically, notwithstanding his assignor's bankruptcy; and this right is not affected by a proviso, that, in case of the bankruptcy of A., the landlord shall have power to re-enter and sell the benefit of the contract and the premises, and hold the proceeds, subject to his own claims, for the use of A.'s estate. *Morgan v. Rhodes*, 1 Mylne & K. 435.

Insolvency is a good ground upon which the court will refuse specific performance of an agreement to grant a lease; but there must be proof of general insolvency; and a particular default in the payment of rent to the landlord of the premises last occupied by the person contracting for the lease, will not disentitle him to the specific performance of the

contract, when there is the testimony of unexceptionable witnesses to his responsibility. *Neule v. Mackenzie*, 1 Keen, 474.

**Award of damages, and rescission of the contract.**—The plaintiff agreed with the defendant to take a lease of premises belonging to the defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of his willful refusal to fulfill his agreement, the plaintiff was unable for fifteen weeks to commence his trade:—Held, that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the loss of profits from his trade during the fifteen weeks; and 250*l.* damages were awarded. *Jaques v. Millar*, 6 L. R., Ch. Div. 153; 37 L. T., N. S. 151; 25 W. R. 846—Fry, J.

After a decree for the specific performance of an agreement by the defendant to take a lease, and for payment by him of the costs and damages, he absconded:—Held, that the plaintiff was entitled to an order rescinding the contract. *Watson v. Cox*, 21 W. R. 310; 42 L. J., Chanc. 279—V. C. B.

As to recovery of damages, in action at law,—see this title, I., 5, c.

**Enforcement by mandamus.**—The 17 & 18 Vict. c. 123, s. 68, which gives an action for a mandamus "to fulfill any duty in the fulfillment of which the plaintiff is personally interested," does not apply to a personal contract, and, therefore, a declaration on an agreement for the lease of a house, claiming a writ of mandamus commanding the defendant to prepare a lease in accordance with the agreement, is bad on demurrer. *Benson v. Paul or Paull*, 6 El. & Bl. 273; 2 Jur., N. S. 425; 25 L. J., Q. B. 274.

As to specific performance of contracts, generally,—see CONTRACT OR AGREEMENT; of contracts to convey land,—see SALE.

#### (c) Recovery of Damages for Breach of Contract.

**Nature of the remedy; and upon what agreements action lies.**—A party who lets premises agrees to give possession, and if he fails to do so, the lessee may recover damages against him, and is not driven to bring an ejectment against a wrongful occupier who refuses to quit. *Coe v. Clay*, 5 Bing. 429; 3 M. & P. 57.

By an agreement in writing, the defendant agreed to let to the plaintiff premises for the term of one year from the 29th September, 1854, and so on from year to year as long as the parties should agree:—Held, that there was an implied contract on the part of the defendant to give the plaintiff possession of the premises. *Jinks v. Edwards*, 11 Exch. 775.

The plaintiff agreed in writing to take of the defendant a farm at a yearly rent, the plaintiff paying all rates and taxes, and agree-

ing to keep the buildings in repair, the defendant agreeing to find bricks, &c., for such repairs, and to lay out a sum of money in repairs, "the tenancy to commence from the 29th of September next, for a term of eight years, subject to a lease," to be drawn up by the defendant's solicitor:—Held, no breach of this agreement, that the defendant did not, before or on the 29th of September, or at any time subsequently, give to the defendant possession of the farm, or enable him to enter thereon. *Drury v. Macnamara*, 5 El. & Bl. 612; 1 Jur., N. S. 1163; 25 L. J., Q. B. 5.

An agreement not under seal between two persons, by which one agrees to let, and the other to take premises for the term of seven years, and by which it is agreed that a good and sufficient lease of the premises shall be prepared, may be good as an agreement; so that an action may lie upon it for not accepting the lease when prepared, although it would be void as a lease, in consequence of the 8 & 9 Vict. c. 106, s. 8. *Bond v. Rosling*, 30 L. J., Q. B. 227; 1 B. & S. 871; 9 W. R. 746; 4 L. T., N. S. 442.

**Pleading and evidence in actions.**—A declaration stated that, by contract between the plaintiffs and the defendant, he agreed to procure as soon as possible, and within four months from the making the contract, sufficient land for a communication between a railway and certain gas works, and stowing a certain quantity of coals, "and to grant a lease of the land to the plaintiffs for a term of five years from the date of the contract," determinable at the end of three years "of the said term" by notice from the plaintiffs, which notice never was given; that the plaintiffs should pay to the defendant for the land, half-yearly, an annual rent equivalent to four per cent. on the money paid by the defendant for the purchase, the first payment to be made six months after possession of the land should be given to the plaintiffs, from which time only the rent was to run; and that, upon the termination of the term of five years, by effluxion of time or by notice, the defendant should pay to the plaintiffs all the moneys expended by them for laying down sidings for the communication, and building sheds and erections on the land for the purposes mentioned in the contract (less five per cent. for deterioration). A plea, that no lease of the land was ever granted to the plaintiffs by the defendant, pursuant to the agreement; nor did the term of five years in the contract mentioned and contemplated ever come into or have any existence:—Held, a bad plea. For that the granting of the lease by the defendant was not a condition precedent to his liability to repay the money, and the meaning of the word "term" was not in the agreement restricted to a term created by lease, but included a period of five years during which the plaintiffs should occupy, after being put into possession under the contract. *Bowes v. Croll*, 6 El. & Bl. 255.

A declaration stated, that it was agreed be-

tween the plaintiff and the defendant, that the plaintiff should purchase of the defendant a house and shop fixtures, specified in an inventory, for 150*l.*; that 125*l.* should be paid on taking possession, and the remainder by bills of exchange; and that the defendant should grant, and the plaintiff should take, a lease of the messuage for twenty-one years, at the rent of 60*l.* The indenture tendered by the plaintiff stated that, as well in consideration of 150*l.* paid by the plaintiff to the defendant, as of the yearly rents and covenants, the defendant demised and leased all that messuage:—Held, that the consideration was not truly stated, and, therefore, that the instrument was not such a lease as was agreed to be granted by the defendant to the plaintiff. *Vonhollen v. Knowles*, 12 M. & W. 602; 13 L. J., Exch. 140.

By an agreement between A. and B., reciting that B. had, as he was advised and believed, legally and effectually put an end to a lease granted to C., of a farm, by entry thereon under a power therein contained, by reason of the bankruptcy of C., and that B. had agreed to grant a lease of the farm to A., for twenty-one years, at the same rents as the same had been held by C.; it was agreed that B. should grant, and A. accept, a lease at a certain rent, payable quarterly; the lease to commence on the 29th of September, 1844, if B. could then legally make and execute the same, or so soon after as he should be in a situation to grant the same; that such lease should contain the same covenants as the lease to C.; and that A. should pay to B., on possession being delivered to him, 500*l.*, as a premium for the lease so to be granted. A. was let into possession, and occupied the farm for about two years, paying the rent; and he also within that time paid B. 250*l.*, in part of the 500*l.* premium; but the flat against C. having been superseded, B. was unable to grant the lease to A. A. thereupon brought an action for the breach of contract, alleging, in his declaration, that he had always been ready and willing to accept a lease:—Held, that the recital in the agreement, and proof of a declaration made by B., that C.'s lease was void and good for nothing, were *prima facie* evidence as against B., that he had power to grant the lease, but that it appearing also by the recitals in the agreement that the lease to C. was supposed to be void by reason of C.'s bankruptcy, such *prima facie* case was rebutted by proof of the supersedeas of the flat against C., and consequently that B. was entitled to the verdict upon an issue as to his ability to grant the lease. *Wright v. Colls*, 8 C. B. 150; 13 Jur. 1056; 19 L. J., C. P. 60.

Held, also, that A., was entitled to recover back the 250*l.* as money paid upon a consideration which had failed. *Id.*

A contract provided that a lease should be drawn, prepared, and executed at the sole expense of the lessor. In an action on the agreement by the lessee:—Held, that it was not necessary to aver that a lease was tendered

to the lessor for execution. *Price v. Williams*, 1 M. & W. 6; 1 Gale, 362.

In a declaration on an agreement between the plaintiff and the defendant, that the defendant would take a house of the plaintiff and execute a lease for the same term as the plaintiff held, less ten days, an averment that the plaintiff accepted the defendant as tenant, and tendered him a lease for his execution, is sufficient, although there was no averment of the plaintiff's readiness and willingness to grant the lease. *Collins v. Willmott*, 13 W. R. 204; 11 L. T., N. S. 340—Q. B.

By an agreement between the plaintiff and the defendant, the former agreed that upon payment to him by the latter of 1,440*l.*, by installments on certain days, he would grant the defendant a lease of a certain parcel of land, and the defendant agreed to accept such lease and execute a counterpart. A declaration assigned for breach non-payment of the moneys:—Held, that the declaration disclosed a sufficient cause of action, the granting of a lease not being a condition precedent to the plaintiff's right to demand payment of the money. *Baggallay v. Pettit*, 5 C. B., N. S. 637; 5 Jur., N. S. 388; 28 L. J., C. P. 169.

A count stated, that in consideration that the plaintiff agreed with the defendant to sell and transfer to him, by the 22d of January, a lease of a farm for 500*l.*, and the implements, stock, &c., at a valuation, the defendant agreed to purchase the same, subject to his being approved of as a tenant by S.; and also, at and upon making the agreement, to pay down 500*l.* as a deposit, and to complete the purchase, and pay the valuation by the 22d of January; that the defendant being unable to pay the 500*l.* upon the making the agreement, in consideration that the plaintiff dispensed with payment down of the 500*l.*, and would take the defendant's I O U for the same, he promised the plaintiff that he would pay the 500*l.* as soon as he could write to his banker, at Berwick, and procure his banker to remit the same. Breach, that the money was not paid:—Held, that the count disclosed a sufficient consideration for the defendant's promise. *Davis v. Nisbett*, 10 C. B., N. S. 752; 8 Jur., N. S. 211; 31 L. J., C. P. 6; 9 W. R. 840.

A plea, that before the defendant could procure his banker to remit, and before any demand of payment of the I O U, the defendant was disapproved as a tenant by S., is a good answer to the count. *Id.*

A plea, on equitable grounds, that before demand of payment of the I O U, the defendant was disapproved of as tenant by S., and the plaintiff was thereby rendered unable to sell and transfer the lease, is not a good equitable defense, inasmuch as the plea discloses no ground upon which the defendant could be liable to an injunction in a court of equity. *Id.*

Replication to this plea, that it was part of the agreement that the 500*l.* should be for-

feited in case of non-completion of the agreement by the defendant on the 22d of January; that it was agreed that, for the purpose of obtaining the approval by S. of the defendant as a tenant, he should apply to S. to accept him as such tenant; and that, before any disapproval of S., the defendant applied to S. to accept him as tenant, and afterwards the defendant withdrew such application, and declined to be accepted as tenant by S.; and that such disapproval was procured and occasioned by the act of the defendant, and from his unwillingness to fulfill the agreement, and not otherwise:—Held, that, assuming the plea to be an answer to the count, the replication was a good answer to the plea. *Id.*

Where a declaration stated, that, in consideration that the plaintiff would procure S. to grant a lease to the defendant, the latter promised to pay the plaintiff 170*l.*, and it was proved that S., having agreed to grant a lease to the plaintiff, the latter originally undertook to assign it to the defendant for the consideration mentioned; but that afterwards, a lease, to which the plaintiff was a party and assented, was granted immediately by S. to the defendant, in which the consideration to be paid by the latter to the plaintiff was not mentioned:—Held, that the evidence merely amounted to proof of the substitution of a new contract to procure a lease from S. to the defendant, in lieu of the original contract; and, consequently, that there was no variance. *Boone v. Mitchell*, 1 B. & C. 18.

The plaintiff, in the first and third counts, alleged, that, at the time of making the agreement with the defendant, he was possessed of a house, for a certain term of years, to expire on the 25th December, 1826; and, in the second, that he was entitled to the term, under and by virtue of a certain contract. The proof was, that the plaintiff was possessed for a term of only twelve years; and there was no contract or agreement under which he was at that time entitled to an extension of the term:—Held, that this was a variance, although it appeared that he had since become possessed of a lease to expire in December, 1826. *Routledge v. Grant*, 1 M. & P. 717; 4 Bing. 658; 8 C. & P. 267.

**Measure of damages.**—A. agreed with B. to grant the latter a lease of a house as soon as he became possessed thereof, to bear date from the 21st December, 1825, for fourteen or twenty-one years. At the date of the agreement the house was under a lease which would not expire till Midsummer, 1827, the legal estate being in trustees, first to pay debts, and secondly to pay an annuity to T., and subject thereto to the use of A., if he attained twenty-four. In June, 1825, after A. had attained twenty-four, but before the outstanding lease expired, he and the trustees joined in a fresh lease to C. for twenty-three years:—Held, that A. was liable to an action before the expiration of the lease, which would not be out until Midsummer, 1827, but that the measure of damages would only be the value

of a lease for so much of the term as upon a calculation of the probable period of the annuitant's death would be likely to be subsisting at the arrival of that period. *Ford v. Tiley*, 9 D. & R. 448; 6 B. & C. 825.

A. entered into possession of premises under an agreement with B., under which he was to hold them as tenant for two years, at the yearly rent of 50*l.*, with liberty to make, at his expense, such alterations in and additions to the premises as he might think proper, the same being improvements, and A. to have option of purchasing the premises at any time during the two years for 600*l.*, "it being understood between the parties that B. was possessed of the premises for his own life and the life of C., and of the survivor of them." It being, however, discovered that B. had not the precise interest mentioned in the agreement, A. brought an action to recover damages for the breach of contract, and also compensation for the money expended by him in improvements:—Held, that he was only entitled to recover the value of the proposed lease, and not the value of the improvements. *Worthington v. Warrington*, 8 C. B. 184; 18 L. J., C. P. 350.

To an action for breach of a contract to grant the plaintiff a good and valid lease, the defendant pleaded payment into court, and no damages ultra:—Held, that the plaintiff might recover damages beyond his expenses, for the loss he had sustained by reason of the non-performance of the contract. *Robinson v. Harman*, 1 Exch. 850; 18 L. J., Exch. 202.

Held, also, that evidence to show that the plaintiff knew the defendant had no title was inadmissible, after the plea of payment into court, which admitted the contract. *Id.*

The plaintiff agreed with F. to let him land on a building lease for ninety-eight years, from Christmas, 1835, at a peppercorn rent, for three years, and then at 115*l.* a year, payable quarterly, F. to build on the land, and cover in the messuages within the first three years, and to accept a lease: proviso for re-entry on default. F. entered, but did not build the houses, whereupon the plaintiff brought ejectment, and recovered possession on June 12th, 1839. After re-entry, the plaintiff agreed with a new tenant to let him the premises for the residue of F.'s term, at a peppercorn rent, for the year ending Midsummer, 1840; 70*l.* for the year ending Midsummer, 1841; and 140*l.* a year for the rest of the term. The plaintiff, in an action for breach of F.'s agreement, claimed as damages the difference between the rent which he would actually receive down to Midsummer, 1841, and that which would have accrued down to the same period if F. had kept his agreement:—Held, that the jury was not bound to award that amount, but might give their verdict on an estimate of the plaintiff's real damage, taking into consideration the increased rent secured to him by the second agreement. *Oldershaw v. Holt*, 12 A. & E. 590; 4 P. & D. 307.

A. entered into an agreement for the trans-

fer of his tenancy in a public-house, and the sale of the goodwill to B. The subject-matter of the agreement, which was in writing, was therein described as "the house and premises he now occupies, known by the sign of the White Hart." There was a coach-house which belonged to the White Hart, and which, at the time of the agreement, was not in the occupation of A., but in that of S., who held it as tenant to A. for a period which had not expired at the time fixed for the completion of the transfer by the agreement. The agreement contained a variety of stipulations with regard to the transfer of the licenses, the payment of rates and taxes, and the purchase of fixtures, furniture, and stock at a valuation by B., and concluded as follows:—"If either party shall refuse or neglect to perform all and every part of this agreement, they hereby promise and agree to pay to the other who shall be willing to complete the same, the sum of 100*l.* as damages, and recoverable in any of her majesty's courts of law." The purchaser refused to perform the agreement on the ground that it included the coach-house, and that A. could not perform his part, and being able to deliver up possession of that portion of the premises on the day fixed for completion, and A. accordingly brought his action to recover the 100*l.* as liquidated damages:—Held, that the words, "he now occupies" formed an essential part of the description of the subject-matter of the agreement, and could not be rejected as *falsa demonstratio*, and consequently that the agreement did not include the coach-house, and A. was entitled to succeed; but that the 100*l.* was not liquidated damages, but a penalty, and therefore A. could only recover the damages found by the jury to have been actually sustained by him. *Mages v. Lovell*, 9 L. R., C. P. 107; 43 L. J., C. P. 181; 80 L. T., N. S. 169; 23 W. R. 334.

### G. Leases.

#### (a) Form and Requisites: Execution and Delivery; Cancellation.

**Statute.**—"The 8 & 9 Vict. c. 124, facilitates the granting of leases, and provides forms which may be usefully adopted in practice."

As to requirements of statute of frauds, and similar statutes,—see this title, I., 3.

**Duty to prepare lease and counterpart.]**—In a written agreement for a lease, it was stipulated that if the tenant should be desirous to take a lease of the premises, "he the said (landlord) will, at the request and costs of the said (tenant), grant and execute to him a lease thereof."—Held, that, upon this agreement, the tenant was not bound to pay for the counterpart of the lease, although the lease was to contain covenants to be performed by the tenant; and that, if the landlord required a counterpart, he must be at the expense of it himself. *Jennings v. Major*, 8 C. & P. 61—Denman.

To an action for breach of an agreement to execute a lease, it is no answer to allege that the intended lessee had not prepared the lease and tendered it for execution to the intended lessor. *Cantley v. Powell*, 10 Ir. R., C. L. 200—Q. B.

**Effect of non-execution by lessor.]**—Action on an indenture for a term of ten years, by the plaintiffs to the defendant, for not yielding up the premises occupied by him during the term in good repair. Plea (setting out the indenture, by which the plaintiffs, as the master and governors of an hospital, demised, under their common seal, to the defendant, who covenanted with such master and governors), that the indenture was not at any time during the term signed by the plaintiffs, nor did they sign any lease in writing:—Held, that the defendant was liable on his covenant, whether the plaintiffs had executed the indenture or not. *Cooch v. Goodman*, 2 D. & G. 159; 2 Q. B. 580; 6 Jur. 779.

Held, secondly, that the plaintiffs could not sue in their individual characters on a covenant made with them in their corporate capacity. *Id.*

To an action on a covenant against the assignee of a lease, of which the declaration averred that the party under whom the assignee claimed executed the counterpart:—Held, that a plea that the indenture was not executed by the plaintiff, or by any agent of the plaintiff, thereunto lawfully authorized in writing, was no answer. *Aveline v. Whisson*, 4 M. & G. 70; 12 L. J., C. P. 58.

Declaration on a deed made between the plaintiff and the defendant, whereby the plaintiff demised to the defendant a messuage, with the appurtenances, for seven years, and the defendant covenanted with the plaintiff, that he would yearly and every year, during the term, keep the premises in repair, and give them up in repair at the end of the term; by virtue of which demise the defendant entered upon and enjoyed the premises. The breach laid was for not keeping the premises in repair during the term. The defendant pleaded that his part of the deed was executed by him after the alleged day of the execution thereof, and that the plaintiff's part was never executed by him, or by any agent of his thereunto lawfully authorized, nor was there ever any demise of the premises to the defendant, nor was there ever any lease of any part of the premises put in writing and signed, or made, signed, sealed or delivered by the plaintiff, or by any agent of his thereunto lawfully authorized by writing or otherwise; and that although before the making of the deed the plaintiff demised the premises for one year, and so on from year to year, by virtue of which demise the defendant entered and occupied the premises for a term, to wit, for nine years, which term ended before the commencement of the suit, the defendant never did occupy the premises under any demise from the plaintiff, other than that last men-

tioned, or for any term granted by the deed; and that there never was any consideration for the execution by the defendant, on his part, of the deed, and that his covenant therein was void:—Held, in substance, a good answer to the action. *Pitman v. Woodbury*, 3 Exch. 4.

Action upon an indenture between commissioners of an inland navigation, under the authority of several acts of parliament, on the one part, and the defendant on the other part, whereby the commissioners demised the tolls of the navigation to the defendant for one year, at a rent payable monthly, together with some other payments, and the defendant covenanted with the commissioners, parties to the indenture, and also with the whole body of the commissioners in a separate covenant, for payment of the rent. The declaration alleged an entry by virtue of the demise, and an occupying and receiving the tolls during the entire year. Breach, non-payment of the rent. Plea, that the commissioners never executed the lease, and that the entry and occupation were at the will of the commissioners only, and not under the demise. Replication, that the defendant entered, and received and enjoyed the tolls by the permission of the commissioners, under the terms of the indenture:—Held, that, as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise, and under its terms; and, therefore, that he was not liable to be sued upon his covenant in that instrument. *Swatman v. Ambler*, 8 Exch. 72; 23 L. J., Exch. 81. See *Morgan v. Pike*, 23 L. J., C. P. 64.

To an action on a covenant in a lease for years by the lessor, a plea, that the lessee was tenant for a term of years, if he should so long live, and that the lease was never executed by the reversioner, is a bad plea. *How v. Greek*, 10 Jur., N. S. 1187; 34 L. J., Exch. 4; 13 W. R. 80; 11 L. T., N. S. 315; 3 H. & C. 391.

—by lessee.]—In ejectment on the title, the defendant relied upon twenty years' adverse possession, to obviate which the plaintiff gave in evidence a lease, the last life in which died within the twenty years; but, though both the lease and the counterpart were attested as "signed, sealed and delivered" by the lessor, neither of them was executed by the lessee, and both, being seventy years old, came out of the custody of the lessor:—Held, that, though the plaintiff was entitled, under all the circumstances of the case, to have had a question as to the fact of the delivery submitted to the jury, he was not entitled to a direction in his favor, and that the verdict directed for the defendant should stand. *Miltown v. Goodman*, 10 Ir. R., C. L. 27—C. P.

Effect of alteration after execution.]—An alteration of a lease, to which others besides the lessor and lessee are parties, after the execution of it by such third parties, but

before the execution by the lessor and lessee, does not avoid it. *Hall v. Chandless*, 12 Moore, 816; 4 Bing. 128.

Delivery; and right to possession of instrument.]—A. being lessee of premises under a lease for twenty-one years, determinable at the end of seven or fourteen years, gave notice to quit at the end of seven years, but did not yield up possession pursuant to such notice. Disputes having arisen, A. gave C., who was entitled to the residue of the term, an undertaking that, in consideration of his granting a new lease to B., he would "deliver up to C. the said lease:"—Held, that the delivery of the lease to C. with the seal cut off, was a breach of the undertaking, although the seal was also delivered at the same time. *Richardson v. Barnes*, 4 Exch. 128; 18 L. J., Exch. 469.

Trover does not lie by a lessor against a lessee to obtain possession of the indenture of lease, upon the expiration of the term by forfeiture or otherwise. *Ball v. Ball*, 3 Scott, N. R. 577; 3 M. & G. 242.

A lessor who has determined the term by re-entry for breach of covenant has no title to the lease as against the lessee. *Elworthy v. Sandford*, 3 H. & C. 830; 34 L. J., Exch. 42; 12 W. R. 1008; 10 L. T., N. S. 654.

Cancellation.]—Canceling a lease by the mutual consent of both parties does not destroy the estate vested in the lessee, and the lessor may therefore maintain an action on the demise for the recovery of the rent. *Ward v. Lumley*, 5 H. & N. 87; 29 L. J., Exch. 322.

A declaration on a demise, for rent, stated that the plaintiff by deed demised to the defendant certain premises. Plea, that the plaintiff did not by deed demise the premises. Since the rent became due the deed was canceled by the mutual consent of both parties:—Held, that the canceled deed was evidence in proof of the issue. *Ward v. Lumley*, 5 H. & N. 656; 29 L. J., Exch. 322; 3 W. R. 184.

#### (b) Principles of Construction; Operation and Effect, in General.

General rules for interpretation.]—The 8 & 9 Vict. c. 106, s. 3, which enacted that a lease required by law to be in writing shall be void at law unless made by deed, has made no difference in the interpretation of written instruments. *Stratton v. Pettit*, 16 C. B. 420; 3 C. L. R. 925; 1 Jur., N. S. 602; 24 L. J., C. P. 182.

The intention of the parties, as declared by the words of the instrument, must govern the construction; and where there is an instrument by which it appears that one party is to give possession of premises, and the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an agreement only for a lease to be afterwards made. *Id.*

It cannot be inferred as matter of law that words occurring in a lease are used by the



parties in a peculiar sense in which they are understood in the district in which the property demised is situate. *Clayton v. Gregson*, 6 N. & M. 694; 5 A. & E. 302.

It is a question for the jury, in what sense the words were used in the particular case. *Ib.*

When a material word appears to have been omitted in a lease by mistake, and other words cannot have their proper effect unless it is introduced, such lease must be construed as if that word was inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it. *Wight v. Dickson*, 1 Dow, 141, 147.

The word "term," in a covenant in a lease, may signify either the time, or the estate granted. *Evans v. Vaughan*, 6 D. & R. 349; 4 B. & C. 261.

A lease contained a covenant by a lessor to do certain work, and at the end of the covenant were these words, "and the whole of which is agreed to be left to the superintendence of the defendant and the plaintiff's son:"—Held, that this was neither a condition precedent to nor concurrent with the covenant. *Jones v. Cannock*, 3 H. L. Cas. 700.

When the term mentioned in the reddendum in a lease differed from that stated in the habendum, and the counterpart throughout stated the term as in the reddendum, the habendum was corrected so as to agree with the reddendum. *Burchell v. Clark*, 2 L. R., C. P. Div. 88; 46 L. J., C. P. Div. 115; 35 L. T., N. S. 690; 25 W. R. 334—C. A.; reversing *S. C.*, 1 L. R., C. P. Div. 602; 45 L. J., C. P. Div. 671; 35 L. T., N. S. 372; 25 W. R. 8.

Counterparts.]—The production of the counterpart of an old lease, coupled with evidence of the payment of rent to the lessee by his under-tenants for a number of years, is sufficient evidence of the lessee's interest under such lease. *Doe d. Manton v. Austin*, 2 M. & Scott, 107.

An expired lease may be presumed to have been destroyed, where reasonable diligence has been unsuccessfully used to secure its production. *Ib.*

Lands at A. were conveyed to a charity in 1763. In 1783 the charity, being then incorporated as the Magdalen Hospital, granted a lease for ninety-nine years to G. of all their lands at A. not included in the site of the hospital. The lease reserved no beneficial rent to the lessors, and contained no onerous covenants binding on the lessee. In 1876 the governors of the hospital brought an action against the defendants, who were in possession of premises alleged to be comprised in the lease, to have the lease declared void under 13 Eliz. c. 10, and for possession. The lease having been declared voidable on demurrer, the defendants denied that they were in possession under the lease, and asserted a freehold title in themselves in fee. Since 1853 they or their predecessors had dealt with the property as if seized in fee. At the trial

of the action it was proved that, assuming the hospital to be owners in 1783 of the lands conveyed to them in 1763, the premises in question were comprised in the lease:—Held, that a counterpart of the lease in the possession of the plaintiffs was admissible as evidence against the defendants, although there was no other evidence of the identity of the property comprised in the lease with that conveyed in 1763, and although there was no evidence that G. entered under the lease, or that the defendants claimed under him; for that, first, where persons are found to be owners of property, there is a presumption, in the absence of anything to the contrary, that they have remained owners of the same property; and, secondly, that the defendants being in possession, it must be presumed that G. entered, and that the defendants were in possession by devolution from him, so as to ascribe to them a rightful rather than a wrongful possession. *Magdalen Hospital v. Knott*, 37 L. T., N. S. 428—Fry, J.

Held, also, that the fact that the defendants had dealt with the property as owners in fee did not rebut the presumption that they held under the lease. *Ib.*

The rule as to lease overruling counterpart applies only where there is inconsistency between those two documents compared with each other, and not where the lease is inconsistent with itself. *Burchell v. Clark*, 25 W. R. 334; 46 L. J., C. P. Div. 115; 2 L. R., C. P. Div. 88; 35 L. T., N. S. 690—C. A.; reversing *S. C.*, 1 L. R., C. P. Div. 602; 45 L. J., C. P. Div. 671; 35 L. T., N. S. 372; 25 W. R. 8.

Explaining by collateral writings or parol agreements, or by extrinsic facts.]—Where a tenant was to hold land according to certain rules in writing, under which a former tenant held, but the length of his term was agreed on orally:—Held, that, to show the expiration of the term, it was not necessary to produce the rules. *Iley v. Moorhouse*, 6 Bing. N. C. 52; 8 Scott, 156.

In an action to recover back a sum alleged to have been overpaid by a tenant to his landlord, upon a settlement between them in relation to a distress for arrears of rent, it appeared that the defendant held the premises under a lease from Michaelmas, 1832:—Held, that a memorandum written in the margin of the draft of the lease, whereby the tenant engaged to pay rent for the preceding half-quarter, was admissible for the purpose of negating the claim. *Corne v. Garment*, 1 Scott, 275; 1 Bing. N. C. 318.

By a lease reciting that A., one of the lessors, was an original lessee for the term of his natural life, and that B., the other, was a person to whom A. had granted a lease for a term of years certain, seven of which would remain unexpired on the 29th September following the date of the lease, A. and B. demised to the lessee the premises from the 29th day of September, for and during the two several terms thereinbefore mentioned

(the rent to be paid to both the lessors and their executors), if the lessee should so long live, and the term and estate of the original lessee should so long continue. Under the lease there was subscribed a memorandum, providing that the rent reserved should be paid during the first seven years to the intermediate lessee, and afterwards to the original lessee, during the term of thirty years, if his interest should so long continue; and that the new lessee, his executors, administrators, and assigns, should have liberty to quit a part of the premises at any time during the term, upon giving twelve months' notice:—Held, that the lease and memorandum must be taken together, and construed as one entire instrument; and that the intention of the parties, expressed by both, was to extend the habendum beyond the term of the life of the lessee, and give him a lease for thirty-seven years, determinable on the death of the lessor. *Weak d. Taylor v. Escott*, 9 Price, 595.

A draft lease was prepared by a lessor, in pursuance of a written contract, which was not objected to by the lessee, who afterwards refused to complete:—Held, that the draft lease could not be used for the purpose of controlling or explaining the contract itself. *Heywood v. Cope*, 25 Beav. 140.

A. leased a farm to B.; before taking it, B. complained to A. of the quantity of game upon it, and A. thereupon told B. that he was about to kill and to keep down the game, and to dismiss most of his keepers, and discontinue letting the shooting, but said that he did not wish this arrangement to be inserted in the lease. The lease was accordingly drawn up and executed, without containing any reference to A.'s undertaking, but it reserved to A., his friends and agents, the game and right of sporting over the farm. The shooting was afterwards re-let during B.'s lease, and a large head of game kept up. A. died, and in a suit to administer his estate, B. brought in as a creditor a claim on account of damage done to his crops by the game:—Held, that the evidence established the fact that there had been a parol agreement collateral to the lease, and upon the faith of which the lease had been executed; that such agreement was valid, and B.'s claim must be admitted. *Erskine v. Adeane, Bennett's claim*, 9 L. R., Ch. 756; 42 L. J., Chanc. 849; 20 L. T., N. S. 234; 21 W. R. 802.

The Goldsmiths' Company entered into an agreement with the plaintiff to grant to him a long lease of ground on which he was about to erect new buildings. The agreement contained a proviso that nothing therein should give the plaintiff any rights of light and air over certain adjoining ground and buildings. A form of lease was annexed to the agreement, and the lease was afterwards granted according to the form, and contained an express demise of lights; but there was no proviso in the lease similar to the one in the agreement. The Goldsmiths' Company afterwards demised the adjoining ground to the defendant, who commenced building so as to

intercept the plaintiff's light:—Held, that the lease must be read as if the proviso in the agreement was inserted in the lease. *Salaman v. Glover*, 44 L. J., Chanc. 551; 20 L. R., Eq. 441; 32 L. T., N. S. 792—V. C. B.

In 1855, S., an owner in fee of two mills, leased one to P., who carried on there the business of a bleacher. The refuse from his works was discharged through a drain, partly open and partly covered, into a natural stream or watercourse, 300 or 400 yards distant, and upon which the other mill was situate. This discharge of the refuse took place about seven times a fortnight, and polluted the stream. In 1858, P. surrendered his lease, and S. granted a new lease to the defendant. In this lease the defendant was described as a "bleacher," and the demise was of the premises "late in the occupation of P." There was a clause that all buildings created by the defendant for the purpose of bleaching should, at the end of the term, become the property of S. In 1868 the plaintiff purchased both mills. The defendant discharged the refuse from his works through the drain into the stream in the same manner that P. had formerly done. The plaintiff, who carried on in the other mill the business of a paper maker, brought an action against the defendant for polluting the stream:—Held, that the lease might be explained by the state of the premises at the time it was granted, and the mode in which they had been previously enjoyed; and that, thus explained, there was an implied grant by S. to the defendant to use the stream for the purpose of his business of bleaching, and therefore the plaintiff, who was in the position of S., could maintain no action against the defendant. *Hall v. Lund*, 11 H. & C. 676; 9 Jur., N. S. 205; 32 L. J., Exch. 118; 11 W. R. 271.

## II. TERM.

### 1. Nature of Estate or Interest of Tenant.

**Definition.**—The word "term," in a covenant in a lease, may signify either the time, or the estate granted. *Evans v. Vaughn*, 6 D. & R. 349; 4 B. & C. 261.

**Leases for lives.**—A demise by A. to B. for the term of his natural life, may inure as a demise either for the life of A. or of B., according to circumstances. *Doe d. Pritchard v. Dodd*, 2 N. & M. 838; 5 B. & Ad. 689.

Seemle, that if the habendum is to B., his executors, administrators, and assigns, presumption is created in favor of a demise for the life of A. *Ib.*

Such presumption is confirmed by a covenant by A. with B. for quiet enjoyment during the life of A. *Ib.*

Such a covenant per se would amount to a demise. *Ib.*

A lease was granted in pursuance of an agreement between A. and B., by which "A. agreed to let her house to B. during her life, supposing it to be occupied by B. or a tenant

agreeable to A.;" and "a clause was to be added in the lease," to give A.'s son an option to possess the house when of age:—Held, that such lease only inured for the joint lives of A. and B. *Doe d. Bromfield v. Smith*, 6 East, 530; 2 Smith, 570; 2 T. & R. 436.

Lease to A., her heirs and assigns, habendum to A. and her assigns, for and during the natural life of B.:—Held, in ejectment by A., the heir of B., that the words "and her assigns," in the habendum, must be rejected as repugnant to the premises. *Doe d. Timmins v. Steele*, 3 G. & D. 622; 4 Q. B. 663; 7 Jur. 555.

Lands, held under a lease for lives, having been devised to Mary for life, and, after her death, to Thomas absolutely, they joined in surrendering the lease, and procured a new one for lives to themselves and their heirs as joint tenants; Thomas devised the lands, but Mary survived him and devised them:—Held, that the legal estate granted by the new lease was vested in the devisee of Mary, in trust for the heir of Thomas and also of his devisee. *Hill v. Hill*, 8 Ir. R., Eq. 140—V. C.

As to validity of leases for lives,—see this title, L. 2.

A lease for 2000 years is not to be construed as a lease, but merely as a term to attend the inheritance. *Denn d. Bargwell v. Barnard*, Cowp. 505.

Option to purchase premises.]—A lease for years contained a covenant on the part of the lessor, that if the lessee should be desirous, at the expiration of the term, of purchasing the premises, and should give to the lessor six calendar months' notice in writing of such desire, and should pay to him 2,000*l.*, the lessor would sell and convey the premises to the lessee; the expense of the preparation and verification of the abstract to be borne by the lessee, he expressly accepting the title. The lessee gave notice, but did not pay the money:—Held, that the payment of the money was a condition precedent to the right of purchase, and that the money not having been paid, no binding contract arose. *Weston v. Collins*, 34 L. J., Chanc. 353—C.

A lease for twenty-one years contained a proviso, that if the lessees should be desirous of purchasing the fee, and should give to the lessor, his heirs or assigns, notice of such desire, they should be entitled to become the purchasers of the premises at the price named, and the lessor, his appointees, heirs, or assigns, would, on payment of the purchase-money, do all acts for conveying the premises to the use of the purchasers. The lessor died, having devised all his real estate to trustees, who disclaimed, and leaving an infant heir. The lessees having served on the infant and his guardian notice of their election to purchase:—Held, that such notice was effectually served, and constituted a valid and binding contract, which the court would not refuse to carry out on the ground that the infant could not give a discharge for the

purchase-money. *Woods v. Hyde*, 31 L. J., Chanc. 293—V. C. W.

A lessee, who had the option of purchasing the freehold at any time within seven years, by giving three months' notice, and paying a certain sum at the expiration of such notice, gave the required notice three months before the seven years elapsed, but did not pay the money on or before the day the notice expired:—Held, that the lessee was not entitled to a decree for specific performance, the time of payment being one of the two conditions of the contract. *Ranelagh v. Melton*, 10 Jur., N. S. 1141; 13 W. R. 150; 11 L. T., N. S. 409; 34 L. J., Chanc. 227; 2 Drew. & Sm. 278.

An owner of a plot of ground agreed to grant a lease of it to A. as soon as the latter had erected a villa thereon. But it was stipulated that if A. should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. A. was to insure in a particular way, and he was to have the option of purchasing the fee within two years. A. erected the villa, but insured in a wrong office and in a wrong name:—Held, that the contract for a lease was independent of the option to purchase, and that, notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed. *Green v. Lou*, 22 Beav. 625; 2 Jur., N. S. 848.

## 2. Commencement, Duration, and Termination.

Commencement of term.]—A lease from a certain day commences on the next day. *Anon.*, Loft, 275.

The words "from the day of the date," mean either inclusive or exclusive, according to the context and subject-matter; and the court will construe them so as to effectuate the intention of the parties. *Pugh v. Leeds*, Cowp. 714.

A lease of lands by deed, to hold from the feast of St. Michael, must be taken to mean from New Michaelmas, and cannot be shown by extrinsic evidence to refer to a holding from Old Michaelmas. *Doe d. Spicer v. Lea*, 11 East, 312.

Where a lease was dated 25th March, 1783, habendum "from the 25th March now last past," and the deed was not executed until some time after the date:—Held, that the term commenced on the 25th March, 1783, and not on the 25th March, 1782. *Steel v. Mart*, 6 D. & R. 392; 4 B. & C. 272.

By indenture of lease of the 28th April, 1834, the lessor of the plaintiff demised to E. a messuage, to hold from the 1st of May then next, for forty years, at the rent of 25*l.* a year. E. covenanted not to underlease without the consent in writing of the lessor; and there was a proviso for forfeiture in case he should be adjudged bankrupt. With the lessor's consent in writing, E. underleased three rooms in the messuage to the defendant for twenty-one years, by a lease dated the

25th March, 1839. In January, 1840, E. was adjudged a bankrupt, and the lessor of the plaintiff brought ejectment for the whole of the messuage, except the rooms leased to the defendant, and entered under a writ of possession on the 12th May, 1841. The defendant continued to occupy the three rooms; and in February, 1843, an execution having issued against him, the lessor of the plaintiff served the sheriff with notice that there was a sum of 25*l.*, being one year's rent, due in November, 1842, in respect of the premises occupied by the defendant as his tenant, and requiring the sheriff to pay the same to him. The sheriff accordingly paid over to the lessor of the plaintiff 25*l.* out of the levy. On the 24th April the defendant was served with a six months' notice to quit:—Held, that the tenancy must be considered as commencing on the 12th May, 1844, and that a demise on the 4th May was before title had accrued to the lessor of the plaintiff, and, therefore, the ejectment was not maintainable. *Doe d. Lloyd v. Ingleby*, 14 M. & W. 91; 14 L. J., Exch. 246.

By an agreement dated the 31st August, 1838, W. agreed to let, and R. to take, a house, at a yearly rent, payable quarterly, "to commence from the 29th September next, and the first quarter's rent to become due and payable on the 25th December next." Though not so stated in the agreement, the house was, at the time of making the agreement, in the occupation of C., as tenant to W., who quit-  
ted on the 26th of September:—Held, that, under this agreement, the tenancy commenced on the 29th of September. *White v. Nicholson*, Scott, N. R. 707; 4 M. & G. 95.

Cognizance that the plaintiff was tenant to H., at a certain rent, and that the defendant distrained for the rent of a half-year ending the 29th of September, 1841. Plea, that, after rent became due, H., by indenture purporting to be made the 1st of February, 1841, but made after the 29th of September, 1841, released the rent. The defendant, in his replication, set out the indenture, dated the 1st of February, 1841, being a demise to the plaintiff of the premises, to hold from the 30th of July, 1840, for fourteen years; the first payment of rent to be made on the 25th of March then next:—Held, that the indenture had not the effect of releasing the tenant from payment of the rent due under a parol contract before its execution. *Cooper v. Robinson*, 10 M. & W. 694; 12 L. J., Exch. 48.

A memorandum of agreement for a lease did not specify the date when the lease was to commence:—Held, that the lease was to commence on the date of the agreement itself, and specific performance of the agreement was ordered accordingly, with damages. *Jacques v. Millar*, 6 L. R., Ch. Div. 153; 37 L. T., N. S. 151; 25 W. R. 846—Fry, J.

**Duration of term, in general.**—The habendum in a lease only marks the duration of the tenant's interest, and its operation as a grant

is merely prospective. *Shaw v. Kay*, 1 Exch. 412; 17 L. J., Exch. 17.

A lease for one year, and so for two or three years, as the parties shall agree, means for two years, and, after every subsequent year begins, is not determinable till that is ended. *Harris v. Evans*, 1 Wils. 263; Amb. 329.

But it is a lease for one year only, without such subsequent agreement. *Ib.*

A lease for years, if the lessee so long lives, with a remainder to another for the residue of the term, must be construed to give the remainder-man a power to enjoy during all the residue of the years to come. *Wright d. Arm v. Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529.

The defendants entered into an agreement "that they should become tenants of the premises, at 37*5l.* a quarter, the tenancy to commence on the 14th June, they paying a quarter's rent on that day; and that they should give security to pay one quarter's rent in advance as long as they should continue tenants:—Held, that, under this agreement, the defendants did not become tenants from year to year, but from quarter to quarter only, and therefore that proof of such an agreement did not support an allegation, that the defendants held "as tenants for a term of years, from year to year, for so long," &c., or "for the residue of a certain tenancy for a term of years," &c. *Wilkinson v. Hall*, 4 Scott, 301; 3 Bing. N. C. 508; 3 Hodges, 56.

A general parol demise, at an annual rent, where the bulk of the farm is inclosed, and a small part in the open common fields, is only a lease from year to year, and not for so long as the usual round of husbandry extends. *Roe d. Bree v. Lees*, 2 W. Bl. 1171.

Upon a demise "until Michaelmas next, and no longer," with the privilege of using part of the premises for specific purposes till Lady-day following, ejectment may be brought for those parts to which the privilege does not extend, in the interval between Michaelmas and Lady-day. *Doe d. Waters v. Haughton*, 1 M. & R. 208.

Demise of freehold and copyhold lands, at an entire rent, habendum so much as was freehold for twenty-one years, and so much as was copyhold for three years, warranted by the custom, and covenant for renewal of the lease of the copyhold every three years, toties quoties, during the twenty-one years, under the like covenants; and that in the meantime, and until such new leases should be executed, the lessee should hold the land, as well copyhold as freehold:—Held, that this was only a lease of the copyhold for three years, and that the lessor after the three years might recover the premises in ejectment against the lessee, there not having been any fresh lease granted. *Fenny d. Eastham v. Child*, 2 M. & S. 255.

A printed instrument, purporting to be a form of a devise of a farm, originally contained in the habendum words creating a tenancy from year to year, but on producing the instrument in evidence, they were found

to be struck through, and were proved to have been so struck through before the execution of the instrument by the party charged. The remaining words of demise were "for the term of one year fully to be complete and ended," and stood immediately preceding those which had been struck out. However, many subsequent stipulations remained in the lease, which seemed to be only applicable to a tenancy for longer than a year, or determinable by notice to quit:—Held, first, that the words struck through might be looked at to ascertain the real intention of the parties in so crasing them, and consequently that the tenancy was for one year only; and next, that the stipulations inapplicable to such a tenancy must be considered as struck out, or as surplusage, unless the tenancy should continue for more than a year. *Strickland v. Maxwell*, 2 C. & M. 539; 4 Tyr. 346.

By the same instrument of demise, after a covenant for payment of rent by the tenant, it was agreed, "that in case the tenant should duly observe and perform the several covenants and agreements thereinbefore contained on his part and behalf," and should peaceably quit the farm in pursuance of notice to do so, he should be entitled to away-going crop, to be taken from lands in seed or turnips the previous summer, such crop being to be left for the landlord, or his in-coming tenant, at a valuation to be made by arbitrators or an umpire:—Held, that this clause did not give the tenant the right of possession of the land to the exclusion of the landlord, after the determination of the year's tenancy, but at most only a right to go on the land to improve the crop; and that the landlord might maintain trespass quare clausum fregit, for taking possession of the crop, and hindering him from having the use and occupation of the land, after the year was expired. *Id.*

By an indenture of lease dated in 1784 and executed by the lessor, he demised certain premises to hold to the lessee and his assigns for the term of ninety-four and a quarter years, yielding and paying therefor during the said term of ninety-one and a quarter years hereby demised a yearly rent. The number of years was not mentioned in any other clause of the lease. But the counterpart, executed by the lessee, which was otherwise identical with the lease, had ninety-one in the habendum as well as in the reddendum. In an action by the assignee of the reversion to recover possession against the assignee of the lessee after the lapse of the ninety-one and a quarter years:—Held, that, there being a manifest clerical error in the lease, the counterpart might be looked at to ascertain where the mistake lay, and that, on the true construction of the lease and counterpart taken together, the "ninety-four" in the lease must be rejected, and the lease read as a grant for ninety-one and a quarter years only. *Burrell v. Clark*, 2 L. R. C. P. Div. 88; 40 L. J. C. P. Div. 115; 25 W. R. 334; 35 L. T., N. S. 690—C. A.; reversing the judg-

ment of the Common Pleas Division, 1 L. R., C. P. Div. 602; 45 L. J., C. P. Div. 671; 25 W. R. 8; 35 L. T., N. S. 373.

— under leases for optional periods.]—A lease for seven, fourteen, or twenty-one years, as the lessee shall think proper, is a good lease for seven years, whatever it may be for the fourteen or twenty-one years. *Ferguson v. Cornish*, 2 Burr. 1032; 3 T. R. 463, n.

Lease of lands by indenture for twenty-one years, with proviso that it should be determinable by the lessee or the lessor at the end of the first seven or fourteen years, and a memorandum indorsed six years after the execution of the lease, "of its being agreed between the parties, previously to the execution, that the lessor shall not dispossess, nor cause the lessee to be dispossessed, of the said estate, but to have it for the term of twenty-one years from this present time;" which memorandum was signed by the parties, and stamped with a lease stamp, but not sealed:—Held, that the lessor might, notwithstanding, determine the lease at the end of the first fourteen years; for the memorandum did not operate as a new lease and surrender of the first lease. *Goodright d. Nicholls v. Mark*, 4 M. & S. 30.

A lease in 1785, for three, six or nine years, determinable in 1788, 1791, 1794, is a lease for nine years, determinable at the end of three or six years, by either of the parties, on giving reasonable notice to quit. *Goodright d. Hall v. Richardson*, 3 T. R. 462.

If a lease is granted for seven, fourteen or twenty-one years, the lessee only has the option at which of the above periods the lease shall determine. *Dann v. Spurrier*, 3 B. & P. 399, 443; 7 Ves. 231. S. P., *Price v. Dyer*, 17 Ves. 803.

So, where the lease was for fourteen or seven years, on the ground that every doubtful grant must be construed in favor of the grantee. *Doe d. Webb v. Dixon*, 9 East, 10.

Where there was an agreement that a tenant should be at liberty to quit at Lady-day, in which case the landlord engaged to take the fixtures at a valuation, or to permit the tenant to let the house:—Held, that the construction of this agreement was, that the tenant had an option in the event of his quitting. *Colton v. Lingham*, 1 Stark. 39—Le Blanc.

And a letting by the tenant to an under-tenant until Lady-day was not an exercise of his right of option. *Id.*

A proviso in a lease for twenty-one years, that, if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators, so to do, upon twelve months' notice to the other of them, his heirs, executors or administrators, extends, by reasonable intendment, to the devisee of the lessor, who is entitled to the rent and reversion. *Doe d. Bamford v. Hayley*, 12 East, 464.

A letting, in 1845, to a yearly tenant, and if he should wish a lease, that the lessor will

grant the same for seven, fourteen or twenty-one years, at the same rent, is sufficiently certain to be specifically performed. It is to be construed as an optional lease for twenty-one years from 1845, determinable at the end of seven or fourteen years, at the option of the tenant. *Hersey v. Giblett*, 18 Beav. 174; 23 L. J., Chanc. 818.

Under such a contract, the landlord might call on the tenant to exercise his option, and, in default, might determine the tenancy, but this might afterwards be waived by a receipt of rent. *Ib.*

A lease was granted to A. for fourteen years, with a proviso for terminating the lease at the end of the first seven years, if the landlord should so desire; on his giving notice of his desire in writing, B. joined in the covenant. The landlord gave a notice, in terms a notice to quit, not expressing in terms his desire to terminate the tenancy under the proviso, but referring to the lease and its determinable quality:—Held, that this was a termination of the lease under the proviso, and discharged the surety. *Giddens v. Dodd*, 3 Drew. 485; 25 L. J., Chanc. 451.

A lease for twenty-one years, determinable at the end of seven or fourteen, if the parties so think fit, is not determinable without the joint assent of lessor and lessee. *Powell v. Tranter*, 3 H. & C. 458; 34 L. J., Exch. 6; 13 W. R. 145; 11 L. T., N. S. 317.

A demise for seven years, with a proviso that, notwithstanding anything before contained, if notice should not be given to determine the lease at the end of the seven years, it should be considered a lease upon the same covenants, from year to year, until notice to determine it, continues after the seven years until put an end to by notice, and the covenants continue binding. *Brown v. Trumper*, 20 Beav. 11.

B., by an indenture, dated and made 19th July, 1851, granted, demised and leased to A. premises, habendum to A. from 25th December, 1849, for and during and until the full end and term of fourteen years thence next ensuing, determinable as therein mentioned; proviso, that it should be lawful for either B. or A. to determine the demise at the expiration of the first seven years thereof, by six months' notice, and thereupon that demise, and every covenant therein contained, should cease and determine accordingly:—Held, that the seven years were to be reckoned from 25th December, 1849, and that the lease might be determined on 25th December, 1856. *Bird v. Baker*, 1 El. & El. 12; 4 Jur., N. S. 1143; 28 L. J., Q. B. 7.

A. agreed to let premises to B. for three years, and, at the expiration of that term, to grant him a lease for an extended term. A. died, and three years having expired, B. continued to hold on under his executors for four years without asking for a lease. He then required a lease:—Held, that B.'s option had not determined, and that he was entitled to the extension of the term. *Moss v. Barton*, 35 Beav. 197.

A person entitled to leasehold premises for a long term of years agreed to underlet them to a tenant for three years, and, whenever called upon to do so by the tenant, to grant to him a lease for three years, seven years, or the remainder of the term that he had it in his power to grant, such lease to contain all the usual covenants for protecting the interests of the grantor. The three years expired without the option being exercised. The tenant, however, continued in possession until he became bankrupt, and his interest in the premises was sold by his assignee to a purchaser, who entered into possession and filed in equity a bill for specific performance of the agreement:—Held, first, that the option might be exercised at any time during the tenancy. *Buckland v. Papillon*, 36 L. J., Chanc. 81; 2 L. R., Ch. 67; 12 Jur., N. S. 992; 15 W. R. 92; 15 L. T., N. S. 378.

Held, secondly, that the bankrupt had such an interest in lands as passed to his assignee either under 12 & 13 Vict. c. 106, s. 142, or under s. 145. *Ib.*

Held, thirdly, that such interest was not prevented from so passing by the absence of the word "assigns" in the agreement. *Ib.*

**Determination.**—Where a lease is to commence from the 25th March then next, for twenty-one years, fully to be completed and ended, the term does not end until the last moment on the 25th March in the last year. *Ackland v. Lulley*, 1 P. & D. 636; 9 A. & E. 879.

A lease for so long as the lessee should continue to inhabit the farm-house and actually occupy the land, and not let or part with the lease; upon his ceasing to inhabit immediately becomes forfeited. *Doe d. Lockwood v. Clarke*, 8 East, 185. And see *Doe d. Norfolk v. Hauke*, 2 East, 481.

A lease to A., his executors, &c., for a year, and so on from year to year, for so long a time as it shall please the lessor and A., his executors, &c., does not expire on the death of A., but vests in his executors. *Muckay v. Mackreth*, 4 Dougl. 213; 2 Chit. 461.

A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least. *Doe d. Clarke v. Smarridge*, 7 Q. B. 957; 9 Jur. 781; 14 L. J., Q. B. 327.

Where the interest of a tenant is determined by the death of a tenant for life, under whom he holds, the possession ceases with the interest, and he cannot maintain trespass unless he does some act indicating an intention to continue in possession. *Brown v. Notley*, 3 Exch. 219.

L. was the holder of a lease of premises from S. for twenty-one years, determinable at the will of either party at the end of the first seven or fourteen years. The first seven years would expire at Christmas, 1863. L. had expended considerable sums on the premises,

for which he was to receive 1,800*l.* from R., to whom he agreed to assign the lease. The agreement contained these stipulations:—"If R. is rejected by S., the 1,800*l.* to be repaid to R. If S. exercises the power of determining the lease at Christmas, 1863, and R. leaves the house, 1,100*l.* are to be returned to R. If at Christmas, 1863, the tenancy of R. is continued, the 1,800*l.* to be retained by L." R. entered into possession, and his aunt, Mrs. C., resided with him. In May, 1863, S. gave notice of an intention to determine the tenancy. At Christmas, 1863, Mrs. C. became lessee to S., under a new lease, at a largely increased rent. R. continued to live in the house after his aunt, Mrs. C., had become the lessee. R. claimed the return of the 1,100*l.* under the agreement:—Held, that the agreement must be construed as applying entirely to a legal termination of R.'s tenancy, which, having taken place, he was entitled under the agreement to the return of the 1,100*l.* *Lucas v. Ridgeout*, 3 L. R., H. L. Cas. 153; *S. C.*, in Exch. Cham., 14 L. T., N. S. 738, affirmed.

When it is a part of the terms of a tenancy created by parol that the tenant shall be allowed to place goods on land not comprised within the letting, the tenant, who has acted upon such license, though not by deed, and though it was afterwards revoked by the determination of the tenancy, has a right to go and remove the goods which he has so placed there, and is entitled to have a reasonable time to do so. *Cornish v. Stubbs*, 5 L. R., C. P. 334; 39 L. J., C. P. 203; 23 L. T., N. S. 21; 18 W. R. 547.

If on the death of the landlord the tenant who has held on such terms continues in possession, and pays the same rent to the landlord's successor, it is evidence that the latter has assented to the tenant continuing on all the terms of the original letting. *Id.*

A lessee is not freed from his covenants by a notice to treat, served by a railway company, until the actual assignment of his interest. *Mills v. East London Union (Guardians)*, 21 W. R. 142; 27 L. T., N. S. 557—C. P.

### III. PREMISES.

#### 1. *Extent.*

**Description.**—Under a demise of a messuage with all rooms and chambers, with the appurtenances thereto belonging, is to be understood all that is occupied together as an entire messuage at one and the same time; therefore, such a demise will not comprehend a room which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previously to the demise. *Kenslake v. White*, 2 Stark. 508—Abbott.

It is to be collected from the recitals of a lease what is intended by the parties to be demised; and where a lease referred to a former demise of premises described as "fifty-

nine acres, provincial measure," and after reciting an intention to demise the "said estate," went on to demise "the same, being forty acres, statute measure:"—Held, that the soil of a road, which was set out and made between the times of making the first and second leases, and was part of the premises demised by the first lease, passed by the second. *Doe d. White v. Osborne*, 4 Jur. 941—C. P.

Under a lease of premises, "together with all ways appertaining, or with any parts thereof used or enjoyed," a right of way passes, although not expressly mentioned, upon proof that it is used with the premises at the time the lease is granted. *Kooystra v. Lucas*, 1 D. & R. 506; 5 B. & A. 880. But see *Harding v. Wilson*, 3 D. & R. 287; 2 B. & C. 96; *Morris v. Edington*, 3 Taunt. 24; *Crisp v. Price*, 5 Taunt. 548.

Under a lease of "all that messuage or tenement, called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises:—Held, that a gateway under a portion of the messuage, and leading to a yard behind, in which were some small houses not included in the demise, the tenants of which had always used the gateway, did not pass, in the absence of evidence to show that it had been in the exclusive occupation of C. *Dyne v. Nutley*, 14 C. B. 122; 2 C. L. R. 81.

A lease of land, described by admeasurement "with the houses now erected or being erected thereon" (it being found as a fact, that at the time the lease was executed the foundations of the house had been laid), is in effect the same as though the lease had been of a specific house; and though the dimensions considerably exceeded those stated:—Held, that it was merely falsa demonstratio. *Manning v. Fitzgerald*, 29 L. J., Exch. 24.

In 1770, P., owner in fee, demised to B. a plot of ground for ninety-seven years and a quarter from the 25th of December, 1765. The trustees of B. demised to S. for ninety-six years, from Lady-day, 1765, a part of the ground upon which a house, called No. 7 Cumberland street, and a stable were built; and they also demised to E., for eighty-nine years, from Lady-day, 1771, another part of the ground upon which a house, called No. 4 Hyde Park place, was built. In 1795, R., being the owner of the leases of both houses, assigned the lease of No. 7 Great Cumberland street to G., reserving the stable, and from that period it was always occupied with No. 4 Hyde Park place. In 1823, the defendant, who had acquired the interest of R. in the lease of No. 4 Hyde Park place, and who was in actual occupation of it, together with the stable (to which he had made a direct communication by a door from the house), obtained from the owner of the reversion of the plot of ground, demised in 1766, a reversionary lease of No. 4 Hyde Park place, for ninety-nine years from the 25th of March, 1822. The house was described in this lease by metes

and bounds, and by reference to a plan in the margin, neither of which included the stable, but the lease contained the following words which were not contained in the lease of the 23d December, 1774:—"Together with all out-houses, edifices, buildings, stables, yards, gardens, ways, watercourses, lights, areas, vaults, cellars, ensemments, profits, and commodities whatsoever to the premises demised, belonging or appertaining." There was also a covenant to deliver up at the end of the term "racks, mangers, stalls," &c. In 1840 the owner of the reversion of the plot of ground demised in 1766, granted to D. a reversionary lease of No. 7 Great Cumberland street, for fifty years, by the following description:—"Together with the capital messuage or tenement, coach-house and stable, erected and built thereon, and which said messuage (but not the stable) is now in the possession of D.," and which stable is now in the possession of M. On the expiration of the lease of the 23d of December, 1774, the plaintiff, to whom the reversionary lease of No. 7 Great Cumberland street had been assigned, brought ejectment to recover possession of the stable:—Held, that the stable did not pass to M. under the general words in the reversionary lease of 1823, as "belonging or appertaining" to the demised premises. *Maitland v. Mackinnon*, 1 H. & C. 607; 9 Jur., N. S. 255; 32 L. J., Exch. 49; 7 L. T., N. S. 427.

A piece of land having been conveyed, together with a right of way from it over a new road to a high road; the person to whom it was conveyed demised the piece of land by parol to a yearly tenant; the demise being general, and making no mention of the right of way:—Held, that the right of way having been made appurtenant to the land, it passed by the parol demise to the yearly tenant, although not expressly mentioned in the parol demise. *Skull v. Glenister*, 11 W. R. 368; 16 C. B., N. S. 81; 33 L. J., C. P. 185.

Before the date of the deed, A. was owner of a row of houses running from north to south, with a garden at the back of each to the east. In the rear of the gardens, and divided from them by a wire fence, was a shrubbery with a gravel walk, which was used in common by the occupiers of all the houses. This shrubbery was bounded on the east and north by the fence of S. By the instrument the premises demised to B. were described as the first house south in the row called, &c., with the garden and shrubbery to the rear and north side thereof, and extending to S.'s fence, either way, and also liberty of way and passage to and for such person for the time being occupying the premises intended to be hereby demised, in, along and over the walk in the rear of the houses, inclosed by a wire fence from the garden ground, or ground occupied with such several houses. The fence of S. ran along the south side of the garden belonging to the house demised to B., as far as the wire fence dividing the garden from the shrubbery.

Afterwards, A., by an indenture demised to C. another house in the same row, with a reservation of a similar right of way:—Held, that the premises demised to B. included at least some portion of the angle of the shrubbery at the back of his garden, between the wire fence and the fence of S. to the east; and therefore that C. had no right to walk over the whole of the land comprised in that angle. *Curling v. Mills*, 6 M. & G. 173; 7 Scott, N. R. 709; 18 L. J., C. P. 316.

A., being seized in fee of a moiety of lands, and B. being seized for life of the other moiety, they in 1805, by deed reciting that they were entitled thereto as tenants in common, and that they had agreed to grant a perpetual lease to C., his heirs, &c., granted and demised the same to C., his heirs, executors and assigns, forever, to hold from a day past unto and to the use of C., his heirs, executors, administrators and assigns, forever; yielding and paying therefor yearly to A. and B., their heirs, &c., the clear yearly rent of 120*l.*, half yearly. The deed contained all the covenants usually found in an ordinary lease:—Held, that in the absence of proof that at the date of the deed the premises were in the occupation of tenants, so that a reversion only could pass, and the expressed intention of the parties precluding the court from presuming that there had been livery of seizin, the deed could not operate as a conveyance of the fee, subject to a rent charge, but created only a tenancy from year to year. *Doe d. Robertson v. Gardiner*, 12 C. B. 319; 21 L. J., C. P. 232.

Premises were demised by the description of "all that cottage or tenement, with the garden thereto adjoining and belonging, situate, &c.; and also a piece or parcel of land lying near to the cottage or tenement, containing by estimation three quarters of an acre (more or less), lately used as garden ground:—"Held, that under such description, an adjoining piece of waste land would not pass, unless it had been theretofore used as an outlet of the garden. *Kingsmill v. Millard*, 11 Exch. 313; 3 C. L. R. 1022.

A reservation in a lease of "the free running of water and soil coming from any other buildings and lands contiguous to the premises demised in and through the sewers or watercourses made or to be made within, through, or under the premises," extends to water and soil coming to and from—though not actually first arising upon or out of—the contiguous lands or buildings, but does not extend beyond such water and soil as are the product of the ordinary use of the land and buildings for habitation. *Chadwick v. Marsden*, 36 L. J., Exch. 177; 2 L. R., Exch. 283; 15 W. R. 964; 16 L. T., N. S. 666.

A., the owner of certain freehold houses and land, with a yard adjoining thereto, demised, by parol, several of the houses. The tenants were in the habit of passing over the yard, and using a common pump and privy there. There was no evidence whether the yard formed part of the demise or not. In



an action by one of the tenants against the landlord for excluding him from the yard, the judge left it to the jury to say whether the landlord at the time of the demise had reserved the yard:—Held, that this was a misdirection, the question being whether he had demised it, and not whether he had reserved it. *Hebbert or Herbert v. Thomas*, 1 C., M. & R. 861; 5 Tyr. 503; 1 Gale, 53.

A lease of a colliery contained an implied covenant on the part of the lessor to procure land by compulsory powers, in order to enable the lessees to make a railway to a neighboring canal, without which they had no access to any available market. The lessor did not procure the land, but brought an action against the lessees for rent. The lessees, acting under the advice of their solicitor, paid the rent, and subsequently proceeded to arbitration under a clause in the agreement, and an award was made in their favor. The lessor having commenced a second action for rent, the lessees applied to the Court of Chancery for an injunction to restrain the action; for specific performance of the agreement to provide the land; for a declaration that the award was binding, and for a rectification of the lease if necessary:—Held, that the colliery being valueless without the land, and the provision of the latter being the basis of the agreement, the documents did not carry out the intention. The whole matter was a failure, and the parties, as far as possible, must be put back in their original positions. *Acraman v. Price, Davies v. Price*, 24 L. T., N. S. 487; 19 W. R. 864—C.

An incumbent agreed to grant, at a future period, a lease of his glebe, containing about 437 acres, "except thirty-seven acres thereof," which were not specified:—Held, that the contract was not void for uncertainty; that the right of selecting belonged to the lessor, he having the first act to do; but that if a lease had actually been granted in the uncertain form of the contract, the right of selecting would then have belonged to the tenant. *Jenkins v. Green*, 27 Beav. 437; 5 Jur., N. S. 304; 28 L. J., Chanc. 817.

Held, also, that this right of selection must not be exercised oppressively, so as to interfere with the beneficial enjoyment of the rest of the farm. *Id.*

By an indenture of lease, lands therein described as "bounded on the west by the River Shannon," and as containing thirty-one and a half acres or thereabouts, and delineated upon a map annexed (which, however, did not show any boundary either on the bank or middle of the river), were demised at an acreable rent:—Held, that, in the absence of anything in the lease to rebut the ordinary presumption, it carried to the lessee half of the bed and soil of the river. *Dwyer v. Rich*, 6 Ir. R., C. L. 144—Exch. Cham.

By a lease, purporting to demise a close containing five acres, at a yearly rent of 10*l.*, the lessor purported to reserve one acre of the close for himself, for such time as he might require it, for his own use, allowing to

the lessee 2*l.* out of the thereinbefore specified rent, as long as the lessor should hold one acre:—Held, that the clause could not be construed as an exception to the lessor of that acre, and that his representatives were not entitled to its possession after his death. *Moroney v. Macnarama*, 6 Ir. R., C. L. 181; 20 W. R. 905—Exch.

As to description of premises in deeds, generally,—see DEED.

## 2. Use and Enjoyment, in General.

**Acts of ownership by tenant.]**—Where a landlord suffers his tenant to exercise acts of ownership, and makes no objection to it, it is evidence to be left to the jury, whether he did not mean to be bound by those acts of his tenant. *Doe d. Winckley v. Pye*, 1 Esp. 366—Kenyon.

**Tenant's duty to preserve boundaries.]**—A tenant is bound to preserve the boundaries, and if he permits them to be destroyed so that the landlord's land cannot be distinguished from his, he is bound to restore them specifically, or to substitute land of equal value. *Att. Gen. v. Fullerton*, 2 Ves. & B. 263.

On a demise of a piece of ground on which a tenant has built, if it corresponds with the abutments, though not with the measured distance as stated in the lease, and the lessor sees the building going on without objecting to it, he will not afterwards be allowed to claim the overplus above the measured distance on the footing of an encroachment. *Neale d. Leroux v. Parkin*, 1 Esp. 229—Kenyon.

Where a tenant of land for life, or for years or at will, has lands of his own adjoining to that which he so holds as tenant, it is his duty to keep the boundaries between them clear and distinct, so that at the expiration of the tenancy the reversioner or remainderman may be able without difficulty to resume possession of what belongs to him; and if the person having such partial interest neglects this duty, and suffers the boundaries to be confused, so that the reversioner or remainderman cannot tell to what lands he is entitled, a court of equity will give relief by compelling the persons who have occasioned the difficulty, to make good, out of what may be considered to lie in the nature of a common fund, that portion of it which belongs to another; but in order to obtain this relief it must be shown that the tenant is in possession of the specific land originally demised. *Att. Gen. v. Stephens*, 6 De G., M. & G. 111; 2 Jur., N. S. 51; 25 L. J., Chanc. 888.

**Inclosures and encroachments by tenants.]**—Where the lord of the manor has conveyed land to A., and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favor of A. from the fact that the

strip of land lies between a highway and land undisputedly comprised in the conveyance to *A. White v. Hill*, 6 Q. B. 487; 9 Jur. 129; 14 L. J., Q. B. 79.

Though it is the presumption of law that a strip of waste land between an old inclosure and a highway belongs to the owner of the old inclosure, yet that presumption may be rebutted by showing that there is other land also adjoining the strip to which it may have formerly belonged. *Doe d. Hurison v. Hampson*, 4 C. & B. 267; 17 L. J., C. P. 224.

When an encroachment by a tenant is on land of which his landlord is not owner, and the power to make it is derived from the tenancy, and it is occupied with and for the purposes of the demised premises, the presumption at the end of the lease is, that the land so encroached upon is part of the demised premises, not that the encroachment was made for the benefit of the landlord. *Andrews v. Hales*, 2 El. & Bl. 349; 17 Jur. 621; 22 L. J., Q. B. 409.

A tenant taking in land adjacent to his own by encroachment must, as between himself and the landlord, be deemed *prima facie* to take it as part of the demised land, but that presumption will not prevail for the landlord's benefit against third persons. *Doe d. Baidley v. Massey*, 17 Q. B. 373; 15 Jur. 1031; 20 L. J., Q. B. 434.

Where, by a deed reciting that several persons had encroached on a common and inclosed land and built cottages, those parties conveyed all their interest in the land and cottages to trustees for the commoners, reserving to themselves the right to occupy the premises for the lives of themselves and their wives, paying 1s. a year to one of the trustees. A., after the execution of the deed, and while in possession of his part of the encroachment conveyed, made a fresh encroachment on the waste which adjoined the other, and he occupied the two together for thirty-eight years, but five years before his death conveyed to B. the latter encroachment for a good consideration:—Held, in ejectment by the trustees against B., that as A., when the fresh encroachment was made, was a tenant (for life at most) to the trustees, and occupied it with the land of which he was tenant, it must be assumed that he made the fresh encroachment for the aggrandizement of the estate, and that therefore it was part of the holding when the tenancy expired. *Doe d. Croft v. Tidbury*, 14 C. B. 304; 2 C. L. R. 347; 18 Jur. 468; 23 L. J., C. P. 57.

Where a tenant incloses land, whether adjacent to, or distant from, the demised premises, and whether the land be part of a waste, or belong to a landlord or a third person, it is a presumption of fact that the inclosure is part of the holding, unless the tenant during the term does some act disclaiming his landlord's title. *Kingsmill v. Millard*, 11 Exch. 313; 3 C. L. R. 1022.

The presumption of law, that where a tenant for years encroaches on land in the neighborhood of that which he holds, he does so for

his landlord's, not for his own, benefit, is not rebutted by the fact, that the land taken by encroachment is separated by a brook from that which the tenant occupies; for, in order to fall within the rule, it need not be immediately adjacent; it is sufficient for it to be near. *Lisburne v. Davies*, 1 L. R., C. P. 259; 12 Jur., N. S. 340; 35 L. J., C. P. 193; 14 W. R. 333; 13 L. T., N. S. 795.

When a man, who has had possession of land on his own behoof for less than twenty years, becomes tenant to another of the adjoining land, he may be held to continue the occupation of the former land on his own behoof, unless there is positive evidence to the contrary. *Dixon v. Baty*, 1 L. R., Exch. 259; 12 Jur., N. S. 1024; 14 W. R. 836.

A tenant under a lease which contained a covenant to repair, and leave in good repair, all buildings and erections then standing or to be erected during the term, built a farmhouse partly on the land demised, and partly on the waste adjoining belonging to the lessor:—Held, that his acquiescence in the act of the tenant prevented his dispossessing him of the premises built on the waste, and that it must be assumed by implication that the covenant to repair extended to the whole building, and that the landlord was entitled, in a suit for the administration of the tenant's estate, to establish a claim for dilapidations. *White v. Wakley*, 20 Beav. 17; 4 Jur., N. S. 983; 28 L. J., Chanc. 77.

When a tenant takes in and incloses adjoining land during his tenancy, the presumption of law that he does it for his landlord, so that the land gained by such encroachment will have to be given up at the end of the tenancy as part of the originally demised premises, is not rebutted by the fact that the landlord expressly assented to the inclosure being made; and where such presumption exists, the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 7, does not apply until the original tenancy has ended. *Whitmore v. Humphries*, 41 L. J., C. P. 43; 7 L. R., C. P. 1; 25 L. T., N. S. 496; 20 W. R. 79.

**Use of premises by tenant; and injury to term or to reversion.]**—A dwelling-house, with grounds and ornamental water, was demised together, with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor, but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs, or assigns. The lease referred to a plan on which the plantation was represented:—Held, that on the construction of the lease as explained by the plan, the lessor was not at liberty, during the term, to destroy the plantation, and an injunction was granted to restrain him from so doing. *Nicholson v. Rose*, 4 De G. & J. 10.

A shop was demised to C., the landlord retaining the right of occupying the flat roof. Shortly afterwards the landlord demised an adjoining house to another person, with the

right of walking and sitting on the roof of the shop. C.'s lease having determined, the landlord demised the shop to the plaintiff by the description of "all that shop as the same was late in the occupation of C." The lease of the house having afterwards determined, the landlord re-let it to the defendant, with the right to occupy the roof of the shop as a photographic studio:—Held, that the words "as the same was late in the occupation of C.," ought to be considered as inserted only for the purpose of identifying the property, and not of limiting the operation of the deed; that the lease to the plaintiff, therefore, gave him a right to the occupation of the roof, and that the erection of a photographic studio by the defendant was an unlawful act. *Martyr v. Lawrence*, 2 De G., J. & S. 261.

Lands partly adjoining a river were demised for 999 years, by indenture, in which the lessor granted to the lessee liberty to cut a goit or sluice out of the river at a proper and convenient distance above a weir, in the most convenient line, through closes (named) of the lessor, into a close intended for a mill-dam, part of the demised lands, and from time to time and at any times to turn the water of the river through the goit, and liberty, from time to time and at all times during the term, to view, examine, carry and lay down materials, and repair and amend the goit or sluice, when so made as aforesaid, or any of them, when and as often as need or occasion should be; making reasonable satisfaction to the lessor, his heirs and assigns, for all damage done or occasioned to the grass or herbage of the lessor, his heirs and assigns, and the lessee covenanted that he, his executors, administrators, or assigns, would make reasonable satisfaction to the lessor, his heirs and assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his executors, administrators, or assigns, in exercise of any of the liberties, privileges, and powers by the indenture granted, except for the term of two years next ensuing the commencement of the rent, during which time no trespass or damage should be charged or paid for. In an action against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, he pleaded that the goit was made in due exercise of the liberty contained in the deed, but that the same not having been made of a sufficient width, and completed to a small and an insufficient width only, viz., nine feet, so that, without widening it, as after mentioned, he could not enjoy the tenements as he was entitled by the indenture so to do, he, in further due exercise of the liberty contained in the indenture, cut down the sides of the goit and widened it. Replication, that before the expiration of two years, and before the commission of the trespasses, the lessee, in due exercise of the liberty in the indenture contained, made and completed a goit, being the goit in the plea mentioned, of the width therein mentioned, and the same remained and was used by the lessee continually, from

the time the same was so made and completed until the lessee, under color of the indenture, committed the trespass complained of:—Held, that the privilege given to the lessee by the deed was to make a goit once only, and that, after having completed a goit, he could not justify entering the land again and widening the goit from nine to eighteen feet, for that the power to make a goit was exhausted, and the widening was not a repairing or amending within the meaning of the indenture. *Dostock v. Sulebottom*, 18 Q. B. 813—Exch. Chan.

By a lease in 1832, premises were demised to the postmaster-general for 1,000 years, at the rent of one shilling, and the postmaster-general covenanted that he and his successors would at all times during the term use the premises as a post-office for the district, and would not use the premises for any other purpose. Ejectment having been brought on a proviso for re-entry for the breach of the covenant, on the ground that the excise duties and licenses for dogs, men servants, horses, &c., had been received and granted on the premises by the post-office clerks:—Held, that there had been no breach of the covenant. *Wadham v. Postmaster General*, 6 L. R., Q. B. 644; 40 L. J., Q. B. 310; 24 L. T., N. S. 545; 19 W. R. 1082.

A lease contained a covenant that a house, to be built immediately adjoining the house in which the lessor lived, should be built fit for a private family, under a penalty of 10*l.* yearly additional rent, unless the lessor should convert his house to any public use:—Held, that this was a continuing covenant, and bound the lessee as well to keep as to build the house as a private dwelling-house, and was broken by his converting it into a public house. *Bray v. Fogarty*, 4 Ir. R., Eq. 544—V. C.

Held, also, that the 10*l.* a year additional rent was a penalty, and not liquidated damages, and that the lessor was not restricted to suing for the additional rent, but was entitled to an injunction to restrain the tenant's converting the house into a public house. *Id.*

The lessee built another house, not adjoining the house of the lessor, on the plot of ground demised by the lease. This second lease was converted into a public house, with the assent of the lessor:—Held, that this was not such acquiescence in the breach of the covenant as to debar the lessor from relief in respect of the other house. *Id.*

A landlord sued his tenant for an injury done by him to the reversion, by wrongfully removing from the land large quantities of clay; and for a conversion of the clay. The jury found that the removal of the clay had depreciated the value of the land by 150*l.*; and that the value of the clay itself was 150*l.* A verdict was entered for the former sum:—Held, on motion to increase the verdict, by adding thereto the sum of 150*l.*, that the plaintiff was not entitled to receive the value of the clay, as well as compensation for the injury done him by the removal of the clay.

*Templemore v. Moore*, 15 Ir. C. L. R. 14—Q. B.

The defendant, in December, 1873, demised to the plaintiff premises to be used for refreshment rooms for twenty-one years. The plaintiff put up a stove for the purposes of his business, which made the party-wall so hot as to endanger the adjoining premises. On receiving notice from the defendant's solicitors to abate the nuisance he substituted another stove in August, 1874, but the evil continued. In October, 1874, the defendant commenced an action of ejectment against the plaintiff for breach of covenant. The plaintiff then had the premises examined, and found that in several respects the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 123, had been violated. The plaintiff by his bill sought to have the lease canceled, the action of ejectment stayed, and damages awarded. The defendant did not insist on the lease or seek damages for past breaches of covenant:—Held, that as the bill was filed before the Judicature Acts came into operation, and was really for damages and not for the rescission of a contract, as the defendant did not seek to enforce the contract, it could not be sustained. The plaintiff's remedy was at law and not in equity. *Thorley v. Gossep*, 34 L. T., N. S. 169—V. C. H.

As to restrictive and other covenants respecting use of demised premises,—see COVENANT.

As to stipulations not to carry on particular trades, &c., on demised premises,—see CONTRACT OR AGREEMENT.

As to covenants for quiet enjoyment of premises,—see COVENANT.

#### IV. HUSBANDRY; TILLAGES, IMPROVEMENTS, CROPS AND EMBLEMENTS.

##### 1. Contracts and Customs.

**Statute.**—[88 & 89 Vict. c. 93, amends the law relating to agricultural holdings in England.]

**What obligations as to husbandry are implied, generally.**—The mere relation of landlord and tenant is a sufficient consideration to raise an implied promise on the part of the tenant to manage a farm in a husband-like manner. *Pouley v. Walker*, 5 T. R. 373.

But a declaration which stated that, in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to make a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer, because those obligations do not arise out of the bare relation of landlord and tenant. *Brown v. Crump*, 1 Marsh, 507.

A tenant may, by the general rules of husbandry, carry away straw or hay from the premises. *Gough v. Howard*, Peake's Add. Cas. 197—Lawrence.

But if a tenant of a farm, during his tenancy, removes a dung-heap, and, at the time of his so doing, digs into and removes virgin soil that is beneath it, the landlord may maintain either trespass *de bonis asportatis* or trover for the removal of the virgin soil. *Higgon v. Mortimer*, 6 C. & P. 616—Parke.

The court will not investigate the proper mode of cultivation of a farm; and the implied term of an agricultural contract, namely, to cultivate in a proper manner according to the custom of the country, is not more specific than a general covenant to keep in repair. *Dunn v. Bryan*, 7 Ir. R., Eq. 143—V. C.

**Effect of custom of the country.**—The custom of the country applies to a tenancy created by lease in writing, though the witnesses who prove the existence of the custom cannot undertake to say whether it applies where the lease is in writing. *Wilkins v. Wood*, 12 Jur. 583; 17 L. J., Q. B. 319.

In an action against a tenant, upon promises that he would occupy a farm in a good and husbandlike manner, according to the custom of the country; an allegation, that he had treated the estate contrary to good husbandry and the custom of the country, is proved by showing that he had treated it contrary to the prevalent course of good husbandry in that neighborhood; as by tilling half his farm at once, when no other farmer tilled more than a third, though many tilled only a fourth; and it is not sufficient to show any precise definitive custom or usage in respect to the quantity tilled. *Legh v. Hewell*, 4 East, 154.

In an action by a landlord against his tenant, the declaration stated that the plaintiff was possessed of a farm, whereon he had laid manure, and thereupon, in consideration that the plaintiff would give up possession of the farm to the defendant, and would permit the defendant to have the benefit of the manure, the defendant promised the plaintiff to pay him so much money as he deserved to have, according to the custom of the country. Breach, non-payment of the value of the manure. At the trial, the plaintiff gave in evidence a written agreement, which stated that the land had been manured with eight loads of manure per acre, and that the tenant agreed that the land, when given up by him, should be left in the same state, or allow a valuation to be made:—Held, that the written agreement excluded the custom of the country, as being inconsistent with it, and that there was therefore a variance between the declaration and the proof. *Clarke v. Royston*, 13 M. & W. 752.

A tenant agreed to cultivate land according to the rules of good husbandry and the custom of the country. He drained (by brick and tile draining) some parts of the land without the knowledge of his landlord. Upon an action in a county court for a proportion of the money thus expended, it was proved for the plaintiff to be the usage, that where a tenant had laid out money in tile

draining the landlord was to repay him five-sevenths of the expense, whether it had been by the consent of the landlord or not; while, on the part of the defendant, witnesses said that such usage was applicable only to cases where the landlord had consented to the outlay. The judge thereupon directed the jury, that it was for them to determine on the evidence what was the custom:—Held, that such custom was not unreasonable, and that the direction was right. *Ludlam v. Mousely*, 15 Jur. 1107; 21 L. J., Q. B. 64.

The defendant's testator, being in possession of an estate, of part of which he was the owner, and another part of which consisted of crown lands leased to him for a term, expiring on the 10th of October, 1849, contracted with the plaintiff for the sale to him of the former part, and, by agreement, demised to him the crown lands for one year from the 29th of September, 1848; and the plaintiff agreed that he would abide by, perform and keep all and singular the covenants and agreements contained in the crown lease; and the testator agreed that, in case he should be able to obtain a further lease from the crown for fourteen years, he would grant to the plaintiff a lease for thirteen years, subject to the same covenants. By a memorandum subsequently signed by the plaintiff, he agreed to take the crown lands, "subject to the same rents, covenants and obligations in all respects," as were contained and provided for in the leases by which the testator held or should hold the same. The plaintiff, on taking possession, paid to the outgoing tenants, according to the custom of the country, the amount of the valuation for fallows, &c., as well of the other lands as of the crown lands. By the terms of the crown lease, the custom of the country in that respect was excluded. At the desire of the plaintiff, the crown lease was not renewed:—Held, first, that the custom of the country was not excluded by the agreement between the parties. *Favell v. Gascoine*, 7 Exch. 273; 21 L. J., Exch. 85.

Held, secondly, that where such a custom exists, there is an implied contract on the part of the landlord, that, if there is no incoming tenant, he will pay the outgoing tenant according to the custom. *Id.*

**Effect of express contracts, generally.]—**Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same rent, the question whether a term contained in the former tenancy is adopted into a new contract of demise is a question of fact. If such a tenant continues to hold under the remainderman, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley v. Monak*, 4 H. & C. 251; 1 L. R., Exch. 159; 85 L. J., Exch. 87; 14 W. R. 406; 14 L. T., N. S. 20—Exch. Cham.

A stipulation in a lease that the tenant shall keep a proportion of the land demised for grass, and pay so much per acre for any deficiency below such proportion, is extinguished by severance of the reversion. *Womersley v. Dally*, 26 L. J., Exch. 219.

As to construction and effect of covenants, in general,—see COVENANT.

**—of covenants and stipulations as to mode of husbandry.]—**Where, at the sale of the stock of the defendant, the tenant of a farm, W., the tenant of an adjoining farm, bought two cows, and, by the defendant's permission, left them on the defendant's farm for some weeks, bringing provender from his own farm to feed them:—Held, that the manure made by these cows was manure made on the farm, and that the removal of it by W. was a breach of a condition of a bond whereby the defendant stipulated with his landlord that he would "put and spread all the manure and compost then collected in the middenstead, or on any other part of the farm or the meadow land, and would not sell, cart, or convey away dung, compost, or manure from the farm." *Hindle v. Pollett*, 6 M. & W. 529.

A tenant was bound either to consume the hay on the demised premises, or for every load of hay removed to bring two loads of manure. On quitting possession of the premises he sold part of a rick of hay then left standing to a purchaser, without mentioning his liability to bring manure. The incoming tenant refused to allow the purchaser to take away the hay until the manure was brought. After an interval of a month, during which time the hay had been considerably damaged, the latter consented that it should be removed; the purchaser, however, then refused to accept or pay for the same:—Held, that although the bringing on the manure was not a condition precedent to the carrying off the hay, as between the landlord and tenant; still, that, after the tenant had quitted the possession of the premises, the succeeding tenant had a right to refuse to permit the hay to be removed till after the manure was brought on; and that, as the vendor had not enabled the purchaser to remove the hay in the first instance, he was not entitled to recover the price. *Smith v. Chance*, 2 B. & A. 753.

A tenant held under the terms of an expired lease, by which it was stipulated that the tenant on quitting the farm should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant; the lease contained no stipulation as to the tenant being entitled to payment for such manure. By the custom of the country the tenant would have been bound not to sell or take away the manure in the fold, but to leave it to be expended on the land by the landlord or his succeeding tenant, and would have been entitled to be paid for the same:—Held, that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not

entitled to be paid for the manure. *Roberts v. Barker*, 1 C. & M. 808; 3 Tyr. 945.

A covenant by the lessee that he would sufficiently muck and manure the land demised with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term, is satisfied by the tenant's laying on two sets of muck within the three last years of the term, if he should think proper so to do. *Pownall v. Moore*, 5 B. & A. 416.

Where clover is sown with corn, the land is not thereby restored to a state of permanent pasture, but is still in tillage. *Birch v. Stephenson*, 3 Taunt. 469.

A covenant in a farming lease not to sow with more than two grain crops during four years, applies to any four years of the term however taken, and not to each successive four years from the commencement. *Fleming v. Snook*, 5 Beav. 250.

In an action for entering a farm, a plea, after setting out a lease from A. to the plaintiff, which contained covenants by the plaintiff that he would not, at any time during the term, sow, reap, or take from the arable lands, or any part thereof, more than two crops of any sort of corn or grain successively, but would, every third year, summer-fallow or lay the arable lands down with rye grass and clover seeds, or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; stated that, during the term, the plaintiff sowed and took off from fifty acres of the arable lands more than two crops of corn successively; and that he did not nor would, every third year, summer-fallow or lay the arable lands, or any part thereof, down with rye grass, &c., nor did nor would plant with potatoes, nor sow with peas, which were twice well, or in any manner, hoed, &c.:—Held, that this covenant was two-fold; that the tenant would not take more than two crops of grain in succession, and that he would do certain other things; that the plea correctly averred a breach of the first branch of the covenant, but did not show a breach of the second, inasmuch as it did not negative the sowing with beans. *Hammond v. Colls*, 1 C. B. 916; 8 D. & L. 164; 14 L. J., C. P. 288.

A covenant in a farming lease provided that the tenant should, during the demise, consume and convert into manure, and spread on the premises, all the turnips and green crops of all kinds grown thereon, but that in case he should take or sell off any part thereof, which he was at liberty to do, then that he should, for every ton of vetches, or of any green crop which should be taken or sold off from the premises, bring back and spread thereon one ton of good stable manure, within three months after the selling or taking off such green crops, &c. In an action upon this covenant, the plaintiff set out the first part only, and assigned for breach, that the defendant carried away fourteen acres of tur-

nips, without converting the same into manure and spreading the same on the premises:—Held, that the covenant was an alternative one, and that the plaintiff should have negatived the bringing back within the time limited an equivalent in manure. *Richards v. Bluck*, 6 C. B. 497; 6 D. & L. 325; 13 Jur. 963.

A farming agreement contained the following clause:—"No hay or straw to be sold off the land without consent of the landlord or his agent, except the value of the straw so sold off be returned in manure on the land:—"—Held, per Pollock, C. B., and Parke, B., that if the tenant sold the hay or straw, he was only bound to spend upon the land as much manure as the straw would have produced; per Alderson, B., and Platt, B., that the tenant was bound to return in manure the price or market value of the straw. *Lowndes v. Fountain*, 11 Exch. 487; 25 L. J., Exch. 49.

A. held a farm as tenant from year to year, upon a written agreement, by which it was stipulated, that he should cultivate the farm "in the same way and manner, or as near thereto as circumstances would admit of, as Parsons (the outgoing tenant) had used and cultivated the same during his occupation thereof, and in all events, according to the rules of good husbandry used and accustomed in the neighborhood." In an action against A., alleging for breach the cutting and carrying away of ashpoles, such user not being as near to the way and manner in which Parsons used and cultivated the farm as circumstances admitted, and being contrary to the rules of good husbandry used and accustomed in the neighborhood, it appeared that the poles in question consisted of shoots growing from old stools, which were seasonable and fit for cutting about every seventeen or eighteen years; that, by invariable custom, they belonged to the landlord, in the absence of a special agreement to the contrary; that, while Parsons held the farm, these poles had never been in a fit state for cutting; that two tenants who had preceded Parsons in the occupation of the farm had cut and sold them as crops; and that A. had, while he occupied, paid the rates for the whole farm, including the wood or spinney in which the poles grew. The judge having omitted to leave to the jury upon what terms Parsons had held the farm, the court granted a new trial. *Hood v. Kendall*, 17 C. B. 260.

In an action by an outgoing tenant against his landlord for not paying for plowing, crops and manure, according to valuation, pursuant to a deed entered into between them, it being made conditions precedent that the tenant should deliver up possession of the farm-house and stable on a certain day, and of the farm on a later day, and should cultivate on the four-course system, according to the custom of the country:—Held, first, that the first covenant meant only the stable of the farm-house. *Newson v. Smythies*, 1 F. & F. 477—Martin.

Held, secondly, that the covenant to cultivate meant only so far as was universally obligatory by the custom of the country. *Id.*

Held, thirdly, that the landlord concurring in the valuation after the tenant had given up possession of the farm, was evidence whence the jury might infer an admission of a substantial performance of the conditions precedent. *Id.*

As to the import of a covenant to farm on the four-course system, see *Rankin v. Lay*, 2 De G., F. & J. 15.

On a covenant in a farming lease that the lessee would not sell or carry away from the demised premises any hay, straw or manure which should be grown or produced thereon, without the consent of the lessor first had and obtained, under the increased rent of 10*l.* for every ton so sold or carried away, and so in proportion for any greater or less quantity, but that the lessee would eat and consume the hay and straw by his cattle; the breach alleged was, that the lessee, without the consent of the lessor, did sell a large quantity of hay and straw grown and produced on the demised premises:—Held, that the covenant was one covenant which gave the lessee the right to sell the hay and straw, on payment of the increased rent, and that therefore the breach was not well assigned. *Leigh v. Lillie*, 30 L. J., Exch. 25; 9 W. R. 55; 6 H. & N. 165.

A tenant of a farm was under a written agreement to pay an additional rent of 10*l.* for every ton, or any less quantity, of "hay, straw or other dry fodder," of the growth of the premises, which should be sold off or taken away, or removed therefrom. At the trial of an action against him to recover damages for a breach of this covenant, it was proved that he had sold and removed a quantity, something less than a ton, of hay, which he alleged was very bad, and utterly unfit to be eaten by cattle. The jury found that the hay so sold was "not fit food for cattle," and thereupon the verdict was entered for the landlord, with leave to move:—Held, that the verdict was rightly entered. What the tenant removed was hay, and came within the meaning of the covenant, although it was hay of very inferior quality, and unfit for food. *Fielden v. Tattersall*, 7 L. T., N. S. 718—Exch.

A farm lease contained a covenant by the lessee that "he should not nor would, during the last year of the term thereby granted, sell or remove from the said farm and lands any of the hay, straw and fodder which should arise and grow on the said farm and lands:"

—Held, that the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term. *Gale v. Bates*, 3 H. & C. 84; 10 Jur., N. S. 734; 33 L. J., Exch. 235; 12 W. R. 715; 10 L. T., N. S. 304.

An agreement for an agricultural lease con-

tained a stipulation that the tenant should perform each year for the landlord, at the rate of one day's steam work with two horses and one proper person for every 50*l.* of rent, when required (except at hay and corn harvest), without being paid for the same. In ejectment for a forfeiture:—Held, that the work thus to be performed meant any work for which teams are generally used, and therefore included drawing coals to the palace of the landlord. *Marlborough v. Osborn*, 5 B. & S. 67; 33 L. J., Q. B. 148; 12 W. R. 418; 10 L. T., N. S. 28.

Held, also, that the tenant was not bound to supply a cart or other vehicle for the purpose of the work. *Id.*

An agricultural lease contained a covenant on the part of a lessor, that he would "drain with proper drain-tiles, one rod apart, ten acres of the lands not in rye-grass, at his cost, except the carriage of the drain-pipes, which is to be borne and paid by the lessee, and will drain the remainder of the lands demised, in manner aforesaid, upon being paid a further yearly rent of 5*l.* for every 100*l.* so expended:"—Held, that the words "in manner aforesaid" referred only to the mode of performing the work, viz., placing the drain-tiles one rod apart, and consequently that the tenant was not chargeable with the expense of carriage of the drain-pipes beyond the first ten acres. *Beer v. Santer*, 10 C. B., N. S. 435.

By a lease empowering the lessee to build, he covenanted to cultivate the part of the demised land, on which no buildings should be erected, in a husbandlike manner, and there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor, but being obliged to discontinue the manufacture by an indictment, he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor, in pursuance of an agreement between them:—Held, that the lessor had not in equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down, and an injunction to restrain an ejectment was dissolved. *Hills v. Rowland*, 4 De G., M. & G. 430; 22 L. J., Chanc. 964.

The 56 Geo. 3, c. 50, s. 11, which makes a purchaser of farming stock bound by the tenant's covenant to consume such stock on the premises, does not enable a landlord to sell his tenant's hay which he has distrained for rent, otherwise than for the best price, as required by 2 Will. & M. sess. 2, c. 5; and therefore he cannot sell the same under a condition that it shall be consumed on the premises, if by reason thereof he fails to obtain the best price, although the tenant is under a covenant to so use it on the premises. *Hawkins v. Walrond*, 45 L. J., C. P. Div. 772; 1 L. R., C. P. Div. 280; 24 W. R. 824; 35 L. T., N. S. 210.

A lease of a plot of moorland was granted to a lessee, who covenanted to bring it into

cultivation within five years from the date of the lease, according to the most approved method of husbandry pursued in the neighborhood of the premises, and to keep it in good farming and husbandrylike condition. The former covenant was not performed by the lessee, and thirty years afterwards his assignee converted the land into a place of amusement, and constructed a running path thereon, and charged for admission thereto. The lessor filled a bill to have the covenants of the lease performed, and for an injunction to restrain the present holder of the lease from using the land as a place of public amusement:—Held, that the land not having been brought into cultivation under the first covenant, there could have been no breach of the second to keep it in cultivation. *Musgrave v. Horner*, 31 L. T., N. S. 632—R.

**Rights in respect of tillages and improvements.]**—Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of the tillages and improvements which he should leave on the farm, according to a valuation to be made at his quitting; and the tenant, in the first year of the tenancy, said that he would leave and his landlord said he might; but no new bargain was made as to his tillages and improvements:—Held, that he was not entitled to the value of the tillages and improvements which he left on quitting. *Whittaker v. Barker*, 1 C. & M. 113; 3 Tyr. 135.

A custom for the tenant of a farm in a particular district to provide work and labor, tillage, sowing, and all materials for the same, in his away-going year, and for the landlord to make him a reasonable compensation for the same, is valid in law, notwithstanding the farm is held under a written agreement, provided such agreement does not, in express terms, exclude the custom. *Senior v. Armytage*, Holt, 197—Thompson.

A custom of a country, by which the tenant of a farm, cultivating it according to the course of good husbandry, is entitled, on quitting, to receive from the landlord or incoming tenant a reasonable allowance for seeds and labor bestowed on the arable land in the last year of the tenancy, and is bound to leave the manure for the landlord, if he will purchase it, is not excluded by a stipulation in the lease under which he holds, that he will consume three-fourths of the hay and straw on the farm, and spread the manure arising therefrom, and leave such of it as shall not be so spread on the land for the use of the landlord, on receiving a reasonable price for it. *Hutton v. Warren*, 1 M. & W. 466; 2 Gale, 71.

A usage for the off-going tenant of a farm in a particular district to bestow his work, labor, and expense in manuring, tilling, fallowing and sowing, according to the course of husbandry, and for the landlord to pay him a reasonable compensation in respect

thereof, is a valid and reasonable usage. *Dulby v. Hirst*, 3 Moore, 536; 1 B. & B. 224.

A tenant held under a lease, which contained a covenant that he should cultivate the farm according to the custom of the country, and should with the last wheat crop lay down the same with 20 lbs. weight of good clover seed per acre, and continue the same so laid down for feeding, not to exceed three grounds belonging to the farm; and should during all the term consume with stock in the farm all the hay, straw and clover grown thereon; which manure should be used on the farm; and that the lessor and his assignees would allow the lessee to occupy half the rooms in the house, and the barn, yards and grinary, until Midsummer-day after the expiration of the term, if necessary, to finish the cropping of the lessee grown on the premises thereby demised. Under the custom of the country the tenant would have been entitled to be paid for the straw and manure on leaving:—Held, that the covenant, containing no provisions as to straw unconsumed on quitting, was not inconsistent with the custom of the country, and therefore the tenant was entitled to be paid for his straw. *Muncey v. Dennis*, 1 H. & N. 216; 26 L. J., Exch. 66.

An outgoing tenant, administratrix of a late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods and effects, and all stock, corn, grain on the farm, and all her estate and interest thereon and therein:—Held, that this comprised tenant right or tillages on the farm. *Cary v. Cary*, 10 W. R. 669—Exch.

A tenant covenanted with his landlord to deliver up possession of a farm and land on a day named, and that in the meantime he would cultivate the land according to the custom of the country, and that upon the delivery up of the land he would surrender and yield up a certain agreement to be canceled, and all his unexpired term and interest in the farm, and would afterwards, on request, execute any further deed for effectually surrendering the term; and the landlord covenanted that if the tenant did on the day named deliver up possession, and did and should in the meantime cultivate the land according to the custom of the country, and also did and should well and truly observe, perform, and keep all and singular other the covenants and agreements thereinbefore contained, and on his part to be performed, he, the landlord, would, upon the delivery up of possession of the land on the day specified, so cultivated as aforesaid, and on such performance of such other covenants as aforesaid, pay the tenant for the manure, tillages, hay, clover and all other things then upon the land as were usually paid for between an outgoing and incoming tenant:—Held, that the delivery up of the agreement was not a condition precedent to payment for the manure, &c. *Newson v. Smythies*, 4 H. & N. 840; 28 L. J. Exch. 97.

Primâ facie the landlord is bound to pay the outgoing tenant for tillages, and the mere



fact of the incoming tenant entering upon the land does not render him liable to do so; but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant. *Cold v. Brown*, 15 L. T., N. S. 530—C. P.

S. was tenant of a farm, with a right to the use of a part of the premises without payment until the 25th of March next after the expiration of the term, "for threshing and spending the last year's crop;" and by the custom of the country he was entitled, at the expiration of the term, to be paid by the landlord or the incoming tenant for tillages. He gave up the farm to G., as incoming tenant, at Michaelmas, 1870, and before so doing valuers were mutually appointed to value the tillages as between them, with the consent of the landlord, and the valuers duly made and signed their valuation. After G. had entered into possession, but before the 25th of March, 1871, the landlord gave him notice that rent was due from S., and required him to pay the amount of the valuation, which was less than the rent due, to him the landlord, and not to S.; and this G. did on receiving an indemnity from the landlord, but without S.'s consent. S. having sued G. for the value of the tillages, was nonsuited:—Held, that the nonsuit was right, for that the contract to be implied between the incoming and outgoing tenant was subject to the right of the landlord to be paid the arrears of rent out of the valuation. *Stafford v. Gardner*, 7 L. R., C. P. 242; 20 W. R. 299; 25 L. T., N. S. 876.

S., on quitting the farm at Michaelmas, 1870, gave up to G., and he exercised it, the right which S. had under the lease of converting the straw on the farm (between Michaelmas, 1870, and the 25th of March, 1871), into manure with his cattle. In so converting it the cattle ate a portion of the straw, calculated to be one third of the bulk, and which the valuers in this case valued as browse at 33*l.*:—Held, that S. was entitled to recover this sum from G. *Ib.*

**Right to away-going crops; emblements.]**

—When the tenancy of a farm expires, the tenant must give up the possession of the whole of it to the landlord, crops and everything else, unless there is a custom of the country for the tenant to hold over any part, or to take any of the crops; and the proof of the custom lies on the tenant. *Caldecott v. Smythies*, 7 C. & P. 808—Parke.

If the custom of the country is for an outgoing tenant, for what is called his odd mark, to crop one-third of the arable in wheat, and to reap that wheat after the tenancy has expired, and the tenant so crops more than the proper one-third, the landlord will be entitled to have all that which was last sown, and which is above one-third, unless it is shown that the tenant has a lien upon it for the sowing and the seed. *Ib.*

Where by the custom of the country as between outgoing and incoming farm tenants, the

former was entitled to an away-going share of the crop of wheat sown by him in the last year of his tenancy: and he cut the whole of such crop, and kept the fences of the field in repair until the whole crop was cut and carried away:—Held, that the outgoing tenant had the possession in law of the field until the crop was carried away: and therefore that his vendee of his share of the crop had a good defense to an action by the new tenant for breaking and entering the close in which the crop grew, for the purpose of carrying away his share. *Griffiths v. Puleston*, 13 M. & W. 358; 14 L. J., Exch. 93.

If a lease contains no stipulations as to the mode of quitting, the off-going tenant is entitled to his away-going crop, according to the custom of the country, even though the terms of holding may be inconsistent with such a custom. *Holding v. Pigott*, 7 Bing. 463; 5 M. & P. 427.

A tenant held a farm under a lease, containing a condition that the wheat land should be summer fallowed and well manured for the crop. By the custom of the country, a tenant who had sown his land with wheat after a crop of turnips at the wheat-seedness next before the expiration of his tenancy was entitled to cut and carry away one-half of the wheat so sown:—Held, that, as the condition in the lease was confined to the period of holding the farm, and not to the time of quitting, the tenant was entitled to the benefit of the custom, giving him a right to a proportion of the wheat sown by him after turnips, leaving the landlord to his remedy for breach of covenant. *Ib.*

A tenant, whose tenancy is determined after Lady-day, by an agreement which is silent as to away-going crops, is not entitled to such crops under a custom which gives to the tenant such crops upon a regular expiration of a Lady-day tenancy. *Thorpe v. Eyre*, 8 N. & M. 214; 1 A. & E. 926.

A custom that tenants, whether by parol or deed, shall have the away-going crop after the expiration of their terms, is good. *Wiglesworth v. Dalison*, 1 Dougl. 201.

So, a custom that a tenant may leave his away-going crop in the barn of the farm, after he has quitted the premises, is good. *Benyon v. Delahay*, 1 H. Bl. 5. S. P., *Lewis v. Harris*, 1 H. Bl. 7, n.

The plaintiff, who was the grandson of the deceased tenant of a farm, remained in possession after his grandfather's death. A bargain was made between the plaintiff and M., an incoming tenant, who had agreed to take the farm from the landlord, by which bargain M. was to give the plaintiff 30*l.* for the crops, manure, &c., to be secured by the promissory note of M. and a surety, which note was to be held by D., and was to be by D. attested and handed over to the plaintiff, if the plaintiff delivered up the possession of the lands on the following morning, but he was to remain in possession of the house for a few weeks at a rent of 1*l.* a week, to be paid to M. The note was accordingly drawn, with

a clause of attestation, and was signed by M. and his surety, and handed to D. The next morning upon M. and D. requesting the plaintiff to give up the possession, he refused to give up the place; but there was evidence that, on that day, M.'s cattle were on the lands, and that the plaintiff's were not. The plaintiff kept possession of the house for three weeks, when he was turned out by a constable. The note was never attested, and it was not proved how the plaintiff got it into his possession:—Held, in an action by the plaintiff against the makers of the note, that a jury was warranted in saying that the bargain had been complied with on the part of the plaintiff. *Evans v. Morgan*, 2 C. & J. 453.

In a lease of a farm of 600 acres a tenant bound himself by a covenant never to have more than one-half of the arable land in white crop during the same season, nor to take two white crops off the same field without a green or black crop intervening, and to take only one black crop, i. e., beans, potatoes, &c., between grass and grass; and, at the end of the lease, to leave the turnip or fallow breaks once plowed for the incoming tenant:—Held, that the words "turnip or fallow breaks" meant the land which would, in the natural course of good husbandry, be plowed and left fallow for the purpose of being planted with turnips, and that the tenant was entitled, over and above the way-going cereal crop on the moiety of the lands, to have an away-going black crop in respect of 100 acres more. *Hunter v. Miller*, 9 L. T., N. S. 159—H. L.

A tenant for a term determinable upon a life, sowed the land in spring, first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley-straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing:—Held, that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed; and, secondly, because even if the tenant was entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley. *Graves v. Wells*, 5 B. & Ad. 105; 2 N. & M. 725.

A lease of lands contained a condition, "that if the lessee should commit an act of bankruptcy whereon a commission should issue, and he should be declared a bankrupt,

or if he should become insolvent, or incur any debt upon which any judgment should be signed, entered up, or given against him, and on which any writ of fieri facias, or any other writ of execution, should issue, it should be lawful for the lessor to re enter into the premises, and the same again to have, repossess, and enjoy, as in his former estate." The tenant gave a warrant of attorney, upon which judgment was entered up and his goods taken in execution and sold, and a commission of bankruptcy afterwards issued against him. The lessor entered for the forfeiture:—Held, that he was entitled to the emblements. *Davis v. Eytton*, 4 M. & P. 820; 7 Bing. 154.

A devise of real estate is entitled to emblements growing at the time of the death of the deviser, unless the language of the devise clearly shows the intention of the deviser that they should go to some other person. *Cooper v. Woolfitt*, 2 H. & N. 122; 3 Jur., N. S. 870; 26 L. J., Exch. 310.

To an action for an assault, the defendant pleaded a justification in defense of the possession of a dwelling-house. The plaintiff new assigned that the assault was committed, not in a dwelling-house, but on a bridge, and in certain yards and fields, parcel of a farm. The plea to the new assignment stated that W. was possessed of the dwelling-house, and also of the bridge, yards and fields which belonged and were adjacent to the dwelling-house, and justified the trespass in defense of the possession of the house, bridge, yards, and fields, and averred that the defendant removed the plaintiff from the bridge, yards and fields, and took him by the nearest way to a public highway, near to the dwelling-house, bridge, yards and fields. The replication alleged the seizin of W. in the farm, a demise of it by him to J. as tenant from year to year, the entry of J., an assignment by J. to B. to secure a debt of the present and future growing crops on the farm, with a power to B. in default of payment to take possession. It then alleged a default by J., that W. at the time of the default was in possession of the farm on which there then were growing crops, which belonged to J. after the date of the assignment; that the plaintiff as servant of B. took possession, and continued in possession of the growing crops for a reasonable time, and that before a reasonable time elapsed the defendant removed him, and dragged him from the dwelling-house across the bridge, yards and fields to the highway:—Held, that as the replication stood upon the right of a person, claiming under a tenant from year to year, to remain on the premises, and retain possession of the crops, after the landlord had resumed possession, it should have stated how the tenancy came to an end; that there was no presumption as to a determination by the landlord rather than by the tenant; nor, supposing that B. was entitled to them after his interest as tenant in the premises had determined, that they were ripe or fit for har-

vesting, or that they needed any cultivation, for which it was necessary that the plaintiff should continue in possession. *Hayling v. Okey*, 8 Exch. 531; 17 Jur. 325; 22 L. J., Exch. 130—Exch. Cham.

The plaintiff occupied, as yearly tenant of A., who was tenant for life, a small laborer's cottage, with an acre of land, which was partly cultivated as a garden and partly sown with corn or planted with potatoes. The defendant became owner of the cottage and land on the death of A., and distrained for the proportion of rent due from the plaintiff in respect of such cottage and land between A.'s death and the expiration of the then current year of the plaintiff's tenancy, up to which time the plaintiff remained in occupation:—Held, that the plaintiff was tenant of lands in respect of which emblements might be claimed within 14 & 15 Vict. c. 25, s. 1, and that the defendant was therefore entitled to recover such proportion of rent by distress. *Haines v. Welch*, 38 L. J., C. P. 118; 17 W. R. 103.

When the herd of an evicted tenant held as part of his wages, and had sown with oats and potatoes, three roods of the evicted farm, which contained fifty-eight acres, the evicted tenant was entitled to avail himself of these crops as emblements. *Kenna v. Nugent*, 7 Ir. R., C. L. 464—Exch. Cham.

If the landlord meant to contend that the claim to emblements was merely colorable, or that the herd held as tenant and not as servant, he ought at the trial to have required those questions to be submitted to the jury. *Id.*

As to fences,—see FENCES.

As to agricultural fixtures,—see FIXTURES.

## 2. Valuation; and Recovery of Value.

**How valuation is made, and its effect.**—Upon a contract for the sale of a farm it was, by a letter signed by both parties, referred to a valuer to ascertain and certify the amount of the following particulars: first, the seed, wheat and vetches sown on the several fields of A.'s late farm at Bampton previous to the 25th of December, 1847 (the day possession was given to the purchaser); secondly, the labor of plowing and sowing the same; thirdly, the quantity and cost price at the kiln of the lime carried on the farm since Michaelmas, 1847, but not the cost of carriage; and fourthly, the value of the hay left on the farm at Christmas, 1847. "All the above are to be paid for by B. We mutually agree to abide by your valuation." The valuer having allowed a sum for three plowings of a portion of the land, another sum for lime, and another sum for working out and burning stroyle, the court declined to interfere. *Brancombe v. Rowcliffe*, 6 C. B. 523.

A person entered upon the occupation of a farm under a written agreement, by which he agreed "to pay 5*l.* for every load of fodder, straw, haum, dung, or turnips, which should

be sold or carried off the premises, and the same sum for every load of hay or wheat straw sold or carried off the premises, for which there should not be two loads of good dung or other manure (at the option of the landlord) to be spent on the premises;" and also "to purchase all the hay, sainfoin, and tares now in the yard; also, all the dung and manure now on the premises; also all the straw from the crops now stacked or about to be stacked in the yard, paying a fair price for the same, to be ascertained by valuers on both sides." And the landlord engaged, on the tenant's quitting the farm, to purchase all hay, sainfoin, and tares in the yard, the produce of the farm; also all straw from the crops of the previous harvest that might be on the premises, paying a fair price for the same, to be ascertained by valuers on both sides:—Held, that the tenant, not being by the terms of the agreement entitled to be paid for the manure at the expiration of his tenancy, was only entitled to be paid for the straw at a fodder price, viz., one-half the market price. *Clarks v. Westrope*, 18 C. B. 765; 25 L. J., C. P. 287.

Held, also, that the incoming tenant having consumed the straw, and the valuers named by the parties not having agreed upon the valuation, or appointed an umpire, the tenant was entitled to maintain an action for it, as upon a quantum meruit. *Id.*

A. held a farm of B., subject to the following covenants contained in a draft lease under which the former tenant had held:—First, to house the produce on the farm, and thresh, feed and fodder the same thereon, and not to sell or dispose of any part thereof, except as after mentioned. Secondly, that A. should be at liberty to sell hay and wheat straw, except that of the last year's produce, bringing back for every load of hay or straw two loads of manure; and thirdly, that A. should, on the determination of the tenancy, leave all the hay, straw and manure arising during the last year of the tenancy, for the use of B. or the incoming tenant, being paid for the hay and wheat straw at a fair valuation, these latter words "fair valuation" being substituted in the draft lease for "consuming price." In an action by A. against B. to recover the value of hay and wheat straw left by the former tenant at the expiration of his tenancy, it appeared that a valuation had been made by an umpire, who was the only witness called at the trial, and who stated that he had valued not at a "consuming price" nor a "market price," but at a "fair valuation," and the jury returned a verdict in accordance with his valuation:—Held, that there was nothing from which the court could see that the valuation had been made upon an erroneous principle, and what was a "fair valuation" being a question, there was no ground for interfering with the verdict. *Cumberland v. Bores or Glamis*, 15 C. B. 848; 1 Jur., N. S. 236; 34 L. J., C. P. 46.

Held, also, that the valuation of the umpire was not invalidated by the circumstance of his

having altered it after he had delivered it, by striking out an item which ought not to have been included therein. *Ib.*

A usage for arbitrators appointed to determine as between outgoing and incoming tenants of a farm, the value of the away-going crop and the deductions for want of repairs of the farm buildings and fences, to make their award, on inspection of the crops and premises, without notice to the parties and without evidence, may be good; but no usage can justify arbitrators in hearing one party and his witnesses only in the absence of and without notice to the other party. *Osmond v. Grey*, 24 L. J., Q. B. 69—B. C.—Erie.

A person who has taken a farm under a person in possession, and claiming as devisee under a will, and has paid for the manure, under a valuation, according to the custom, is liable for the value to the person who afterwards takes out letters of administration, the will having turned out to be invalid. *Searson v. Robinson*, 2 F. & F. 351—Williams.

By an agreement made between the plaintiff and defendant, the defendant sold to plaintiff all his interest in a farm, together with the growing crops and those already harvested, the covenants and general valuation of the farm and all the stock, both live and dead; and it was agreed between them that all the aforesaid matters and things should become a subject of valuation by two indifferent persons, one to be chosen by each party, and in the event of their not agreeing, then by their referee or umpire, whose decision should be final and binding on both parties. The valuers appointed under the agreement made a valuation at a gross sum, not specifying the value of undivided items, and the plaintiff gave a promissory note for the amount, and took possession of the farm and stock. In a month or so afterwards the plaintiff re-sold the farm, and before giving up possession to the purchaser, discovered that a number of items had been included in the valuation, that, according to the custom of the country, did not form a subject of valuation between an incoming and an outgoing tenant. He did not, however, claim to have the matter re-opened, but duly paid the amount of the promissory note to the defendant when it afterwards became due. He subsequently brought an action against him to recover the whole of the money paid by him as money received to his use, without previously giving any notice of the circumstances to the defendant, or claiming repayment from him:—Held, that he could not recover the whole or any part of the money which he had paid. *Freeman v. Jeffries*, 38 L. J., Exch. 116; 4 L. R., Exch. 189; 20 L. T., N. S. 532.

**Right of action for value.**—Where the outgoing tenant has covenanted with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation, to be made by certain persons, the

effect of such covenant is to give the outgoing tenant a right of on-stand for his manure upon the farm; and the possession of and property in it remain in him in the meantime; and, therefore, if the incoming tenant removes and uses it before such valuation, he is answerable to the outgoing tenant in trespass. *Beaty v. Gibbons*, 16 East, 116.

Where an agreement between an outgoing and an incoming tenant was, that the latter should buy the hay, &c., of the former upon the farm, and that the former should allow to the latter the expense of repairing the gates and fences of the farm, and that the value of the hay, &c., and of repairs, should be settled by third persons:—Held, that the balance settled to be due to the outgoing tenant, for his hay, &c., after deducting the value of the repairs, might be recovered by him in a count for goods sold and delivered, after having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Loods v. Burrows*, 12 East, 1.

**Prima facie** the landlord is bound to pay the outgoing tenant for tillages, and the mere fact of the incoming tenant entering upon the land does not render him liable to do so; but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant. *Codd v. Brown*, 15 L. T., N. S. 536—O. P.

The outgoing tenant's remedy for tenant right is against the landlord, and not against the incoming tenant, unless by virtue of an agreement between the parties to that effect. The outgoing tenant is entitled to recover the amount of the tenant right from the landlord upon a quantum meruit; and the ascertainment of the amount by a valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease. *Sucksmith v. Wilson*, 4 F. & F. 1083—Martin.

The plaintiff, at Lady-day, 1821, gave up possession of a farm to the defendant, having previously sown forty acres of it with wheat. At a meeting in the previous month, the plaintiff asked the defendant if he would take the wheat at 200*l.*, saying that if he would not, he should not have the farm. The defendant said he would take the wheat, and being asked to whom the dead stock should be valued, replied "To me." The defendant afterwards undertook to pay for the wheat and dead stock on a specified day, and did pay 75*l.* on account generally, and eventually had possession of the farm, the wheat, and the dead stock:—Held, that the contract for the dead stock being distinct from the contract for the sale of the wheat, or the giving up of the farm, the plaintiff might recover for that amount. *Mayfield v. Hadsley*, 5 D. & R. 224; 3 B. & C. 857.

Assignees of the reversion may be sued by an outgoing tenant on a contract or custom of the country, by which he is entitled to receive, on the termination of his tenancy by

notice from the landlord, reasonable allowance for the value of labor bestowed on the land, and the benefit of which he loses by such termination of his tenancy, although he has paid all the rent to the original landlord and received notice from him, the assignees having renewed the notice after the conveyance to them, and possession having been given to them. *Womersley v. Dally*, 26 L. J., Exch. 219.

The defendant demised a farm for a term of fourteen years; the lease contained a covenant by the lessees not to assign without license, with a proviso for re-entry, and a covenant by the lessor at the expiration of the tenancy to pay for certain things at a valuation. At the expiration of the term, the lessees continued tenants from year to year on the terms of the original lease. They afterwards, by deed, assigned their interest in the premises, with their right to be paid for the things at a valuation, to the plaintiff. He entered into the occupation of the premises, but never paid rent; nor did the defendant ever recognize him as his tenant. The defendant gave the lessees the proper six months' notice to quit, and the plaintiff gave the defendant a similar notice:—Held, that the plaintiff could not maintain an action against the defendant for the amount of the things at a valuation, on the ground (per Mellor and Lush, JJ.), that no new tenancy had been created between them, and that the bare assignment of the parol tenancy did not pass to the assignee a right of action upon the special stipulation; and per Stree. J., on the ground that as the lessees had no power to assign without license, they could not transfer any interest in the premises to the plaintiff. *Elliot v. Johnson*, 2 L. R., Q. B. 120; 8 B. & S. 88; 36 L. J., Q. B. 41.

**Pleadings and evidence in actions.]—**A breach of a covenant to cultivate land according to the custom of the country, is sufficiently averred by stating that the tenant did not so cultivate, without specifying instances. *Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

A declaration stated that the defendant covenanted with the plaintiff not to sell or carry away from the premises any manure, made on the premises, without his consent, under the increased rent of 10*l.* for every ton so given, sold or carried away; and also covenanted that he would pay all the increased rent. Breach, that he sold a large quantity of manure made on the premises, to wit, 160 tons, and did allow the same to be carried away from the premises; and the plaintiff claims 2,000*l.* Plea, that the defendant brought upon the premises a quantity of manure, larger and better in quality than that carried away:—Held, first, that the plea was bad. *Legh v. Lillia*, 6 H. & N. 165; 30 L. J., Exch. 25.

Held, secondly, that the declaration was bad for not alleging that the increased rent was due or that it was unpaid. *Id.*

To a declaration, charging the defendant, as tenant to the plaintiff, with carrying away, in an untenable manner and contrary to the custom of the country, several loads of hay off the farm, without bringing back and spending on the premises an equal number of loads of dung, a plea, that there was not any such custom of the country, is good. *Hartley v. Burkitt*, 4 Bing. N. C. 687; 6 Scott, 497; 1 Arn. 258; 2 Jur. 642.

A count averring that the defendant was tenant to three plaintiffs, and had agreed to farm the lands in a husbandlike manner, and it appearing that the demise was only by two, and that the agreement was also to keep the land constantly in grass:—Held, variances. *Saunderson v. Griffiths*, 8 D. & R. 643; 5 B. & C. 909.

In an action against a tenant upon promises to cultivate a farm according to the course of good husbandry, and the custom of the country, if the declaration sets out the custom, and the defendant traverses it, the plaintiff must prove it as alleged. *Angerstein v. Hindson*, 1 C., M. & R. 789; 5 Tyr. 583; 1 Gale, 8.

A declaration stated that the defendants were tenants to the plaintiff of a farm, and by reason thereof it was their duty, as such tenants, to manage and cultivate the farm in a husbandlike manner, according to the custom of the country; and assigned breaches in over-cropping, &c. Plea, that the defendants were not, nor was either of them, tenants to the plaintiff of the messuage, &c., as alleged:—Held, this plea only put in issue the fact of the tenancy, and not the holding subject to a duty to cultivate according to the custom of the country, and that the defendants could not therefore object, on this record, that a lease, under which the land had been originally taken, was not produced by the plaintiff, in order to show that it did not exclude the custom. *Hallifax v. Chambers*, 4 M. & W. 662; 7 D. P. C. 342; 1 H. & H. 417.

On a contract between outgoing and incoming tenant referring to the lease, the lease must be put in. *Tanner v. Washburne*, 1 F. & F. 380—Willes.

The rule of law, as to importing into the terms of a tenancy "the custom of the country," does not admit of evidence of the usage of a particular estate, or the property of a particular person, however extensive it may be, it not being shown that the tenant was aware of it. *Womersley v. Dally*, 26 L. J., Exch. 219.

A count stated that the defendant had become tenant to the plaintiff on the terms and stipulations that the rent should be payable half-yearly, that the defendant "should not sell any straw or manure grown or produced upon the farm, without the written license of the plaintiff, under certain penalties, and that the penalties should be considered as additional rent, and should be recoverable by distress or otherwise as rent." Averments, that, in consideration thereof, the defendant promised the plaintiff to pay all such penal-

ties as he might be liable to pay the plaintiff according to the stipulations; and that the defendant, without license, sold straw on the premises during his tenancy. Breach, non-payment of penalties in respect thereof:—Held, by Lord Campbell, C. J., and Patteson, J., that the promise to observe the terms, one of which was payment of penalties, was supported by the bygone consideration of having become tenant on these terms, and that the stipulation must be construed to be not at any time to sell straw grown during the tenancy: Erle, J., dissentiente, holding that the stipulation should be construed to be, not during the tenancy to sell straw, &c., grown during the tenancy. *Massey v. Goodall*, 17 Q. B. 810; 15 Jur. 991; 20 L. J., Q. B. 526.

A declaration stated, that in consideration that the plaintiff had become tenant to the defendant of a farm, upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made expensive improvements upon the farm, for which the subsequent crops should not have compensated the plaintiff, the farm should, on the determination of the tenancy, be looked over by two persons, one to be appointed by each party, and that the persons appointed should determine to what compensation the plaintiff should be entitled; and that the defendant promised the plaintiff that if the tenancy should be determined, and the plaintiff should have made improvements for which he should not have been compensated, the defendant would, at the plaintiff's request, appoint a person for such purposes. Averment, that the tenancy was determined by the defendant; that the plaintiff had made improvements for which he had not been compensated; that the plaintiff, after the determination of the tenancy, appointed D. to determine the compensation, and D. was ready to act, of which the defendant had notice, and was then requested by the plaintiff to appoint some person on his behalf:—Held, that the declaration was bad, as stating a promise which did not legally arise from an executed consideration, and also on the ground that there was no allegation that the plaintiff had requested the defendant to appoint a valuer before the commencement of the suit. *Lattimore v. Garrard*, 1 Exch. 809.

Declaration, that the defendant became tenant to the plaintiffs upon the terms that the defendant would keep such number only of hares and rabbits as would do no injury to the trees of the plaintiffs, or to the crops of their tenants; and that in case he should keep such a number of hares and rabbits as should injure the trees or crops, he would pay to the plaintiffs or their tenants a fair and reasonable compensation for such injury. Breach, that he did keep such a number of hares and rabbits as did injury to such trees and crops, and had not paid a fair and reasonable or any compensation. Plea, that one of the terms of the tenancy was that in case any such injury should be done "the defendant would pay a fair and reasonable compensation for the

same, the amount of such compensation, in case of difference, to be referred" to arbitration, and that a difference arose as to the amount of compensation, but no arbitrator had been appointed nor any award made:—Held, that the plea was bad, for the stipulation as to compensation and reference, though in the form of one sentence, contained in reality two covenants, and such covenants were distinct and independent. *Dawson v. Otho Fitzgerald*, 45 L. J., Exch. 893; 1 L. R., Exch. Div. 257; 24 W. R. 773; 35 L. T., N. S. 220—C. A.; reversing the judgment of the Court of Exchequer, 43 L. J., Exch. 19; 9 L. R., Exch. 7.

## V. REPAIRS.

### 1. Contracts to make.

**Duty to make repairs, generally; implied contracts.**—There is no implied contract to use demised premises in a tenant-like manner, where the tenant has expressly contracted to repair. *Standen v. Christmas*, 10 Q. B. 135; 11 Jur. 694; 16 L. J., Q. B. 265.

A. agreed to let, and B. to take, a house at a yearly rent, payable quarterly, and at the end of the agreement was the following stipulation: "A. agrees to take the fixtures at the expiration of B.'s tenancy, and to allow the price at which they may be valued, provided they are in as good condition then as they are now, and B. agrees to leave the premises in the same state as they now are." Though not stated in the agreement, the house was at the time of the agreement in the occupation of C. as tenant to A., who afterwards quitted:—Held, that notwithstanding the existence of express terms of agreement, an implied contract arose on the part of B. to use the premises in a tenant-like manner, and that the agreement was properly described as an agreement to leave the premises, at the expiration of the tenancy, in the same state as they were in at the commencement of the tenancy, and not at the date of the agreement. *White v. Nicholson*, 4 Scott, N. R. 707; 4 M. & G. 95.

A landlord has no right to enter his tenant's premises to repair them, unless there was some stipulation at the time of the letting to that effect. *Barker v. Barker*, 3 C. & P. 557—Best.

A. demised to B. for a term of years two messuages; the lease contained a covenant by B., that he would, during the term, keep the premises in repair, and leave them, at the end of the term, in good repair, and in the same state as they were in at the beginning. At the end of the term the messuages were out of repair, and had been converted into a single house. B. held on without a fresh lease, and C. afterwards purchased the reversion of A., and B. continued to hold on under C.:—Held, that B. was not liable, on an implied contract, to put the messuages in such repair and in the same state as they were in at the commencement of the term; that, supposing

B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion. *Johnson v. St. Peter's, Hereford (Churchwardens)*, 4 A. & E. 520; 4 N. & M. 186; 1 H. & W. 720.

A tenant hired of a landlord the ground floor of a warehouse, the upper part of which was occupied by the landlord himself. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A hole was made in the box by a rat, through which the water entered the warehouse and wetted the tenant's goods. The landlord had used reasonable care in examining and seeing to the security of the gutters and the box. In an action by the tenant against the landlord for the damage so caused:—Held, that he was not liable, either on the ground of an implied contract, or on the ground that he had brought the water to the place from which it entered the warehouse. *Carstairs v. Taylor*, 6 L. R., Exch. 217; 40 L. J., Exch. 129; 19 W. R. 723.

When in a lease of premises there is a covenant by the lessee to repair, and the premises depend for support on a wall, which the lessor has a right to repair and maintain, there is no implied covenant by the lessor to maintain the supporting wall. *Colebeck v. Girdlers' Company*, 24 W. R. 577; 1 L. R., Q. B. Div. 234; 45 L. J., Q. B. Div. 225; 34 L. T., N. S. 350.

But semble, that such support is in the nature of an easement, and gives the lessee the right to do all things necessary for the preservation of the easement which the lessor could do. *Id.*

**Express contracts; their nature and effect, in general.**—An agreement to leave a farm as he found it, is an agreement to leave it in tenantable repair, if he found it so. *Winn v. White*, 2 W. Bl. 840.

A lease, containing a covenant by the lessee to repair the premises at all times (as often as need or occasion should require), and at farthest within three months after notice, is one entire covenant, the former part of which is qualified by the latter. *Horsfall v. Testar*, 1 Moore, 89; 7 Taunt. 385.

A covenant for a landlord to be allowed to come into a house to see the state of its repair at "convenient times," is not broken by his not being allowed to go into some of the rooms, if he has given no notice of his coming. *Doe d. Wetherell v. Bird*, 6 C. & P. 195.—Denman.

By an agreement under seal, E. covenanted with B., his executors and administrators, that he would at any time thereafter, at the request of B., his executors, administrators, or assigns, execute a demise of certain freeholds for the term of twenty-one years at the yearly rent of 180*l.*, which lease should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants; and B., for himself, his executors, or administrators, covenanted with E., whenever thereto requested by E., to accept such lease, and execute a

counterpart. Under this agreement B. entered and paid rent until his death (which took place before the 1st of January, 1870), and after his death his widow and legal personal representative entered and paid rent. No lease was ever executed, and no such request as above mentioned was ever made by either party. Since his death rent had accrued due, and a sum was required for repairs:—Held, that the liability under the deed was from the first, and still was, a specialty; hence that a claim by E. for the sums due for arrears of rent and dilapidations under the covenants agreed to be entered into by B. were debts by specialty against his estate. *Kidd v. Boone*, 12 L. R., Eq. 89; 40 L. J., Chanc. 531; 24 L. T., N. S. 350.—V. C. B.

An action may be maintained by a tenant against his landlord upon a parol agreement by the landlord to put a house in tenantable repair, although a written agreement for a lease made shortly afterwards is silent as to the terms of such parol agreement. *Mann v. Nunn*, 80 L. T., N. S. 528; 43 L. J., C. P. 241. But see *Angell v. Duke*, 82 L. T., N. S. 321.

By agreement, reciting a former agreement, for the grant of a lease of copyhold premises to A. for twenty-one years, from the 25th of March, 1820, and that A. had requested, and the plaintiff had agreed, that the defendant should be accepted as tenant, and a lease should be granted to him instead of to A. on the same terms; and that the plaintiff was desirous to let the premises to the defendant so soon as a good license for that purpose should be granted to him by the lord of the manor, but not before; the plaintiff, in consideration of the covenants and agreements on the part of the defendant, covenanted that he would, so soon as a good license for that purpose should have been procured to him from the lord, at the defendant's expense, lease the premises to the defendant for all the residue then unexpired of the term of twenty-one years from the 25th of March, 1820; and the defendant covenanted thenceforth yearly, during the remainder of the term, to pay the plaintiff the rent, and also that he would, from time to time during the term to be granted, keep the premises in repair. The defendant entered upon the premises, and occupied them until the expiration of twenty-one years from the 25th of March, 1820:—Held, that he was liable on the covenant for repair, although no lease had ever been made to him pursuant to the agreement, nor any license obtained from the lord for that purpose. *Pistor v. Cator*, 9 M. & W. 815; 12 L. J., Exch. 129.

**To what premises obligation to repair extends.**—A covenant in a building and repairing lease to leave the demised premises, with all new erections, well repaired, extends to the new erections only. *Lant v. Norris*, 1 Burr. 287.

Under a lease of a farm, the tenant was bound to keep in repair the buildings to be

erected thereon during the term; the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and he enjoyed it with the farm:—Held, that the tenant was also under an obligation to keep the house in repair. *White v. Wakley*, 26 Beav. 17; 28 L. J., Chanc. 77; 4 Jur., N. S. 988.

A lessor demised "three tenements or dwelling houses, and a field or plot of ground adjoining thereto," and the lessee covenanted "well and sufficiently to repair, sustain and keep the tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings, walls, hedges, ditches, fences, gates, as in all other needful and necessary reparations whatsoever, when and as often as occasion shall require during the term, and at the end or sooner determination thereof, the premises so well and sufficiently repaired into the hands and possession of the lessor peaceably to leave and yield up."—Held, that the covenant did not extend to houses afterwards built in the field. *Cornish v. Cleiffe*, 3 H. & C. 446; 11 Jur., N. S. 181; 84 L. J., Exch. 19; 13 W. R. 389; 11 L. T., N. S. 606.

Where a lessee of a coal mine covenanted at the end of the term to yield up the works and mines, and all ways and roads in such good repair, order and condition, so that the works might be continued and carried on by the lessor:—Held, that such covenant did not include wooden sleepers, or iron tram plates fastened to such wooden sleepers, used for the purpose of a railway. *Beaufort v. Bates*, 31 L. J., Chanc. 481; 10 W. R. 200; 6 L. T., N. S. 82; 3 De G., F. & J. 381.

A lessor of a house, situate in a borough, covenanted with the lessee to repair and keep in repair all the external parts of the demised premises, except the glass and lead of the windows. The corporation, acting under a local statute passed after the demise, pulled down an adjoining house, and thereby left the wall of the demised house, which had previously divided the two, exposed and without support; the wall thereupon gave way, and the house became uninhabitable. The lessee immediately called upon the lessor to repair, which he, six weeks after the sinking of the wall, finally refused to do. On this the lessee, who had removed to other premises, pulled down and began to rebuild the wall, and, before the work was finished, sued the lessor upon his covenant:—Held, that the wall, even before the neighboring house had been removed, was an external part of the demised premises; the external parts of premises being those which form the inclosure of them, and beyond which no part of them extends. *Green v. Kules*, 2 Q. B. 225; 6 Jur. 436; 1 G. & D. 408.

Held, also, that the lessor was liable on his covenant, though the injury to the wall was done in the first instance by the corporation, and the local statute had a special clause for the recovery of compensation from them in case of such injuries; for the lessor ought to

have set about the repair in time to prevent the mischief which ensued. *Id.*

In such an action the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the costs thereof, the jury having found that this was the proper mode of restoring it. *Id.*

He may also recover the price of damage done to plate glass and fixtures in consequence of the sinking of the wall; but the lessee cannot recover the rent paid by him for the occupation of other premises during the progress of the repairs, though, during that time, the demised premises were not safely inhabitable. *Id.*

**Performance and satisfaction, or breach of covenant or other contract to repair.]—**A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair: a literal performance of the contract is not to be required. *Harris v. Jones*, 1 M. & Rob. 173—Tindal.

A lessee covenanted to preserve and keep, and at the end of the term leave the demised premises in good and tenantable repair:—Held, that this covenant would be satisfied by leaving the premises in such a state as, regard being had to the age of the building at the time of the demise, might be considered tenantable. *Stanley v. Towgood*, 3 Scott, 313; 3 Bing. N. C. 4; 2 Hodges, 132.

The lessee during the term erected a lean-to, with a roof so ill constructed, that it did not exclude the weather, and so left it at the end of the term:—Held, that it was a breach of his covenant to repair. *Id.*

A lessee covenanted, within the two first years of the term, to put premises in good and sufficient repair, and at all times during the term to repair, pave, scour, cleanse, empty, and keep the messuages, ground, and other the premises, when, where, and as often as need should require; and within the first fifty years of the term to take down four messuages, as occasion might require, and in the place thereof erect upon the premises four other good and substantial brick messuages:—Held, that, if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied without taking down the old houses. *Evelyn v. Raddish*, 7 Taunt. 411.

Where a very old house is demised, with the usual covenants to repair, it is not meant that the house should be restored in an improved state, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care. *Gutteridge v. Munyard*, 7 C. & P. 129; 1 M. & Rob. 834—Tindal.

A. on becoming tenant to B. of a farm and outbuildings, agreed to keep the same, and at the expiration of the tenancy to deliver up the same, in good repair, order and condition. Breach, that he did not deliver up the same



**In good repair, order and condition:**—Held, that, on this contract to keep the premises in good repair, the tenant was bound to put them in that condition, and that the tenant was not justified in keeping them in bad repair because he found them in that condition; but the extent of that repair was to be measured by their age and class. *Payne v. Haine*, 16 M. & W. 541; 16 L. J., Exch. 130.

On a covenant, as often as necessary, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted, the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint, &c. *Scales v. Lawrence*, 2 F. & F. 289—Willes.

In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of repairs at the commencement of the demise, in order to assess the damages for which the defendant is liable. *Burdett v. Withers*, 2 N. & P. 122; 7 A. & E. 186; W., W. & D. 444; 1 Jur. 514.

So it is competent to the defendant to show the general state and condition of the premises at the time of the demise, but not to go into matters of detail. *Young v. Mants*, 6 Scott, 277; 1 Arn. 108; 8 C., nom. *Mants v. Goring*, 4 Bing. N. C. 451.

Under a covenant by a farm tenant "well and substantially to repair, and keep in good substantial repair, and so well and substantially repaired" to yield up at the end of the term, the tenant is bound to give up the premises in as good a state of repair as when he took possession, and they must be inferred to have been then in a tenantable state. *Brown v. Trumper*, 20 Beav. 11.

If a doorway is broken through the wall of a demised house into an adjoining house, and kept open for a long space of time, it amounts to a breach of covenant to repair. *Doe d. Vickery v. Jackson*, 2 Stark. 293—Ellenborough.

Enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and to keep in repair a dwelling-house, together with all such buildings, improvements or additions as should be erected, set up or made by the lessee. *Doe d. Dalton v. Jones*, 1 N. & M. 6; 4 B. & Ad. 126.

A covenant by a lessee, that he will, during the term, repair, uphold, support, and sustain and maintain the brick walls to the demised premises belonging, is broken, if the lessee, during the term, pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house. *Doe d. Wetherell v. Bird*, 6 C. & P. 195—Denman.

On a covenant to keep premises in repair, it is a breach to pull them down, either wholly or partially, even so far as to open doors in a wall; and it is a breach for which the lessor

may sue for and recover substantial damages during the term. Nor is it any equitable defense that it was done with the consent and acquiescence of the lessor, unless it appears that it was with his previous consent. *Gauge v. Lockwood*, 2 F. & F. 115—Willes. See *Bargnis v. Edwards*, 2 F. & F. 111.

On a covenant in a lease of a farm and cottages, to keep and uphold and maintain the premises in good repair, the lessee or assignee is bound to keep up the cottages in situ, and to repair them if ruinous, or so as to replace them, as nearly as might be, in the position in which they were when demised, and is liable, having pulled them down, for their value as they stood, without reference to the result of their removal as regarded the general improvement of the farm. *Woolcock v. Dew*, 1 F. & F. 337—Willes.

Under a covenant that the tenant "should and would substantially repair, uphold and maintain" a house, he is bound to keep up the inside painting. *Mark v. Noyes*, 1 C. & P. 265—Abbott.

A tenant under a covenant to repair is liable for repairs only, and is not liable for the extra expense of laying a new floor, on an improved plan, or the like. *Soward v. Leggatt*, 7 C. & P. 618—Abinger.

The term "habitable repair" means a state of repair reasonably fit for occupation of an inhabitant. *Belcher v. McIntosh*, 8 C. & P. 720; 2 M. & Rob. 186—Alderson.

Where a tenant takes premises which are out of repair, and agrees "to put the premises into habitable repair," this implies that he is to put them into a better state than that in which he found them; and, regard being had to the state of the premises at the time of the agreement, and to their situation, and to the class of persons likely to inhabit them, he is to put them into a condition fit for a tenant to inhabit. *Id.*

A direction to keep buildings in good repair means, not the state of repair in which they were at the testator's death, but in habitable repair. "Farming buildings" include "farmhouses." *Cooke v. Cholmondeley*, 4 Drew. 326.

A covenant "forthwith" to put premises into complete repair, must receive a reasonable construction, and is not to be limited to any specific time; and therefore it will be for the jury to say, upon the evidence, whether the defendant has done what he reasonably ought in the performance of it. *Doe d. Pittman v. Sutton*, 9 C. & P. 706—Denman.

The mere removal and sale by a tenant, during the term, of fixtures, which he does not immediately replace, but which can be replaced before the end of the term, is not in itself a breach of his covenant to repair and uphold the demised premises, and to deliver up the same at the end of the term, together with all things affixed thereto. *Doe d. Burrell v. Davis*, 10 C. B. 821; 15 Jur. 155.

In an action for a breach of a covenant for repair in a lease, a tenant is not liable for acts done before the time of the execution of the

lease, although the habendum of the lease states the premises to be held from a day prior to its execution. *Shaw v. Kay*, 1 Exch. 412; 17 L. J., Exch. 17.

A breach of covenant to repair is not excused, because the covenantor has bona fide employed persons to repair. If the covenantor's agent has, in fact, not repaired, the breach is not such as equity will relieve against. *Nokes v. Gibbon*, 3 Drew. 681; 8 Jur., N. S. 726; 26 L. J., Chanc. 433.

A breach of a covenant to make a roadway in front of a particular house is not to be relieved against in equity, because, if made before the roadway in front of adjacent houses is made, it would be continually cut up and useless. *Id.*

By an agreement of demise of a house and grounds, the landlord undertook to keep the premises in repair, and to pay all rates, taxes and charges which might be payable in respect of the premises. In the grounds was a piece of ornamental water, in which during the tenancy an accumulation of mud caused at one spot a public nuisance, and at another spot a nuisance to the tenant, and elsewhere choked up the stream. The tenant, being summoned under the Nuisances Removal Act, 1855, in respect of the public nuisance, employed a contractor to clear out the whole stream to the satisfaction of the inspector of nuisances. Afterwards, at the hearing of the summons, an order was made on him to abate the public nuisance. The whole of the mud was cleared out under the contract, that part which constituted the public nuisance being removed partly before and partly after the date of the order:—Held, first, that the landlord was not, under his agreement to repair, bound to cleanse the ornamental water. *Bird v. Eaves*, 3 L. R., Exch. 225; 37 L. J., Exch. 91; 16 W. R. 1120; 18 L. T., N. S. 727.

Held, secondly, that no charge on the premises in respect of any part of the work done had been created by the proceedings under the Nuisances Removal Act, 1855. *Id.*

A., in November, 1865, agreed with B. as follows: "I agree to let to you, for the term of five years, the whole of the warehouse and cellars, now occupied by P. & Co., for the annual rent of 600*l.*, the building to be put by me into good tenantable repair." Repairs were thereupon done by A., who knew that the premises were to be used by B. in his business of a silk and linen merchant and warehouseman; and in January, 1866, B., who had previously inspected the premises, entered into possession, making no complaint of their condition or want of repair. The building had originally been a dwelling-house, and had been converted into a warehouse by the addition of two stories, without strengthening the outer wall, which was only fourteen inches thick, and as a warehouse it had been occupied by P. & Co. By reason of the insufficient thickness of the outer wall, and the weight of the linen stored by B. on the premises, the outer wall began to give way some time between March and June, and

in October, 1866, a portion of it fell, rendering it necessary to pull down and rebuild the whole wall, which was done by A., B. being for some time deprived of the use of the premises, and otherwise sustaining damage thereby. In an action by him to recover damages for an alleged breach of agreement to put the premises into good tenantable repair:—Held, that A.'s contract was clearly performed at the time B. took possession of the premises, and made no complaint of their state of repair; that there was no contract on his part to put them into good tenantable repair for any particular or specified purpose; and that if B. required any extra support for his goods he should have called A.'s attention thereto while the repairs were going on. *McClure v. Little*, 19 L. T., N. S. 287.

A covenant by an under-lessee to repair after notice is not broken by a non-compliance with a notice to repair served upon the premises by the superior landlord as such landlord. *Williams v. Williams*, 80 L. T., N. S. 698—C. P.

**Destruction of or injury to premises.**—A lessee of a house, who covenants generally to repair, is bound to rebuild it if it is burned by an accidental fire. *Bullock v. Dommitt*, 6 T. R. 650; 2 Chit. 608. S. P., *Digby v. Atkinson*, 4 Camp. 275. And see *Phillips v. Leigh*, 1 Esp. 398.

The assignee of a lease, whereby the lessee covenanted for himself and his assigns absolutely to repair premises without qualification, is bound to repair, notwithstanding they are destroyed by fire. *Id.*

So, if a lease contains a covenant to keep in repair, as well as a covenant to insure for a specific sum, and the premises are burnt down, the lessee is liable on the former covenant, and the amount is not limited to the sum mentioned in the latter. *Digby v. Atkinson*, 4 Camp. 275—Ellenborough.

A tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent, notwithstanding the premises are destroyed by fire. *Hare v. Groves*, 3 Anst. 687.

If a lessor covenants with his lessee that he will, in case the premises demised shall be burnt down, "rebuild and replace" the same in the same state as they were in before the fire, he is only bound to restore the premises to the state in which they were when he let them, and is not bound to rebuild any additional parts which may have been erected by his tenant. *Loader v. Kemp*, 2 C. & P. 375—Best.

The lessee covenanted to repair, "casualties by fire and tempest excepted":—Quære, if the landlord was bound to repair in either of the excepted cases? *Waigall v. Waters*, 6 T. R. 488.

When a lessee covenants to pay the rent reserved and keep the demised premises in repair, he was bound, during the term, to perform both covenants as long as the subject-matter of the demise continues to exist,

although it was originally of no value. *Meath v. Cuthbert*, 10 Ir. R., C. L. 395—C. P.

In 1832, an equitable tenant for life made a lease containing a covenant to keep the demised premises in repair, and, upon the determination of the lease by the death of the lessor, the lessee and his devisee continued in possession, and paid rent to the remainderman, without any fresh express agreement. In 1853, the remainderman assigned the reversion to a purchaser, who, in the following year, demised the premises to the remainderman for a term still unexpired. The premises were burnt in 1859, and no change of tenancy had taken place up to the death of the devisee in 1871:—Held, first, that the devisee's assets were liable, under the covenant, to the expense of rebuilding the premises. *Morrogh v. Alleyne*, 7 Ir. R., Eq. 487—V. C.

Held, secondly, that the remainderman's title being merely equitable could not be relied on as a bar to his claim. *Id.*

Held, thirdly, that the Statute of Limitations did not apply. *Id.*

As to effect of destruction of premises upon obligation to pay rent,—see this title, VII., 2.

As to duty of tenant from year to year to make repairs,—see this title, XVI., 2.

As to obligation to make repairs after assignment of term,—see this title, VIII., 3.

As to operation and effect of covenants to repair,—see also COVENANT.

## 2. Remedies for Failure to make.

**Tenant's right to leave premises.]**—Where a tenant of a house undertakes by his agreement to keep it in as good repair as when he took it, fair wear and tear excepted, he is not entitled to quit upon its becoming uninhabitable for want of other repairs during the term; and the landlord is under no implied obligation to do any repairs in such a case. *Ardlen v. Pullen*, 10 M. & W. 831. S. P., *Gott v. Gandy*, 2 El. & Bl. 845.

In an agreement for a tenancy of buildings for a term, the landlord to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done. *Surplice v. Parnsworth*, 7 M. & G. 576; 8 Scott, N. R. 307; 8 Jur. 760; 13 L. J., C. P. 215. S. P., *Nulton v. Temple*, 12 M. & W. 52; 13 L. J., Exch. 17.

Where B. took possession of a house, and paid 10*l.* to A., who neglected to execute a lease and to make repairs within the period of ten days, as agreed on, notwithstanding which B. still continued in possession:—Held, that, on account of B.'s intermediate possession of the premises under the agreement, he could not, by quitting the house, for the default of A., rescind the contract, and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the special contract. *Hunt v. Silk*, 5 East, 449; 2 Smith, 15.

A. agreed to purchase B.'s equitable interest in lands for a term of years at a specified rent:—Held, that A., after paying the rent several years, and acknowledging that a further sum was due, could not resist B.'s claim for such further rent in an action on the agreement, by showing that he had not been able to use the lands; but it seems that B. might have recovered in an action for use and occupation. *Conolly v. Baxter*, 2 Stark. 525—Ellenborough.

**Right of action for breach.]**—Upon a covenant to repair and keep in repair during the continuance of a term, an action may be maintained for breaches committed before the term has expired. *Luzmore v. Robson*, 1 B. & A. 584.

Upon a covenant by a lessor to keep in repair the main walls, main timbers, and roofs of the demised premises, the lessor cannot be sued by the lessee for non-repair, unless he has received notice of want of repair. *Makin v. Watkinson*, 6 L. R., Exch. 23; 40 L. J., Exch. 33; 23 L. T., N. S. 502; 19 W. R. 386.

**Liability for injury to third person from neglect to repair.]**—A landlord let premises to a tenant under a lease by which the latter covenanted to keep them in repair. Attached to the house was a coal cellar under the footway, with an aperture covered by an iron plate which was at the time of the demise out of repair and dangerous. A passer-by in consequence fell into the aperture and was injured:—Held, that, the obligation to repair being by the lease cast upon the tenant, the landlord was not liable for this accident. *Pretty v. Bickmore*, 8 L. R., C. P. 401; 21 W. R. 733; 23 L. T., N. S. 704.

Held, also, that the provision in the Metropolitan Local Management Act, 1855, 18 & 19 Vict. c. 120, s. 102, makes no difference in this respect. *Id.*

**Parties to actions.]**—The executor of a tenant for life may recover for the breach of a covenant to repair, committed by the lessee of the testator in his lifetime, without averring a damage to his personal estate. *Ricketts v. Weaver*, 12 M. & W. 718; 13 L. J., Exch. 195.

The benefit of a covenant to repair in a joint demise by tenants in common runs with the entire reversion only, and therefore the representatives of all the tenants in common in a lease so jointly made by them must join in suing for a breach of such covenant. *Thompson v. Hakevell*, 19 C. B., N. S. 713; 11 Jur., N. S. 732; 35 L. J., C. P. 18; 14 W. R. 11; 13 L. T., N. S. 989.

As to parties to actions after assignment of term,—see this title, VIII., 8; after assignment of reversion,—see this title, IX.

**Pleadings in actions.]**—In schedule B. to the Common Law Procedure Act of 1852, the following specimen of a count (No. 24), upon a covenant to repair, is given: "That the plaintiff by deed let to the defendant a house, No. 401, Piccadilly, to hold for seven years from the — day of —, A.D. —, and the

defendant by the said deed covenanted with the plaintiff well and substantially to repair the said house during the said term (*according to the covenant*), yet the said house was during the said term out of good and substantial repair."

If the covenant to repair contains an exception of "fire and all other casualties," it is fatal on non est factum to state it as a general covenant to repair, omitting the exception. *Tempany v. Burnand*, 4 Camp. 20. S. P., *Brown v. Knill*, 5 Moore, 164; 2 B. & B. 395—Ellenborough.

In an action for not repairing premises demised, the declaration stated that the plaintiff "demised certain premises, with the appurtenances (except as therein is excepted), to hold, &c., except, &c., for the term of twelve years, except the last day thereof;" the lease being produced in support of the declaration, was found to contain no exception "of any part of the premises," but only an exception of the "last day of the term:"—Held, not to be a fatal variance, the allegation of the exception being either satisfied in the lease, or it might be rejected as surplusage. *Williams v. Hayes*, 9 Price, 642.

A landlord may maintain an action for not repairing, against a tenant who occupies premises under a special agreement (which was to be the basis of a future lease), containing a provision that he should keep the premises in tenantable repair, without setting out such special agreement in the declaration. *Colley v. Streeton*, 3 D. & R. 522; 2 B. & C. 273.

In an action on a covenant to keep premises in tenantable order and repair, and at the end of the term deliver them up in such tenantable repair, the breach assigned was, that the tenant did not nor would sufficiently repair and keep the premises in tenantable order and repair, nor deliver them up in such tenantable repair at the end of the term; but, on the contrary thereof, suffered and permitted the premises to be and continue, and the same were, ruinous and in decay, for want of needful and necessary reparations, and the tenant at the end of the term left them so out of repair:—Held, that, under this breach, the lessor could not recover for voluntary waste, as by removing windows, &c. *Edge v. Pemberton*, 12 M. & W. 187; 1 D. & L. 467; 13 L. J., Exch. 48.

A declaration stated that the plaintiff agreed to let and the defendant to take the farm of L. at a yearly rent, and the plaintiff undertook to put the premises in repair within twelve months, after which time the defendant undertook to keep them repaired, and that the plaintiff repaired within twelve months, and demised to the defendant on the terms aforesaid, and he became tenant and occupier, but he did not keep in repair. The agreement produced at the trial was to let and take as above, that the plaintiff should keep the buildings insured in 600*l.* (the defendant repaying the premiums), and rebuild in case of fire; and that the plaintiff should repair within twelve months, and the defendant

afterwards keep in repair as above stated:—Held, that the variance between the contract declared upon and that proved was a ground of nonsuit. *Beech v. White*, 12 A. & E. 668; 4 P. & D. 899.

A plaintiff sued upon a deed by which the defendant covenanted and agreed with him to procure a license from the lord of the manor, in which a messuage in the occupation of the plaintiff was situate, to lease the premises to the plaintiff, and to make him a good and sufficient demise of the same; the declaration alleged that it was thereby covenanted, that the lease should contain a covenant, that pending the occupation by the plaintiff under the provisions of the deed, the defendant would, once in every three years, paint the outside of the messuage, and keep the same in good and tenantable repair; and that, until the license should be obtained and the lease granted, the plaintiff should continue in possession of the premises as tenant from year to year, subject to the terms and conditions in the deed specified; breach, the non-repair of the outside of the premises during the continuance of the tenancy from year to year. The deed, on its production at the trial, contained the provisions that, until the license could be obtained, and the lease should be granted, the plaintiff should be considered to be tenant of the premises at the rent and subject to the terms and conditions hereinbefore specified:—Held, that there was no variance between the allegation and the proof, but the declaration correctly stated the legal effect of the deed. *Price v. Birch*, 1 D., N. S. 720—C. P.

A declaration stated, that the defendant had become and was a tenant to the plaintiff of rooms, on the terms that the defendant should not allow any nails to be driven into the walls, and that, if any damage should arise from so doing, he would pay the cost of repairing the same on vacating the apartments; and that, in consideration thereof, the defendant promised the plaintiff to use the rooms in a tenant-like manner, and not to allow any nails to be driven into the walls. The declaration averred, that the defendant quitted possession, and that he did not use the rooms in a tenant-like manner, but, on the contrary thereof, pulled down bells, and broke chimney-pieces and stoves, and drove nails into the walls, and although the costs of repairing the injuries of the walls amounted to 150*l.*, he had not paid that sum to the plaintiff:—Held, on general demurrer, that this declaration showed a sufficient consideration for the defendant's promise, by alleging that he had become tenant on the terms of the special agreement, and that it was not necessary to allege that he became tenant to the plaintiff at his request. *Dietrichsen v. Giubilei*, 14 M. & W. 845; 3 D. & L. 292; 15 L. J., Exch. 73.

To an action by a lessor for a breach of covenant, on an indenture of lease in not repairing, the lessee cannot plead in bar that the lessor had only an equitable estate in the

premises; for that is tantamount to a plea of nil habuit in tenementis. *Blake v. Foster*, 8 T. R. 487.

A declaration on a covenant in a lease to deliver timber growing on the demised premises, sufficient for the repairs thereof, averred that there was timber growing on the premises sufficient for the repairs, but that the defendant did not deliver it, and the defendant pleaded that there was not timber growing on the premises sufficient and proper for the repairs:—Held, that the plea was good, although it did not allege that there was not timber growing on the premises sufficient for the repairs or any part thereof. *Snell v. Snell*, 7 D. & R. 249; 4 B. & C. 741.

Assignees of G., a bankrupt, sued the executor of J. H. A count stated that R. H. demised premises to G., and covenanted to put all the premises forthwith in repair, and during the term maintain in repair, the main walls and the steam engines, by the fair and reasonable wear and usage thereof; that the reversion became vested in J. H.; and that, though R. H. had not put into repair, J. H. had not done so, or maintained in repair according to the covenant. To the first breach, for not putting in repair, the defendant pleaded, first, that a reasonable time for performance elapsed in the time of R. H., and he broke the covenant; secondly, that not only was this so, but that G. brought an action against J. H. and R., as executors of R. H., for such breach, and recovered compensation:—Held, that there could be but one breach of the covenant as to putting in repair, and that as such breach occurred in the time of R. H., these pleas were good. *Coward v. Gregory*, 12 Jur., N. S. 1000; 30 L. J., C. P. 1; 15 W. R. 170; 15 L. T., N. S. 279; 2 L. R., C. P. 153.

To the second breach, for not maintaining in repair, the defendant pleaded, first, that G. brought an action against J. H., as an assignee of the reversion, for not maintaining in repair, and recovered compensation; and that the want of repair complained of was only a continuance of that for which the former action was brought; secondly, that there had been such recovery by action, as mentioned in the plea to the first breach and the preceding plea to the second breach, and that G. did not expend the sums recovered on the premises, or put them in repair, and that if he had done so, no breach would have occurred:—Held, that the breach was continuing; that the former recovery went in mitigation of damages, and not in bar, even on equitable grounds; and that the pleas were therefore bad. *Id.*

The defendant also pleaded to the second breach, that the default arose from G. not keeping a covenant to maintain in repair all except what the landlord was to maintain; to which the plaintiff replied, that the landlord had never put in repair:—Held, that the putting in repair was a condition precedent to the tenant's covenant coming into force,

and that therefore the replication was good. *Id.*

The defendant also pleaded to the second breach, that the want of repair was not occasioned by fair and reasonable wear and usage:—Held, that these words only applied to the steam-engines, &c., and that, therefore, the plea was bad. *Id.*

**Evidence.**—A tenant occupied premises, under an agreement containing a proviso to keep the premises in tenantable repair, and the landlord declared generally, that "the defendant became tenant of the premises, and in consideration thereof undertook to repair," without setting out the agreement:—Held, that such agreement was admissible to prove the fact of tenancy as the consideration for the promise to repair. *Colley v. Streston*, 3 D. & R. 522; 2 B. & C. 273.

In an action against a tenant for not leaving premises in repair, evidence as to a prior promise on the part of the lessor to put them in repair is not admissible, and it would be a misdirection to tell the jury to have regard to such promises; but they may measure the extent of the repairs to be done by the age and class of the premises. *Haldane v. Newcombe*, 12 W. R. 135; 9 L. T., N. S. 420—B. C.—Crompton.

In ejectment for a forfeiture, under a covenant to keep in tenantable repair, it is not necessary to show that the premises were not in repair on the day of the demise; but if proved to be out of repair a short time previously, it is incumbent on the defendant to give evidence that they have been put into repair before the right to re-enter accrued. *Doe d. Hemmings v. Durnford*, 2 C. & J. 667.

A stamped agreement for a lease of premises for seventeen years and a half, to which the plaintiff was no party, but made between the defendant and other persons, from whom the plaintiff derived title to the premises, is admissible to prove the defendant's promise to keep the messuages in repair. *Dyer v. Ashton*, 2 D. & R. 19.

**Measure of damages.**—Where a tenant for years agrees to keep the premises in repair during the tenancy, and before the expiration of the term an action is brought against him for breach of this agreement, the plaintiff is entitled to recover nominal damages only. *Marriott v. Cotton*, 2 C. & K. 553—Rolfé.

A. leased premises to B., from the 25th March, 1823, for sixteen years wanting ten days; and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C., from the 24th June, 1834, for four years and three quarters, wanting eleven days; and C. covenanted with B. to keep the premises in repair (the covenant so far being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of this covenant, and B. let judgment go by default, and upon the writ of inquiry the damages

were assessed at 64*l.* 10*s.*, being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previously to the commencement of the action. B. afterwards sued C. for the amount of the dilapidations and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57*l.* 10*s.*:—Held, that B. was not entitled to recover also the amount of the costs in the former action. *Penley v. Watts*, 7 M. & W. 601.

A defendant held premises under a lease, with a covenant to keep and yield them up in repair. At the expiration of the lease, at Christmas, 1868, the premises were dilapidated to an amount fixed by the jury at 22*l.* The plaintiff (the reversioner) had before this time made a verbal agreement with a third person to grant him a lease for a long term, and he at once proceeded to pull down the premises:—Held, that the plaintiff was, notwithstanding, entitled to recover substantial damages. *Raulings v. Morgan*, 18 C. B., N. S. 776; 11 Jur., N. S. 564; 34 L. J., C. P. 185; 13 W. R. 746; 12 L. T., N. S. 348.

Upon an appeal from the decision of a county court in an action for dilapidations, evidence was given that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item especially, as the jury had viewed the premises with the particulars in their hands, and would therefore be able to judge if the plaintiff had made out his case. The court directed a new trial. *Smith v. Douglas*, 16 C. B. 31.

Upon the execution of a writ of inquiry in an action for dilapidations, two surveyors were called on each side; those called for the plaintiff estimated the dilapidations, the one at 119*l.*, the other at 124*l.*; those called for the defendant estimated them, the one at 63*l.* 15*s.*, the other at 68*l.*; the jury returned a verdict for 36*l.* 10*s.* The court ordered that the inquiry be set aside without costs, unless the defendant would consent to the verdict being entered for 63*l.* 15*s.* *Weeding v. Mason*, 2 C. B., N. S. 382.

When a railway company gives the lessee for years of a house notice to treat, and an award is made, and eventually a conveyance executed, and thereupon possession given to them, such lessee is liable to his landlord at all events up to that time, on a covenant to repair and keep in repair, and the measure of damages is the diminution of the market value of the reversion at that time. *Mills v. East London Union (Guardians)*, 8 L. R., C. P. 79; 42 L. J., C. P. 40; 27 L. T., N. S. 557; 21 W. R. 142.

The defendants' predecessors in title obtained an act for the formation of a road which was to pass under a railway by means of a bridge. By the act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting the same, until

they should have delivered to the company plans, drawings and specifications of the works intended to be executed under or affecting the railway and works thereof, such plans, &c. to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, &c., should have been examined and approved by the engineer of the company; and that "the same works should be executed and thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company." And it was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers. The bridge was accordingly constructed of brick piers and iron pillars, of iron girders resting upon the piers and pillars, and of timber and wood-work. In the construction of the bridge, the brick and iron-work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and woodwork, the superstructure, was done by the plaintiffs' engineer at the expense of the undertakers, and with materials provided by them. The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by the company, who claimed to be reimbursed their outlay in so doing by the defendants, although the defendants had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:—Held, that the plaintiffs were not entitled to recover the expenses so incurred. *London and South Western Railway Company v. Flower*, 1 L. R., C. P. Div. 77.

In an action, brought during the term, for a breach of covenant to repair, if the evidence shows that the premises were out of repair before action the lessor is entitled to nominal damages, although the lessee expended money, after action, in repairing the demised premises. *Morony v. Ferguson*, 8 Ir. R., C. L. 551—Q. B.

In an action for breach of covenant to keep in repair, brought by the lessor or his assignee during the pendency of the term, the damages may, but need not necessarily, be the present value of a sum equal to the cost of repair, that sum being payable at the end of the term; or the damages may, but need not necessarily, be the injury caused by the want of repair to the salable value of the reversion; and, save in very extreme cases, it is the province of the jury to decide which of these modes is, in the particular case, the appropriate one. *Melge v. Kavanagh*, 11 Ir. R., C. L. 431—Exch.

As to repairs after assignment of lease,—

see this title, VIII., 3; after assignment of reversion,—see this title, IX.; in cases of tenancy from year to year,—see this title, XVI.

## VI. RATES AND TAXES.

### 1. *Contracts to pay.*

**What rates, taxes, &c., are included in agreements.**—If a party agrees to take a lease at a net rent, he cannot object that the lease contains a covenant for him to pay the land tax and sewers' rate. *Bennett v. Womack*, 3 C. & P. 96; 7 B. & C. 627.

A tenant verbally agreeing "to pay all taxes," is bound to pay the land tax, although not specifically mentioned. *Amfield v. White*, R. & M. 246—Bayley.

Upon the construction of an agreement to demise a farm for fourteen years, "at the yearly rent of 40*l.*, payable quarterly, free of all outgoings;" and by which the parties agreed "to grant and accept a lease on the above and other usual terms:"—Held, that the landlord was entitled to a net rent, payable free of land tax and tithe commutation rent-charge. *Parish v. Sleeman*, 1 De G., F. & J. 326; 6 Jur., N. S. 385; 29 L. J., Chanc. 96; 8 W. R. 166.

A. demised land to B. upon a building lease, at the yearly rent of 60*l.*, clear of all rates and assessments, the sewers' rate and land tax excepted, with the usual covenant for payment of rent. B. having by building on the land increased its ratable value to 300*l.* per annum:—Held, that he was only entitled to deduct the sewers' rate and land tax upon the original rent, and not in respect of the improved value. *Smith v. Humble*, 15 C. B. 321.

A., who was tenant of premises under a lease, in which he covenanted to pay "all such parliamentary, parochial, and county district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burdens, duties, and services whatsoever, as during the term should be taxed, assessed, or imposed upon or in respect of the premises," underlet the premises to B., who covenanted in the underlease to perform the covenants on the lease's part in the lease to A. A district board of works, acting under the Metropolis Management Act, 18 & 19 Vict. c. 120, compelled B., as occupier of the premises, to pay the expense of executing drainage works from the premises, which the board was authorized by the act to obtain the payment of from the occupier, the act allowing such occupier to deduct the same out of the rent due from him to the owner, provided it did not affect any contract between landlord and tenant:—Held, that this was an expense included in the terms of the covenant in the original lease, and against which the occupier, B., undertook to bear A. harmless, and that therefore B. was not entitled to deduct the same from his rent. *Sweet v. Seager*, 2 C. B., N. S. 119; 3 Jur., N. S. 588.

L., being possessed, in 1811, of premises for

terms expiring at Midsummer, 1854, granted an annuity to T. and another to E. for three lives, and to secure such annuities demised the premises to T. and E., separately, for forty-three years, if the lives should last so long. In 1827 the residue of the terms granted to L. became vested in the plaintiff, subject to the annuities and underleases to T. and E. In 1825, L. having died, his executors let T. and E. into possession, and they covenanted by deed to pay off certain arrears of ground rent and other charges, and made the same chargeable on the premises. The plaintiff, in 1830, became tenant to T. and E. of the premises, at a rent payable to them in moieties. T. was the survivor of the *cestuis que vie*: he died in 1851, and the defendants were his executors. From his death till Midsummer, 1854, W. E., as agent for E. and the defendants, demanded and received the rents, and paid over one moiety to E., and the other to the defendants, deducting payments in respect of ground rent, rates, taxes, insurance, repairs, and commission. The plaintiff did not know of T.'s death:—Held, that he was entitled to recover back the amount of rent after T.'s death: that the plaintiff must be taken to have had notice of the deed of 1825, and to be bound by it: that the sums mentioned in it must be taken to have been paid; but that the plaintiff must be taken to have sanctioned the continued payment of the ground rent, rates, and taxes, and that a set off to that amount must be allowed. *Barber v. Brown*, 1 C. B., N. S. 121; 8 Jur., N. S. 18; 26 L. J., C. P. 41.

Where a party took a part of premises, the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof:—Held, that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises. *Watson v. Atkins*, 3 B. & A. 647.

Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed, but that he would pay all further or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlords to pay all rates on the premises, or on the tenant, in respect of the yearly rent of 80*l.*, except such further or additional taxes as might be assessed on the premises: the tenant is bound to defray all increase of the old as well as the new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rate. *Graham v. Wade*, 16 East, 29.

By a local act for draining lands in the

county of Lincoln, it was declared, that "the taxes to be charged and assessed by virtue of the same should be paid by the tenants of the lands, &c., charged with the same respectively, who might deduct and retain the same out of the rents payable to their respective landlords." Where, therefore, a tenant had quitted lands liable to a drainage tax under that act, and, after he had quitted, the collector levied the tax in arrear upon property which he had left in possession of the succeeding tenant:—Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenants for the time being, and, consequently, that the succeeding tenant might maintain an action against the landlord for money paid to his use. *Dunson v. Linton*, 1 D. & R. 117; 5 B. & A. 521.

A tenant of a piece of ground, at a fixed annual rent, covenanted not to build without the license of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term. At the time of executing the lease the lessor gave the lessee a license to build, which he did, and thereby much increased the annual value of the premises:—Held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved value. *Watson v. Home*, 7 B. & C. 285; 1 M. & R. 191.

The tenant compounded his taxes under the provisions of a local act, whereby his premises were assessed at a less annual sum than the improved annual value:—Held, that the tenant paid taxes in respect of the whole improved annual value, and that the landlord was to pay that proportion of the taxes paid which the rent bore to such improved annual value. *Ib.*

An assessment levied under an act, enabling the owners of land to raise money for repairing a bridge, to the repair of which they were liable *ratione tenuræ*, is not a parliamentary tax charged upon the demised premises within the meaning of a covenant in a lease to pay rent, "free and clear of and from any land-tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed, charged or imposed, or thereafter to be taxed, charged or imposed upon the premises or any part thereof, or upon G., his heirs, executors, administrators or assigns, in respect thereof, the landlord's property tax or duty only excepted." *Baker v. Greenhill*, 2 G. & D. 435; 2 Q. B. 148; 6 Jur. 710.

A sewers' rate, not being imposed directly by act of parliament, is not "a parliamentary tax." *Palmer v. Earith*, 14 M. & W. 428; 14 L. J., Exch. 256.

A lessee covenanted that he would pay all taxes, charges, rates, tithes or rent-charge in lieu of tithe dues, and duties whatsoever, as then were or should at any time thereafter during the demise be taxed, charged, assessed or imposed upon the demised premises:—Held, that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of

his occupation, and all future rates which might be imposed on the land itself. *Hurst v. Hurst*, 4 Exch. 571; 19 L. J., Exch. 410.

A declaration, after setting forth an agreement, by which the defendant took of the plaintiff's rooms, part of a house, and agreed to pay, without saying to whom, the proportion of the rates and taxes "which might be assessed on the premises so taken" by him, averred, that afterwards, rates amounting, to wit, to 150*l.*, were assessed on the house, being the rates whereof the proportion was agreed to be paid as aforesaid; that such rates were afterwards assessed, became due, and were paid by the plaintiff; that the proper proportion payable by the defendant was a proportion, to wit, one-third, amounting to, to wit, to 50*l.*, of all which the defendant had notice, and was requested by the plaintiff to pay that sum. Pleas, first, as to 12*l.* 10*s.*, tender and payment into court; secondly, as to the residue, traverse of the request to pay; and fourthly, as to the residue, that the proper proportion payable by the defendant was a proportion amounting to 12*l.* 10*s.*, without this, that the proper proportion, to wit, one-third, amounting, to wit, to 50*l.*:—Held, first, that the defendant was bound to pay his proportion of the rates to the plaintiff. *Hooper v. Woolmer*, 1 L. M. & P. 634; 10 C. B. 370; 20 L. J., C. P. 63.

Held, secondly, that his liability to do so was a primary and not a collateral liability; and, therefore, that no request to pay was necessary. *Ib.*

Held, thirdly, that under the agreement to pay a proportion of the rates assessed on the premises so taken by him, he was bound to pay a proportion of the rates assessed on the house of which such premises were a part. *Ib.*

Held, fourthly, that the fourth plea was bad, as traversing only the precise amount of the proportion stated in the declaration, which was immaterial. *Ib.*

The lessor of lands was, at the date of the lease, also the owner of the tithe rent-charge upon such lands. The lease contained a covenant by the lessee to pay "all taxes and assessments whatsoever for or in respect of the demised premises, save and except the level tax, property tax, and land tax," which were to be paid by the lessor:—Held, in an action under the covenant by the assignees of the reversion and of the tithe rent-charge, against the lessee for non-payment of tithe rents, that the words "taxes and assessments" in the covenant did not include the tithe rent-charge, and that the action was therefore not maintainable. *Jeffrey v. Neale*, 6 L. R., C. P. 240; 40 L. J., C. P. 191; 24 L. T., N. S. 362; 19 W. R. 700.

In a lease of a house and premises, the lessee covenanted with the lessor to "bear, pay, and discharge the sewers' rate, tithes, rent-charge in lieu of tithes, and all other taxes, rates, assessments, and outgoings whatsoever, which at any time or times during the demise should be taxed, rated, charged, assessed, or imposed



upon the demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved" (except the landlord's property tax):—Held, that the lessee could not recover from the lessor the expenses of making a drain, which, under 29 & 30 Vict. c. 90, s. 10, the lessor, as owner, might have been required by the sewer authority to make, but which the lessee had made under an arrangement with the lessor, by which the expense was to be borne by the party liable. *Crosse v. Rao*, 9 L. R., Exch. 209; 23 W. R. 6.

By a lease, the tenant agreed to pay the rent, "without any deduction in respect of any taxes, rates, assessments or charges whatsoever, the landlord's property tax only excepted."—Held, that he was bound to pay the tithe rent-charge imposed upon the demised hereditaments. *Lockwood v. Wilson*, 43 L. J., C. P. 179; 30 L. T., N. S. 761; 22 W. R. 919.

**When liability to pay becomes fixed.**—A local act for the parish of Marylebone makes the occupiers of houses liable to be assessed to parochial rates. The lessor, landlord, owner, or proprietor of houses let out in parts is to be deemed the occupier, and be liable to the payment of rates; and every person renting or occupying any such part is to be liable and compellable to pay such rates, and may deduct the same out of the next or any other rent due to such lessor, &c.:—Held, that to render the occupier of part liable to pay, and to enable him to deduct the rates for the whole of the house, the landlord must be assessed to the rates. *Lobban v. Cook*, 8 H. & N. 238; 27 L. J., M. C. 254.

A local act gave a corporation power to call on the owner (i. e., the person receiving the rack rent) of any houses, to pave the street opposite to his houses, and in default to do it themselves, and recover the expenses from such owner by action, and also, as an additional remedy, by obliging all his tenants to pay to the extent of their unpaid rent, whether the expenses were incurred before their own particular houses or not. A. let a house to B., who covenanted to pay and discharge "all taxes, rates, assessments and impositions payable in respect of the demised premises." The corporation, on default by the landlord, paved the street before the tenant's house; the landlord paid the money expended by them in his default, and sought to recover it from the tenant on his covenant:—Held, that he was not liable. *Tidswell v. Whitworth*, 36 L. J., C. P. 103; 2 L. R., C. P. 326; 15 W. R. 427; 15 L. T., N. S. 574.

A lease contained a covenant by the lessee to pay all rates and taxes, and a proviso for re-entry on breach:—Held, first, that the non-payment within a reasonable time of a poor-rate, which had been duly assessed, allowed and published, was a breach justifying a re-entry by the landlord, and that it was not necessary to show that the rate had been demanded of the tenant, or that express notice

of it had been given to him. *Davis v. Burrell*, 10 C. B. 821; 15 Jur. 658.

Held, secondly, that if the covenant meant to pay on demand, a personal demand was not necessary, but that a demand on the premises of the tenant's son was sufficient. *Id.*

## 2. Deducting from Rent.

**Right of tenants to deduct sums paid.**—By the Metropolis Management Amendment Act, 1862, s. 96, the owner shall allow the occupier to deduct out of the rent from time to time becoming due in respect of the premises the sums of money which the occupier pays to the vestry or district board for works done by them under the act:—Held, that to entitle the occupier to avail himself of that provision, the money must have been actually paid; and, consequently, that a distress for rent which became due after service of a notice from the vestry, made before payment to the vestry clerk, was not illegal. *Ryan v. Thompson*, 3 L. R., C. P. 144.

A lessee covenanted that he would, during the continuance of the term, pay and discharge "all taxes, rates, duties and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof." The vestry of the parish, having under the provisions of the Metropolis Management Acts, paved the street upon which the demised premises abutted, assessed the sum payable by the owner as his proportion of the estimated expenses at 49*l.* 2*s.* 6*d.*, gave the occupier a notice under s. 96 of the act of 1862, requiring him to pay it, and, upon his failure to do so, took proceedings against the owner before a magistrate, and compelled him to pay:—Held, that this was a duty or an assessment, assessed or imposed upon the owner in respect of the premises, within the covenant. *Thompson v. Lupton*, 3 L. R., C. P. 149; 37 L. J., C. P. 74; 16 W. R. 312; 17 L. T., N. S. 507.

The exception in s. 8 of 37 & 38 Vict. c. 54, to the right of a tenant of a mine to deduct one-half of the rate newly imposed by that act, and paid by him, from the rent, payable to his lessor, namely, "unless he has specifically contracted to pay such rate in the event of the abolition of the exemption" does not take effect in favor of the lessor, unless the lease has in terms anticipated the imposition of this new liability, and thrown it upon the tenant; and a covenant to pay the rent, "free of and from all rates, taxes, tithe rent charges, expenses and deductions whatsoever, parliamentary, parochial or of any other nature," will not deprive the tenant of his right to make the deduction given by the above section. *Devonshire v. Barron Hematite Steel Company*, 4*r* L. J., Q. B. Div. 96; affirmed on appeal, 46 L. J., Q. B. Div. 435; 2 L. R., Q. B. Div. 286—C. A.

As to set-off against rent, generally,—see this title, VII., 4.

**Recovering back from landlord after payment of rent without deduction.**—If a tenant pays taxes which he alleges ought to have been paid by his landlord, and afterwards pays rent for two years subsequently, without making any deduction, he cannot recover the amount against the landlord. *Saunderson v. Hanson*, 3 C. & P. 314—Tenterden.

A broker, who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as allowing the land tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted. *Ib.*

Where a tenant has voluntarily paid his full rent, without deducting a landlord's tax, for upwards of a year, he can neither recover it back, nor plead it as a payment in replevin. *Andrew v. Hancock*, 1 B. & B. 37; 3 Moore, 278. And see *Fuller v. Abbott*, 4 Taunt. 105.

By an agreement marsh lands were demised subject to a condition that the tenant should pay all outgoings, rates, taxes, scots, &c., whether parochial or parliamentary, which were and might be chargeable on the lands. An assessment was made by the commissioners of sewers for the permanent benefit of the lands, in certain proportions, upon the owners and occupiers. For four years the tenant paid, in the first instance, both his own share and that of his landlords, and upon each half-year's settlement of accounts for rent due with the landlord's agent, who was ignorant of the agreement, the sum so paid was allowed towards the rent, and the receipts were given for the balance:—Held, in an action brought upon the agreement to recover the sums so allowed as arrears of rent, that the facts supported a plea of payment of the rent. *Waller v. Andrews*, 3 M. & W. 812.

A plea in bar to a cognizance for a distress for rent, stated that divers sums had been from time to time duly assessed on the premises for land tax, and paid by the plaintiff, wherefore he deducted the amount of the tax, which the defendant, as landlord, was liable to bear in respect of rent:—Held, that this plea was bad; first, in not stating the specific periods for which the respective sums were assessed or paid; and, secondly, in not stating that the payment was made after the rent distrained for had accrued, or was then accruing due. *Stubbs v. Parsons*, 3 B. & A. 516.

As to recovering back rent from landlord, —see this title, VII., 4.

## VII. RENT.

### 1. Contracts to pay; Reservation.

**Covenants and agreements to pay, in general.**—There is an implied covenant for payment of rent under the words "yielding and paying." *Iggulden v. May*, 9 Ves. 330; 7 East, 237; 3 Smith, 269; 2 N. R. 449.

Where it appears on the face of a lease, as

set out in a declaration, in an action on the covenant for rent, that the lessor has only an equitable interest, the covenant for the payment of the rent may be properly treated as a covenant in gross. *Pargeler v. Harria*, 7 Q. B. 708; 10 Jur. 260; 15 L. J., Q. B. 113.

Upon the marriage of A., the grandson of W., from whom A. had large expectations, a house and lands were settled upon A., and it was agreed that the grandfather should occupy the house and lands, and also some glebe-lands belonging to A. There was evidence as to the rent that was to be paid, which was about the actual value. A. never enforced the rent during the eight years of his grandfather's occupancy, which ceased with his death, but had received sums in money and goods equal to about half the alleged rent. *Stuart, V. C.*, allowed an exception to the master's report, allowing the rent as alleged. But *Cranworth, C.*, reversed his decision, coming to the conclusion that there was either an express contract to pay the rent, or an agreement to occupy as any other tenant, and pay a quantum meruit; the sums and goods paid to go towards the rent. *Alington v. Booth*, 3 Jur., N. S. 50—C.

Where a contract was made by the plaintiff and A., that A. should build houses on the plaintiff's land and procure tenants for the same at a given rate, and himself pay the rent till he so procured tenants from the Michaelmas then next ensuing:—Held, that, under this contract, no tenancy was created between the plaintiff and A. *Taylor v. Jackson*, 2 C. & K. 22—Erle.

The plaintiff being the owner of a farm, and lessee of the tithe commutation rent-charge, under a dean and chapter, at a rent of 60*l.* per year, let the land verbally to the defendant at a rent of 400*l.* a year, tithe free:—Held, that, as by 6 & 7 Will. 4, c. 71. s. 80, in the event of the defendant distraining for the tithe rent, she would be compelled to allow the same to the plaintiff in account, the plaintiff was tenant to the defendant, at a rent of 400*l.* *Meggison v. Bowes*, 7 Exch. 685; 21 L. J., Exch. 284.

A declaration averred that the plaintiffs, being tenants to H., of chambers at a certain rent, payable quarterly, underlet them to the defendant, who undertook to pay the rent to H., and agreed that if he did not do so he would indemnify the plaintiffs in respect thereof, and that the defendant did not pay the rent to H., nor indemnify the plaintiffs:—Held, that whether the contract meant that the defendant was to pay to H. the rent due from the plaintiffs to H., or to pay the rent under the demise from the plaintiffs, the promise of the defendant to pay did not extend beyond the term of his own tenancy. *Smith v. Coles*, 1 L. M. & P. 794; 10 C. B. 6; 15 Jur. 250; 20 L. J., C. P. 37.

The defendant entered into a written agreement with the plaintiff to take premises at a rent of 20*s.* a week, payable on demand, and subject to four weeks' notice to quit on

either side. During the continuation of this tenancy, a verbal agreement was made between the parties that the rent should be 16s. a week, and the defendant for several weeks paid this reduced amount, and on one occasion submitted to a distress:—Held, that there was no fresh demise, and that the original rent continued to be the rent payable for the premises. *Crowley v. Vitty*, 7 Exch. 319; 21 L. J., Exch. 135.

A. demised to B. premises from the 15th of May, 1851, at the yearly rent of 145*l.*, payable on November 14th and May 14th. These premises had been let to C., whose tenancy expired on the 13th May, 1851, and who had omitted to give a notice to quit to one of his under-tenants, who occupied a cottage, at a yearly rent of 5*l.*; and in consequence B. could not obtain possession of that part of the premises. It was then agreed that A. should receive from the under-tenant rent for two half years, and deduct that 5*l.* from the rent to be paid for the whole by B., and that B. should pay 70*l.* to A. on the 14th of November, 1851, and 14th of May, 1852:—Held, that such agreement operated as a new demise, and that A. was entitled to distrain for 70*l.*, which became due on the 14th of November. *Watson v. Waul*, 8 Exch. 335; 22 L. J., Exch. 161.

W. and B. entered into partnership in 1801 as millers, W. being at the time the freeholder of a steam mill and four acres of land, subject to a mortgage. One of the provisions of the partnership articles was that the business should be carried on upon the mill and premises. The articles also provided that the stock and effects of W. should be taken at a valuation by the partnership, and that the annual sum of 210*l.* should be allowed and paid out of the partnership property to W., his heirs and assigns, in equal half-yearly payments. No formal demise of the mill and land was made to the partnership. In 1870 the partners were adjudicated bankrupt, and W. instituted proceedings for liquidation in respect of his separate estate. The trustee of his separate estate claimed 700*l.* as arrears of rent under the partnership articles against the joint estate. The mortgagees also served notices upon the trustee of the joint estate, requiring him to pay to them all rent due and thereafter to become due:—Held, that no rent, properly so called, was due under the agreement, the relation of landlord and tenant not having been created. *Appleby, Ex parte, Wyche, In re*, 20 W. R. 411—C. J. B.

A lease is a sale pro tanto, and a premium reserved on a lease is in the nature of purchase-money, for which, if unpaid, there is a lien on the land; and consequently, unpaid premium is an interest in land within 9 Geo. 2, c. 36, s. 8. *Shepherd v. Beetham*, 46 L. J., 138anc. Div. 763; 6 L. R., Ch. Div. 597; 25 W. R. 764; 36 L. T., N. S. 909—V. C. M.

As to construction of covenants for payment of money, generally,—see COVENANT.

— to pay additional rent, as penalty or liquidated damages.—Upon a covenant not to plow up any ancient meadow, and, if he does, to pay an additional yearly rent per acre:—Held, that the increased rent was not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties; and therefore a court of equity ought not to interpose in an action brought for the recovery of it. *Rolfe v. Peterson*, 2 Bro. P. C. 436.

On a reservation of 5*l.* per acre during the last twenty years of a term for every acre of meadow thereby demised, which the tenant should plow, dig, ear, break up, or convert into tillage during the last twenty years of the term, and so after that rate for any greater or less quantity than an acre, or less term than a year, the rent is due in the last twenty years if the land is then plowed, whether it was first plowed within the last twenty years or before; and the rent continues payable during the twenty years, though the land is again laid down to permanent grass. *Birch v. Stephenson*, 3 Taunt. 469. And see *Howell v. Richards*, 11 East, 633.

In an action of covenant by lessor against lessee, on a lease reserving an increased rent for every acre of certain lands converted into tillage, the jury having given damages for the actual injury sustained instead of the increased rent, the court granted the plaintiff a new trial, although it was urged that the verdict was consistent with justice, the judge having expressly directed the jury to find damages to the amount of the increased rent; and it was granted without payment of costs. *Farrant v. Olmius*, 3 B. & A. 692.

A lease granted by virtue of a power, enabling a tenant for life to make leases without impeachment of waste, contained a proviso, that the tenant should pay a further rent of 10*l.* per acre for plowing up pasture land, or for managing the farm contrary to the covenants. In an action to recover the penalty, a motion in arrest of judgment, on the ground that this amounted to a license to commit waste, was disallowed. *Bringle v. Goodson*, 8 Scott, 71; 5 Bing. N. C. 738; 1 Arn. 822.

A farm and lands were demised to a tenant at a yearly rent, and also under and subject to certain yearly payments in case the tenant should not crop, manure, and manage the farm in manner therein specified and covenanted; and also, in case the tenant, in the last three years of the term, should sow more than seventy acres of clover in one year, the additional rent of 10*l.* an acre, for every acre above seventy acres, for the remainder of the term:—Held, that the additional rents were in the nature of liquidated damages, and not of penalties. *Jones v. Green*, 3 Y. & J. 298.

A lease contained a stipulation, that, for every acre, and so on in proportion for a less quantity of the land which the lessee should suffer to be occupied by any other person without the consent of the landlord, an additional rent should be paid. The tenant undertook to use, occupy, dress, and manure the

land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop. It was proved to be the custom of the country for farmers to pursue that course:—Held, that the landlord was entitled to the additional rent, this being an occupation by other persons. *Greenlaude v. Tapscott*, 1 C. M. & R. 55; 4 Tyr. 566.

In a lease of land, the lessee, in addition to a reserved rent, covenanted to pay a penal rent for pasture land broken up, or "used or converted to any other use than for meadow land:"—*Quære*, whether using the land as a race-course and ground for training horses was a breach of the covenant? at all events, the question is one for a jury, and not determinable by the court on demurrer. *Aldridge v. Howard*, 5 Scott, N. R. 623; 4 M. & G. 921.

A declaration on an indenture stated, that the plaintiff demised to the defendant a farm for ninety-nine years, at a yearly rent of 100*l.*; and also yielding and paying unto the plaintiff, upon the days of payment of the yearly rent first reserved, over and above the same rent, a further yearly rent or sum, according to the rate of 20*l.* the acre, of any grazing or mowing land which the defendant should cause to be plowed or used in tillage without the consent of the plaintiff; and also yielding and paying unto the plaintiff, upon the days of payment of the yearly rent first named, over and above the rent so reserved, according to the rate of 20*l.* the acre of any of the land which the defendant should underlet, or upon which he should sow potatoes, or from which he should take more than three crops of corn or grain in any one course of tillage, or from which should be taken a second or other crop of wheat without making a clean summer fallow, or from which should be taken a third crop in any one course of tillage, without seeding down the same. "The several eventual or contingent rents, if any such should become due, to be additional to the first-mentioned rent, and to be paid and payable half-yearly, by equal portions, and the first payment to become due and be made at that day of payment of the first-mentioned rent which should first or next happen after such eventual or contingent rent should be incurred, and to continue payable from thenceforth during all the residue of the term created." A breach, that the defendant, in three successive years and in one course of tillage, to wit, 1843, 1844 and 1845, took three successive crops of corn, to wit, of oats, and did not seed down, whereby he became liable to pay a certain other yearly rent, of 125*l.*; and although one half-yearly payment of the rent had become due—viz., on the 25th of March, 1845, yet the defendant had not paid the same. Another breach, that although two other half-yearly payments of the rent had become due—viz., on the 29th of September, 1845, and the 25th of March, 1846, yet defendant had not paid the same. Upon the production of the lease at the trial, it ap-

peared, that in addition to the *reddendum* as set out in the declaration, it contained the following:—"And also yielding and paying unto plaintiff, upon the days for payment of the rent first reserved, over and above the same rent, the further yearly rent or sum of 20*l.* the acre of land which should be mowed, unless the defendant should once at the least in every three years bring thereon sufficient manure:—Held, that the variance could not be taken advantage of on a plea of *non est factum*. *Boyers v. Nicolson* (in error), 13 Jur. 834—Exch. Cham.; *S. C.*, in court below, 12 Q. B. 558, n.; 18 L. J. Q. B. 85.

Held, also, that the defendant was liable to the contingent rent reserved in the third branch of the *reddendum* for taking three successive crops of oats without seeding down. *Ib.*

In a subsequent action to recover the half-yearly payments due on the 29th of September, 1846, and the 25th of March, 1847, the declaration was as before:—Held, that the sums reserved in the third clause of the *reddendum* were payable as rent annually during the residue of the term, and not as a penalty on the occurrence of every breach of the covenant. *Ib.*

A tenant agreed, in case of breach of all or any of the conditions contained in the contract, to pay an additional or penal rent, to be recovered by distress or otherwise as the reserved rent was recoverable by law as between landlord and tenant:—Held, that the additional rent was not a penalty. *Wright v. Tracy*, 7 Ir. R., C. L. 134—C. P.

In 1862, A. agreed to lease a mine to B. Disputes arose between the parties, and A. brought an action against B. under the agreement, and B. filed a bill against A. to have the agreement set aside. The parties then referred all the matters in dispute between them to arbitration, and the arbitrator awarded that the agreement for a lease was valid; that it should be canceled, and that B. should pay to A. 5,513*l.* B. died, and a suit was instituted to administer his estate, under which A. carried in a claim to rank as a specialty creditor in respect of the sum awarded:—Held, that the sum was awarded by way of damages and not for rent, and therefore was not entitled to rank as a specialty debt. *Talbot v. Shrewsbury*, 16 L. R., Eq. 26—V. C. M.

A lease contained covenants by the lessee, to pay an increased rent of 20*l.* for every acre which he should plow up over and above one-third part of the demised lands; and also that, in case he should plow up one-third, or greater or less part, he should lay down the same with clover or grass seeds. The lessee plowed more than one third, paid the increased rent for it, and then laid it down in pasture:—Held, that, upon the construction of both the covenants taken together, the increased rent ceased to accrue from the time that the plowed land had been restored to pasture. *Domeile v. Forda*, 7 Ir. R., C. L. 534—Q. B.

As to distinction between penalties and liquidated damages, generally,—see CONTRACT OR AGREEMENT.

**To what parties rent reserved is payable.]**

—Upon a lease by tenants in common the survivor may sue for the whole rent; although the reservation is to the lessors according to their respective interests. *Wallace v. M'Laren*, 1 M. & R. 516.

One of several joint tenants may demand and receive the whole rent due, and give a discharge for it, and such a discharge is good and binding on his companions. *Robinson v. Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 C. & P. 234.

One or two joint tenants may demise his or their portion to another, so as to create the relationship of landlord and tenant between them, with a right to distrain in respect of rent in arrear. *Cowper v. Fletcher*, 34 L. J., Q. B. 187; 13 W. R. 739; 12 L. T., N. S. 420; 6 B. & S. 464.

Where one seized in fee settles lands on himself for life, with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs and assigns, those in remainder shall have the rent. *Greenaway v. Hart*, 14 C. B. 340; 2 C. L. R. 870; 18 Jur. 449; 23 L. J., C. P. 115.

So where one seized in fee settles lands on A. for life, with remainders, and gives him a leasing power, which he exercises, reserving rent during the term to himself, his heirs and assigns, those in remainder shall take it. *Ib.*

The defendant being in possession of premises under a lease from two trustees, of a term which had expired, a new lease was granted for a further term, but was executed by one only of the trustees. The defendant paid rent to both trustees until one of them died, and for the rent due after his death the other trustee brought an action for use and occupation:—Held, that he might maintain the action in his own name and right, and was not bound to sue as surviving trustee. *Wheatley v. Boyd*, 7 Exch. 20.

B., being mortgagee in fee simple of lands, and the equity of redemption in fee belonging to Billings by indenture of lease and release, dated October, 1833, between Billings of the first part, B. of the second part, T. of the third part, and H. of the fourth part, Billings did limit and appoint, and B. conveyed to H., and Billings confirmed, the lands, to have and to hold the same to H., his heirs and assigns, to the use of H., his heirs and assigns, forever, subject to a proviso for redemption, by Billings, his heirs and assigns, on payment of 5,000*l.* There was a proviso, that if default should be made in payment of that money, it should be lawful for H., his heirs and assigns, to sell. This deed contained a proviso for quiet enjoyment by Billings, until default; also the following:—"Provided always, and it is expressly agreed and declared between and by the parties, that if at any time hereafter, when

and so soon as H., and every other person claiming or to claim by, from, through or under him, shall, under or by virtue of any power or authority herein contained, enter into or upon or otherwise become possessed of the premises, or any part thereof, the same shall thenceforth be subjected and be charged to and with the payment to Billings and his assigns of the annual sum of 40*l.*; and the same shall thenceforth be recovered or recoverable by distress or otherwise, upon or out of the mortgaged premises." This conveyance was executed by B. and Billings, but not by H. Default having been made in payment, H. entered into possession for the purpose of exercising the power of sale, and by deed, dated 1847, he conveyed to T., who entered into possession of the lands, and duly paid the 40*l.* rent:—Held, first, that the charge of the rent of 40*l.* a year was not a good reservation of a rent, inasmuch as it was in favor of a person not having a legal estate in the land. *Gilbertson v. Richards*, 4 H. & N. 277; 28 L. J., Exch. 158.

Held, secondly, that there was no creation of a rent-charge, good at common law, because the releasee in fee simple did not execute the deed of 1838. *Ib.*

Held, thirdly, that the rent was well created by way of use under the statute. *Ib.*

Held, fourthly, that the declaration of this use, though after the limitation of the estate to H., and his heirs and assigns, to the use of H., his heirs and assigns, was not open to objection as being a use upon a use. *Ib.*

Held, fifthly, that assuming that the rent might arise at any time, however distant, the limitation was not void for remoteness as tending to a perpetuity. *Ib.*

By a turnpike act it was provided, that in leases of the tolls, the rent shall be made payable to the treasurer, and that in default, every such lease shall be null and void to all intents and purposes whatsoever. A lease was made whereby the rent was reserved to the trustees or their treasurer:—Held, first that the reservation in the alternative was bad within the former part of this clause: and, secondly, that the words "null and void to all intents and purposes" were to be construed as meaning absolutely void, and not voidable only. *Pearse v. Morrice*, 4 N. & M. 48; 2 A. & E. 84.

As to effect of assignment of rent or reversion,—see this title, IX.

**Amount of rent.]**—A net rent is a sum to be paid to the landlord clear of all deductions. *Bennett v. Womack*, 7 B. & C. 637; 1 M. & R. 644; 3 C. & P. 96.

If A. agrees to let, and B. to take a messuage, from a day past, for a term of ten years, "at and under the rent of 80*l.*," this is an agreement by B. to pay a rent of 80*l.*; and therefore, if there is a power of re-entry in case of a breach of "any of the agreements therein contained," A. has a power of re-entry for non-payment of rent, and may bring ejectment, although there is no express agreement

to pay the rent. *Doe d. Rains v. Kneller*, 4 C. & P. 8—Tenterden.

A. demised a colliery to B., and B. covenanted to pay as rent "one-third part of the money that should arise, be made, received, or produced from the sale of the coals;" and covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof to A.:"—Held, that, taking the two covenants together, the rent was to be calculated on the amount of coal sold, and not on the amount of money actually received. *Edwards v. Lees*, 7 C. & P. 840—Coleridge.

In an action on an indenture of demise of a coal mine, made on the 8th July, 1803, reserving one-fourth of the coal raised, or the value in money, at the election of the lessor; and if the one-fourth fell short of 400*l.* per annum, then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions:—Held, that the lessor having elected to take the whole in money, might declare for two years and three months' rent in arrear. But even if the money rent was reserved annually, the plaintiff might remit his claim as to the three months' rent, and enter up judgment for the two years' rent only. *Buckley v. Kenyon*, 10 East, 139.

A lease of mines was granted for thirty years in consideration of 250*l.* paid down, and a reservation of 500*l.* to be paid annually during the first ten years, which, with a power of re-entry in case of non-payment, was reserved to the lessor, his heirs and assigns. The payments were to be made clear of all deductions for rates and taxes except property tax, and, if more than one acre per annum was worked, the 500*l.* for that year was to be increased proportionately, but no payments were to be made after the total sum of 5,000*l.* had been thus paid:—Held, that the annual payments of 500*l.* were of the nature of rent, and were not installments of unpaid purchase-money. *Barra v. Lea*, 12 W. R. 525; 33 L. J., Chanc. 437—V. C. W.

In a lease of land for twenty-one years, from 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year, with a proviso that the rent for each subsequent year of the term should be reduced or increased, according to the average price of wheat in any one year of the term, such average to be taken and ascertained from the then 'current year's averages, which were taken in the month of January in every year, under and by virtue of the Tithe Commutation Act, 6 & 7 Will. 4. c. 71, s. 56, which is the result of the sales during seven years ending on Thursday next before Christmas-day then next preceding:—Held, that the rent must be computed according to each septennial average so published in each year. *Kendall v. Baker*, 11 C. B. 542; 16 Jur. 479; 21 L. J., C. P. 110.

**Time for which rent is payable.]**—A subsequent agreement may by relation operate to make a reservation of rent from the beginning. *M'Leish v. Tate*, Cowp. 781.

On a parol demise, rent was to be payable from the Lady-day following:—Held, that evidence of the custom of the country was admissible to show that the parties meant Old Lady-day. *Doe d. Hall v. Benson*, 4 B. & A. 588. S. P. *Denn d. Peters v. Hopkinson*, 3 D. & R. 507.

But parol evidence is not admissible to prove an additional rent payable by a tenant, beyond that expressed in the written agreement for a lease. *Preston v. Moreau*, 2 W. Bl. 1240.

As to commencement and duration of term, —see this title, II., 2.

**At what time rent becomes payable.]**—Under an agreement for the quarterly payment of rent, the first payment becomes due at the end of the first quarter, and the custom of the country to pay rent in advance cannot be imported into it. *Doe d. Mitchell v. Weller*, 1 Jur. 623.

By an agreement dated the 8th September, the defendant agreed to let a house to the plaintiff for seven years, at an annual rent, payable quarterly, the first payment to be made on the 25th of March following:—Held, that a quarter's rent only became due on the 25th March. *Hutchins v. Scott*, 2 M. & W. 809; M. & H. 194.

But under a reddendum of a yearly rent, payable by four equal quarterly payments, commencing from the 25th day of March, then instant, the first quarter's rent is payable on the said 25th day of March; and, consequently, the rent is a beforehand rent. *Hopkins v. Helmore*, 3 N. & P. 453; 8 A. & E. 463; 1 W., W. & H. 386; 2 Jur. 856.

By indenture of 21st March, 1828, a lessor demised a messuage to the tenant, habendum from 25th March then instant, for the term of seven years then next ensuing, wanting seven days, yielding and paying yearly and every year during the term the yearly rent of 285*l.* by four equal quarterly payments, on the 25th March, 24th June, 29th September, and 25th December in every year, commencing from 25th March then instant; and the lessee covenanted to pay the yearly rent of 285*l.* on the days and in the manner appointed:—Held, that 285*l.* was payable for each year; and that either the first payment was to be made on the 25th March, 1828, or a payment on 25th March, 1825, though after the expiration of the term. *Id.*

By a memorandum in writing, A. agreed to let to B. a house at a yearly rent of 50*l.*, with a proviso that A. should, in consideration of the yearly rent being duly paid, give B. quiet possession of the house; and B. agreed to pay the rent, and all taxes. The memorandum concluded thus:—"likewise the stable and loft over, now occupied by H., at a further rent of 25*l.* per annum, to be paid on the usual quarter-days:"—Held, that the reservation of quarterly payments applied only to the 25*l.* rent, and not to the 50*l.* *Coombes v. Howard*, 1 C. B. 410.

A. agreed to let to, and B. agreed to take the second floor in a house, to hold from the

25th of March, 1844, for a twelvemonth certain, and thence for the continuance of the term of A.'s interest in the premises, until determined by a six months' notice from B., expiring at any quarter of a year, at the rent of 120*l.* a year:—Held, that, after the expiration of the first twelve months, the rent continued to be payable yearly. *Collett v. Curling*, 10 Q. B. 785; 11 Jur. 890; 16 L. J., Q. B. 890.

A covenant that half a year's rent shall remain in the hands of the tenant till the last year, means the current half year. — *v. Nicholls*, Loft, 893.

The defendant avowed that the rent was payable at Martinmas, to wit, November 23d:—Held, that this must be taken to mean New Martinmas; and the plaintiff having shown that the rent was, in fact, payable at Old Martinmas, the court refused to set aside a verdict given for him. *Smith v. Walton*, 8 Bing. 235; 1 M. & Scott, 380.

By a memorandum dated the 31st of January, 1840, between B. and J., J. agreed to become the tenant of the S. farm at the customary time of entry, under the following conditions: viz., that 200*l.* annual rent should be paid at the usual time for the house, premises and lands as agreed upon; and B. agreed to lay out in the improvements of the farm-house a sum not exceeding 200*l.*:—Held, that this agreement did not necessarily import, in point of law, that the year's rent was to be payable at the end of the year from the time of entry; but that it might be shown from the contemporaneous or subsequent dealings of the parties, that their understanding was, that the rent should become payable at an earlier period. *Gore v. Loyd*, 12 M. & W. 463; 13 L. J., Exch. 306.

The plaintiff and defendant agreed that the plaintiff should let, and the defendant take, premises, subject to the approval by the superior landlord of the lease; that the plaintiff should forthwith apply to the superior landlord for a license to demise, and for the defendant to carry on a certain trade, and that the defendant, "until the lease should be granted, should hold and occupy the premises at the annual rent of 130*l.*":—Held, that the rent was not payable until the required consents had been obtained. *Brook v. Fletcher and Company*, 37 L. T., N. S. 100—Q. B. Div.

**When rent is payable in advance.]**—Where there was a stipulation for "rent to commence at Michaelmas, and to be paid three months in advance, such advance to be paid on taking possession":—Held, that the stipulation could only go for the advance of the first quarter's rent. *Holland v. Palser*, 2 Stark. 161—Ellenborough.

A. held premises of B. under a lease for three, seven, or ten years, determinable on notice, with a stipulation that the amount of a quarter's rent should be paid by A. on taking possession, which was to be allowed to him for the last quarter's rent "on the determination of the tenancy." After a notice

to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that A. should continue tenant for another year, no express mention being made of the terms of the tenancy:—Held, that the above was, in substance, a stipulation for a forehand rent, and that in the absence of any express mention of other terms, A. continued to hold, subject to the terms of the original lease, and consequently, that the payment made on taking possession was applicable to the last quarter of the fourth year. *Finch v. Miller*, 5 C. B. 428.

In 1851, A. became tenant of premises under terms of a written agreement (not under seal) for a term of three years, the rent payable quarterly in advance. A. occupied the premises for some time, and paid several quarters' rent, and the receipts given to him by the agent of the landlord stated that such payments were in advance, although, in fact, A. never paid the rent in advance:—Held, that although the agreement was void under 8 & 9 Vict. c. 106, s. 8, as not being under seal, still that the receipts taken were ample evidence of the tenancy being upon the terms of the rent being payable quarterly in advance. *Lee v. Smith*, 9 Exch. 662; 2 C. L. R. 1079; 23 L. J., Exch. 108.

By an agreement for the sale of a house and land, 75*l.*, part of the purchase-money, was payable on signing the agreement, and 1,500*l.*, the remainder of the purchase-money, was payable, with interest, on a day certain; and after stipulating for the delivery of an abstract of title and the time within which the title should be deemed accepted, the agreement stated that, as the purchaser was to be let into immediate possession, and for the purpose of securing the due performance of the several agreements therein contained, the purchaser admitted himself to be a tenant from week to week to the vendor of the hereditaments thereby agreed to be sold, at the weekly rent of 80*l.*, payable in advance:—Held, that the agreement gave a right of distress to the vendor for the sum payable as a weekly rent. *Yeoman v. Ellison*, 36 L. J., C. P. 326; 17 L. T., N. S. 65.

An agreement to take a house having been entered into, conditioned to pay two quarters' rent in advance, the tenant entered and failed to perform such condition. In an action to recover that sum:—Held, that a count for use and occupation did not apply to such a case, and that the plaintiff could only recover under a special count on the agreement. *Angell v. Randall*, 16 L. T., N. S. 489—B. C.

**Right to payment in priority.]**—The estate of a deceased lessee, which was being administered by the court, was indebted to the lessor in 210*l.* for rent secured by covenant in the ordinary way:—Held, that the lessor was not entitled, since 33 & 39 Vict. c. 40, to be paid in priority to other creditors. *Shirreff v. Hastings*, 25 W. R. 842; 6 L. R., Ch. Div. 610—V. C. M.

## 2. Destruction of or Injury to Premises; Eviction or Expulsion of Tenant.

**Effect of destruction of whole or part of premises.**—A lessee, who covenants to pay rent and to repair, with an express exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice. *Belfour v. Weston*, 1 T. R. 310.

The defendants were tenants from year to year to the plaintiff of the upper floors of a warehouse, at a rent payable quarterly; the premises were destroyed by an accidental fire in the middle of a quarter, and were wholly untenanted until rebuilt about seven months after:—Held, that the relation of landlord and tenant between the parties was not determined by the destruction of the premises, but that the defendants remained liable for rent until the tenancy should be in the usual manner put an end to, and that such rent was recoverable in an action for use and occupation. *Izon v. Gorton*, 7 Scott, 537; 5 Bing., N. C. 501; 2 Arn. 39; 3 Jur. 653.

Where apartments were occupied under a parol agreement to pay an annual rent quarterly, and they were destroyed by fire in the middle of a quarter:—Held, that the tenant was liable to pay compensation for his actual occupation to the time when it ceased. *Packer v. Gibbins*, 1 G. & D. 10; 5 Jur. 1036; 1 Q. B. 431.

A tenant of premises demised by a written agreement is liable for rent accruing due after the premises have been burnt down, and are no longer habitable. *Baker v. Holtzapfell*, 4 Taunt. 45.

There is no equity in favor of a lessee of a house liable to repair with the exception of damage by fire, for an injunction against an action under the contract for payment of rent, upon the destruction of the house by fire. *Holtzapfell v. Baker*, 18 Ves. 115.

A testator directed his trustees to allow A. to occupy a mill, so long as he should think proper to do so, "he, nevertheless, keeping the premises in good and tenantable repair, and repairing," at a rent of 100*l*. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—Held, that he was bound to reinstate them, and was liable for the rent in the meanwhile, and that he could not escape from the liability to rebuild by declining any longer to retain them. *Gregg v. Coates*, 23 Beav. 33; 2 Jur., N. S. 904.

By an agreement between F., the receiver appointed in chancery for lands and buildings thereon, and J., it was recited that J. had expended money in improving the premises on the understanding that a lease should be granted to him, on the terms after mentioned, pursuant to a previous agreement with parties at the time interested; and that F., in consideration of the premises; and according to his power, agreed with J. to let to him, and J. agreed to take, the land, with the buildings thereon, lately converted at J.'s expense

into a mill, and other things, to hold for twenty-one years, at rent payable quarterly; and it was agreed that, when that agreement should have been approved of by the Court of Chancery, or the master, or if it should be ascertained that such sanction was not necessary, a lease should be executed from F. to J. (and a counterpart by J.), under the terms of the agreement stipulated, which should contain covenants on the part of J. to pay the said rent in manner before mentioned, damage by fire excepted; and that, until the lease should be granted, F. might distrain "for all or any part of the rent hereby agreed to be paid." Provided that the agreement should be in all respects subject to the approbation of the Court of Chancery or the master, F. undertaking to endeavor to obtain such approbation, but if the approbation were refused, the agreement to be void. J. entered into possession and erected new buildings;—Held, that J. was tenant from year to year on such terms as would be inserted in a lease pursuant to the agreement so far as they were applicable to a tenancy from year to year; that, if any part of the premises originally demised was destroyed by fire, the result would be, not to destroy or suspend the whole rent, but to entitle J. to a deduction from the rent according to the proportion which the annual value of the destroyed part bore to the annual value of the whole, taking the whole to be the premises as originally demised, not as improved by subsequent additions made by J. *Bennet v. Ireland*, El., Bl. & El. 326; 28 L. J., Q. B. 48; 4 Jur., N. S. 1104.

**Premises uninhabitable.**—Where premises are held under a parol agreement, by which the landlord is to do the necessary repairs, and the tenant quits because the premises are in an untenanted state, an action for use and occupation is maintainable, though, by the landlord's default, the tenant has not been, and could not be, during the period for which the rent is claimed, in actual beneficial occupation. *Surplice v. Farnsworth*, 7 M. & G. 576; 8 Scott, N. R. 307; 8 Jur. 760; 13 L. J., C. P. 215.

In an action by a landlord for rent, the tenant pleaded, in substance, that through the neglect and default of the landlord the house and premises which formed the subject of the letting had become unfit for habitation, in consequence of defects which the tenant was not bound to rectify, and that, the landlord having refused to remedy these defects when required to do so, the tenant quitted, and gave up to the landlord possession of the house and premises before any of the rent claimed had accrued:—Held, a bad plea. *Murray v. Mace*, 8 Ir. R., C. L. 396—Exch.

As to obligations to repair,—see this title, V., 1.

**What amounts to an eviction or expulsion; and its effect.**—An eviction by a landlord of his tenant from a part of the demised prem-



ises creates a suspension of the entire rent during the continuance of the eviction, but the tenancy is not thereby put an end to, nor is the tenant thereby discharged from the performance of his covenants other than the covenant for the payment of the rent. *Morrison v. Chadwick*, 7 C. B. 266; 6 D. & L. 567; 18 L. J., C. P. 189.

To constitute an eviction of a tenant by his landlord, which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion from any part of the premises; but any act of a permanent character, done by the landlord or by his procurement, with the intention of depriving the tenant of the enjoyment of the premises as demised, or any part of them, will operate as such eviction. *Upton v. Townsend*, 17 C. B. 30; 1 Jur., N. S. 1080; 25 L. J., C. P. 44.

The existence of the intention is a question for the jury. *Ib.*

Where, after a fire on premises let to two different tenants by A., who was entitled to have the premises restored by the superior landlord, out of certain insurance moneys, A. approved of a new plan submitted to him by the superior landlord without the consent of the tenants, and the premises when rebuilt on that plan were, in the one case, a little smaller, and in the other, a little larger than before, and there was evidence of an intention to oust the tenants:—Held, in an action by A. for use and occupation, for rent accruing after the premises were so far advanced in rebuilding as to be permanently altered, that there was an eviction to which A. was a party, and that, therefore, the rent was suspended. *Ib.*

In an action upon a parol demise, a plea, that during the term it was agreed that the tenant should relinquish the possession to the landlord for a month, after which the possession should be resumed by the tenant; and that he did relinquish the possession, but the landlord would not restore the possession, is bad, as not showing an eviction or a surrender. *Dunn v. Di Nuovo*, 8 M. & G. 105; 3 Scott, N. R. 487.

In an action by a landlord against his tenant, on a farming lease, assigning breaches on his covenants:—1. To repair; 2, not to plow meadow land; 3, or depasture orchards; 4, or cut, lop, or injure trees, woods, or plantations; 5, or assign or under-let the premises, or any part thereof, without the landlord's consent in writing; he pleaded that, before any of the breaches assigned, he was evicted and kept out of part of the demised premises by the authority of the plaintiff:—Held, that the plea afforded no defense to the action. *Newton v. Allin*, 1 G. & D. 44; 1 Q. B. 518; 6 Jur. 99.

An owner of a house let the first floor to the defendant, who, being desirous to under-let, put a man in to show the rooms, and put up a bill in the window, stating that the rooms were to be let. The owner, annoyed by this proceeding, and by the conduct of the man, turned him out of the house, and

took the bill down, but left the keys in the rooms. In an action for rent, the judge left it to the jury to say whether the assault upon the man was for the purpose of expelling him, or with the intention of evicting the defendant:—Held, right. *Henderson v. Mears*, 5 Jur., N. S. 709; 28 L. J., Q. B. 305; 7 W. R. 554; *S. C.*, at Nisi Prius, 1 F. & F. 686.

The rent of four houses, demised for a term of years, being in arrear, and the lessee having assigned his lease, and two of the houses being unoccupied, the lessor took possession of these two, first, by putting a police constable in charge of them, and subsequently by putting a person in possession, under a parol agreement to grant a lease of the four houses as soon as possession of the two others was obtained:—Held, that taking possession of the unoccupied houses did not amount to an eviction. *Wheeler v. Stevens*, 6 H. & N. 155; 30 L. J., Exch. 46; 9 W. R. 233; 3 L. T., N. S. 702.

A lessee of mines of ironstone, coals, and other minerals demised the same for a term of years to the defendant, reserving a royalty upon the ore and coal raised by him, or an annual sum in lieu, if the royalties in any year should not amount to that sum, with power to the lessee to distrain for the rents, reservations and royalties, and with liberty to the defendant, during the demise, to use, jointly with the lessee, a railway then on the land demised; the defendant covenanting to repair the same or to do so jointly with others who might use it, he having leave to divert it at his own expense if he thought fit:—Held, that the fact, that the defendant had been prevented by the plaintiff from using the railway, did not constitute an eviction, so as to disentitle the plaintiff to the rent, the use of the railway being an easement, and not part of the demise. *Williams v. Hayward*, 5 Jur., N. S. 1417; 28 L. J., Q. B. 374; 7 W. R. 563; 1 El. & El. 1040.

### 8. Apportionment.

**Statutes.**—[By 11 Geo. 2, c. 19, s. 15, after reciting that, *whereas, where any lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved, or made payable, such rent or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord; nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements, or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the under-tenants, who thereby avoid paying anything for the same; for remedy whereof, it is enacted, that where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and*

from such under-tenant or under-tenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or, if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.

The 4 & 5 Will. 4, c. 23, reciting the above section, and that doubts have been entertained whether the provisions of that act applied to every case, in which the interests of tenants determined on the death of the person by whom such interests have been created, and on the death of any life or lives, for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the act, and that it is desirable that such doubts should be removed by a declaratory law; and also reciting that by law, rents, annuities and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands, and other evils arise from such rents, annuities and other payments not being apportionable, which evils require remedy, enacts and declares, that rents reserved and made payable on any demise or lease of lands, tenements or hereditaments, which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases and recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be deemed within the 11 Geo. 2, c. 19.

By s. 2, from and after the passing of this act (16 June, 1834), all rents-service reserved on any lease by a tenant in fee, of or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of the act, and all rents-charge and other rents, annuities, pensions, moduses, compositions, and all other payments of every description in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods, under any instrument that shall be executed after the passing of the act, or (being a will or testamentary instrument) that shall come into operation after such date, shall be apportioned so and in such manner, that on the death of any person interested in any such rents, &c., or on the determination by any other means whatsoever of the interest of any such person, he or she and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, &c., according to the time which shall have elapsed from the

commencement or last period of payment thereof, including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, &c., being made, and that every such person, his executors, administrators or assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, &c., when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, as he, she or they would have had for recovering and obtaining such entire rents, &c., if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents, of which such portions shall form a part, shall be received and recovered by the person or persons who, if the act had not passed, would have been entitled to such entire rents, and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action at law or suit in equity.

By s. 3, these provisions are not to apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description.]

Commissioners under the powers of a private act purchased land lying partly in two parishes, for the purpose of forming a metropolitan road, and charged it with the payment of an annual rent. By the Metropolis Roads Act, 1863, 26 & 27 Vict. c. 73, s. 4, it was provided that so much of the road as lay within any parish mentioned in a schedule, which included the two parishes, should be dealt with as part of the common highways of the parish, and all quit-rents and other outgoings payable in respect thereof should be paid as part of the expenses of maintenance:—Held, that the effect of the act was to apportion the rent between the two parishes; and that the representatives of the person from whom the land was bought were entitled to recover from each of the parishes a proportional part of the rent; and that the proper form of declaration was one framed on the statute, and not for use and occupation. *Sansom v. St. Leonard (Vestry)*, *Shoreditch*, 4 L. R., C. P. 654; 38 L. J., C. P. 286; 18 W. R. 40.

**What rents apportionable.**—Upon the death of a tenant in tail, the rent shall be apportioned. *Payel v. Gee*, Amb. 198; 3 Swans. 604. S. P., *Baillie v. Lockhart*, 2 Macq. H. L. Cas. 253.

Land-tax, quit-rent, &c., are not apportionable as between tenant for life and remainderman. *Sutton v. Chaplin*, 10 Ves. 66.

A lessee of 100 acres of land accepted the lease, and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became

due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. The prior lease was for a term extending beyond the duration of the latter lease:—Held, that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable, and the lessor was not entitled to distrain for the whole rent or any part of it. *Neale v. Mackenzie* (in error), 1 M. & W. 747; 2 Gale, 174—Exch. Cham.; reversing the judgment of the Court of Exchequer, in 2 C., M. & R. 84; 1 Gale, 119; 5 Tyr. 1106.

The 4 & 5 Will. 4, c. 22, s. 2, does not apply to rents payable by tenants from year to year, which have not been reserved by an instrument in writing. *Markby, In re*, 4 Mylne & C. 484; 8 Jur. 767.

The 4 & 5 Will. 4, c. 22, s. 2, applies to cases in which the interest of the person interested in such rents is terminated by his death, or by the death of another person; but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representatives of such person, whose interest is not terminated at his death. *Broune v. Amyot*, 3 Hare, 173; 13 L. J., Chanc. 232; confirmed by *Beer v. Beer*, 12 C. B. 60; 16 Jur. 223; 21 L. J., C. P. 124.

The 4 & 5 Will. 4, c. 22, s. 2, applies to rents reserved by leases granted after the passing of the act, in pursuance of a power created before the act. *Plummer v. Whiteley*, Johns. 585; 29 L. J., Chanc. 247; 5 Jur., N. S. 1416. S. P., *Lock v. De Burgh*, 4 De G. & S. 470; 15 Jur. 961; 20 L. J., Chanc. 384.

The 4 & 5 Will. 4, c. 22, applies where either the instrument creating the life interest or the lease under which the rent is payable is dated after the statute. *Llewellyn v. Rous*, 12 Jur., N. S. 580; 35 Beav. 591.

An equitable tenant for life under a settlement of freehold leases for lives, obtained a renewed grant for lives to himself. At his death the property was in the occupation of yearly tenants, under parol demises by him:—Held, that the rents were not apportionable either under 11 Geo. 2, c. 19, or under 4 & 5 Will. 4, c. 22. *Mills v. Trumper*, 4 L. R., Ch. 320; 17 W. R. 428; 20 L. T., N. S. 384; overruling *S. C.*, 1 L. R., Eq. 671; 12 Jur., N. S. 329; 14 L. T., N. S. 220; 14 W. R. 630—V. C. S.

The 4 & 5 Will. 4, c. 22, applies to a case of an expiration of a term in trustees to accumulate rents, for payment of debts, legacies and other charges, with remainder to a tenant for life; as well as to the case of an estate for life to A., remainder to B. *St. Aubyn v. St. Aubyn*, 1 Drew. & Sm. 613; 30 L. J., Chanc. 917; 9 W. R. 922; 5 L. T., N. S. 519.

But the act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents, payable at uncertain periods; such as royalties payable upon the selling of ore from a mine. *Id.*

The 4 & 5 Will. 4, c. 22, does not apply to rents reserved by parol. *Cattley v. Arnold*,

1 Johns. & H. 651; 5 Jur., N. S. 361; 28 L. J., Chanc. 352. S. P., *Alexander, In re*, 4 Ir. Chanc. R. 257—R.

Therefore, where an owner of the fee demised by parol to tenants from year to year, and died, having devised the estates to a tenant for life, with remainder over:—Held, upon the death of the tenant for life, that the remainderman was entitled to the whole of the rents accruing for the half-year in which he died, without apportionment. *Id.*

So, also, where the parol demise originated with the tenant for life. *Id.*

A testator, whose will came into operation before 4 & 5 Will. 4, c. 22, gave the rents of his real estates to his son after he should attain twenty-one, and directed personal estate to be invested in funds or securities, with power to invest in land. The son attained his majority in July, 1854:—Held, that he was entitled to receive the whole of the rents which became due in September on the devised estates and on the purchased estates, without regard to the date of the leases under which the rents became payable. *Fletcher v. Moore*, 3 Jur., N. S. 458; 26 L. J., Chanc. 530—V. C. K.

A devise was in trust for one for life, the remainder for his first and other sons in tail, remainder for testator's own right heirs. The devisee for life proved to be heir-at-law of the testator, and died intestate and without leaving issue:—Held, that notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a determination of his interest, within the meaning of 4 & 5 Will. 4, c. 22, and therefore the rents were not apportionable between his heir and his personal representative. *Olulow, In re*, 3 Kay & J. 689; 26 L. J., Chanc. 513.

A died in 1838, having, by will, given real estates to trustees, in trust, after keeping up his mansion, to pay five-eighths of the net rents to his widow for life. The widow died in 1847, and rents were receivable on the next rent day, under leases created by A. anterior to 4 & 5 Will. 4, c. 22:—Held, that the rents were apportionable. *Knight v. Boughton*, 13 Beav. 812; 19 L. J., Chanc. 66.

The 4 & 5 Will. 4, c. 22, extends to Scotland. *Fordyce v. Bridges*, 1 H. L. Cas. 1.

The Apportionment Act, 1870, 33 & 34 Vict. c. 35, applies to a specific devise of real estate, and generally as between the real and personal representatives; and that in a case where a will has been made before, and the testator has died after the passing of the act. *Hasluck v. Pedley*, 44 L. J., Chanc. 143; 19 L. R., Eq. 271; 23 W. R. 155—R.

A testator seized in fee devised real estate by a will dated before the Apportionment Act, 1870, 33 & 34 Vict. c. 35, and confirmed by a codicil dated after the act:—Held, that the rents were apportionable between the executor and the devisee. *Capron v. Capron*, 17 L. R., Eq. 288; 43 L. J., Chanc. 677; 22 W. R. 847; 29 L. T., N. S. 826—V. C. M.

Semble, that the result would have been the same without the codicil. *Ib.*

The 33 & 34 Vict. c. 35, has not the effect of altering the usual contract of purchase, so as to entitle a purchaser to obtain, out of the purchase money lodged by him, the portion of the head-rent from the last gale day to the time of his purchase. *Keillor, In re*, 6 Ir. R., Eq. 329.

Since the Apportionment Act, 1870, a devise of the testator's estate in fee does not, per se, pass rent which had accrued at the time of his death. *Roseingrace v. Burke*, 7 Ir. R., Eq. 186—V. C.

**In what cases apportionment may be made.]**

—A lease for years by a rector having ceased by his death, the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor died:—Held, that the executor was entitled to an apportionment. *Hawkins v. Kelly*, 8 Ves. 808.

Semble, that if an act of parliament takes away a portion of the subject-matter of a demise, the lessee is not entitled to an apportionment of the rent. *Harris v. Morrice*, 10 M. & W. 260; 12 L. J., Exch. 43.

The 4 & 5 Will. 4, c. 22, s. 2. does not apply to cases where the party entitled to the rent himself puts an end to the term. *Oldenshaw v. Holt*, 4 P. & D. 807; 12 A. & E. 590; 1 A. & H. 1; 4 Jur. 1012.

A., in 1836, let land to B. under a building agreement; the rent was to commence at Christmas, 1838, and A. to have a right of re-entry in case of non-performance on the part of B. A. availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st January, 1839. In September, 1838, he had re-let the land to C., at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement. In an action by A. for breaking the first agreement:—Held, first, that the demise in the ejectment was to be taken as the date of the re-entry by A.; and that he was not entitled to that portion of the rent between the previous Christmas and that day, under 4 & 5 Will. 4, c. 22, s. 2. *Ib.*

Held, that, secondly, it was properly left to the jury, as a mere money calculation, to say whether A. had sustained more than nominal damages by breach of the agreement. *Ib.*

The devisee of an estate for life is not entitled, as against him in remainder, to an apportionment of rents upon parol leases from year to year, created by his testator, and not since determined by himself by any act inter vivos. *Cattley v. Arnold*, 1 Johns. & H. 651; 5 Jur., N. S. 361; 28 L. J., Chanc. 352.

A tenant from year to year has a lease for a year certain, with a growing interest, during every year thereafter, springing out of the original contract, and parcel of it; and therefore, where such a tenancy has been created by an owner in fee of lands, who devises them to one for life with remainders over, the interest of the tenant from year to year,

unless terminated by the devisee for life by some act inter vivos, does not determine upon the decease of the tenant for life; and, consequently, the rent then accruing due is not apportionable under 11 Geo. 2, c. 19, s. 15. *Ib.*

A. by will directed that, for twenty-one years next after his death, his trustees should receive and accumulate the rents and profits of his real estate, and apply towards payment of his debts and legacies, and, subject to that term, he gave the beneficial interest in the income of his estate, to B. for life:—Held, under 4 & 5 Will. 4, c. 22, s. 2, that the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested in the accumulations, and the tenant for life, who was entitled on the expiration of the term. *St. Aubyn v. St. Aubyn*, 30 L. J., Chanc. 917; 9 W. R. 922; 5 L. T., N. S. 519; 1 Drew. & Sm. 611.

A tenant in fee demised lands from year to year. He died, having devised the lands for life. The devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy:—Held, that the administrator of the tenant for life was not entitled to an apportionment of the rent under 11 Geo. 2, c. 19, s. 15. *Botheroyd v. Woolley*, 5 Tyr. 522; 1 Gale, 66.

C. occupied two parcels of land upon an understanding that he should let off a portion of it when he could. He paid the rent agreed upon for more than a year, and he then let off a portion of each parcel to A. and B. separately, who paid rent to D., and C. continued to hold the residue himself. The rent becoming in arrear, the landlord distrained:—Held, that there was evidence that the rent was apportionable, and that the landlord was entitled to distrain. *Fletcher v. Trotman*, 6 L. T., N. S. 218—Exch. Cham.

The Apportionment Act, 4 & 5 Will. 4, c. 22, s. 2, is not intended to apply as between a mortgagee, of a tenant for life, who has no entered and a remainderman, so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived. *Paget v. Anglesea, Watkins' claim*, 43 L. J., Chanc. 487; 17 L. R., Eq. 288; 22 W. R. 507—R.

**How apportionment may be made.]**—Where a lease was made to A. of two houses adjoining each other, at one entire rent of 65l. 10s., and the lessor conveyed one of the houses by deed (to which the lessee was no party) to B. in fee, at an apportioned rent of 40l.:—Held, that such apportionment should have been made by a jury to give it validity, inasmuch as the grantee had not acquired the same rights and remedies against A., the lessee, as he would have acquired under the legal apportionment by a jury; the lessee not being bound by the apportionment in the conveyance to which he was no party, and the propriety of which he might dispute. *Bliss v. Collins*, 1 D. & R. 201; 5 B. & A. 876.

When a gift of part of a farm, subject to an entire rent, described it as "containing about ninety-eight acres, subject to the proportion of rent same bears to the whole," and the gift of the other part of the farm had described it as "containing about twenty acres, subject to the proportion of rent to which the entire of the lands is subject," the proportion of the rent to be borne by the twenty acres and ninety-eight acres respectively is to be determined by their relative value, and not by acreage. *O'Connor v. O'Connor*, 10 W. R. 60—Ir. R.

As to apportionment upon assignment or severance of reversion,—see this title, IX.

#### 4. Payment; Set-off; Recovering back Rent paid.

**How payment is made; and what amounts to a satisfaction of the rent, generally.]**

—A covenant for the payment of rent, at a specified time, when no particular place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain, and it is accordingly incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money. *Haldane v. Johnson*, 8 Exch. 689; 17 Jur. 937; 23 L. J., Exch. 264.

A tenant having made payments to his landlord, and also advances at his request to a firm of which he was a member, on account (as the tenant alleged) of rent not then due:—Held, that if the advances were made on account of the rent, they were an answer to an action for the rent by the landlord's executors. *Nash v. Gray*, 2 F. & F. 391—Byles.

On the trial of an ejectment in 1835, between landlord and tenant, a verdict was taken by consent for the plaintiff, it being then agreed that the defendant "is not to be called upon for any rent now due." The defendant had, with another person, given a promissory note to his landlord, to secure the payment of a half-year's rent due at Lady-day, 1834:—Held, that this agreement extinguished the landlord's claim on the note. *Howell v. Lewis*, 7 C. & P. 560—Denman.

The payment of rent by a tenant to an authorized agent, who pays over the rent to his principal, is evidence as against the tenant of the principal's title, although the agent does not disclose his principal's name at the time. *Hitchings v. Thompson*, 5 Exch. 50; 19 L. J., Exch. 140.

B. leased a farm to A. for fourteen years, by deed, reserving rent payable quarterly. The lease contained various clauses by which A. and B. agreed to do certain things, and concluded with the following clause: "And the landlord further agrees and orders that K., or his appointed agent, is to receive all rents from the tenant at all times when it becomes due during the term hereby granted, and his receipt to be a full and sufficient discharge from all liability."—Held, that, K. having no interest in the rent, the agreement or authority for him to receive it was revo-

cable. *Venning v. Bray*, 2 B. & S. 502; 8 Jur., N. S. 1039; 31 L. J., Q. B. 181; 10 W. R. 56; 6 L. T., N. S. 327.

As to time when rent is payable,—see this title, VII., 1.

**Right to set off, against rent, payments of ground rent or other charges.]**—A payment of ground rent by the occupier, in default of the mesne tenant, will operate as a discharge of the growing rent as well as of the rent actually due. *Carter v. Carter*, 5 Bing. 406; 2 M. & P. 723.

A plaintiff in replevin cannot plead in bar a set-off to an avowry for rent. *Laycock v. Tuffnell*, 2 Chit. 531.

But, to an avowry for rent, the tenant may plead payment of a ground rent to the original landlord. *Sapsford v. Fletcher*, 4 T. R. 511.

So, to an avowry for rent, the plaintiff in replevin may plead payment of an annuity, secured out of the lands demised, previously to the demise to him, for the arrears of which the grantee of the annuity threatened to distrain. *Taylor v. Zamira*, 2 Marsh. 220; 6 Taunt. 524.

In an action on a covenant for rent, the defendant pleaded that he was under-tenant of parcel of certain premises, for the whole of which the plaintiff, his lessor, covenanted to pay rent to the landlord paramount, and showed that he, the defendant, paid to the landlord paramount, under threat of distress, more rent than he owed to the plaintiff; the plaintiff traversed that any rent was due from himself to the landlord paramount:—Held, that this replication was not supported by proving that the plaintiff assigned his term in the residue of the premises to K., who assigned them to the defendant, who covenanted to pay in discharge of the plaintiff the whole rent reserved to the landlord paramount. *Sturges v. Farrington*, 4 Taunt. 614.

If a tenant, with the assent of his landlord, pays interest upon a mortgage charged on the premises demised, it is equivalent to a payment of rent pro tanto. *Dyer v. Bowley*, 9 Moore, 196; 2 Bing. 94.

To an avowry of a distress for rent the plaintiff pleaded that, before the defendant had any interest in the premises, they were mortgaged in fee; that the mortgagor remained in possession, and demised to the defendant; that the defendant, the mortgage money being still due, demised to the plaintiff; that afterwards, the mortgage-money being still due, and interest thereon, and 14*l.*, avowed for by the defendant, being also in arrear, the mortgagee gave notice to the plaintiff to pay the 14*l.* to him, instead of the defendant, and threatened, in case of non-payment, to put the law in force, and was then about to put the law in force, wherefore the plaintiff necessarily paid that sum to the mortgagee, and so the said sum was not in arrear:—Held, that the plea was good, being a plea of payment, and not of *nil habuit in tenementis*. *Johnson v. Jones*, 1 P. & D. 651; 9 A. & E. 809.

To an avowry for rent a plea in bar of payment to a ground landlord or other incumbrancer amounts to a plea of *riens in arriere*, and should be so pleaded. *Jones v. Morris*, 3 Exch. 742; 18 L. J., Exch. 477.

To an action for two years and a half rent, a plea, that, before the premises were demised to the defendant by the plaintiff, the plaintiff conveyed all her interest therein to A.; that the plaintiff, up to the time of the demise, was in possession of the premises; that, after the commencement of the suit, A. gave notice to the defendant, and demanded payment of such portion of the rent reserved as might, on a just apportionment, be found due, and threatened the defendant, in case of non-payment, to eject him, and put the law in force; that 40*l.* 10*s.* was the sum due on a just apportionment, wherefore the defendant paid the same to A., is bad, as a plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land or of any debt due from A. *Boodle v. Cambell*, 8 Scott, N. R. 104; 2 D. & L. 60; 7 M. & G. 386; 8 Jur. 475; 18 L. J., C. P. 142.

In 1840, A., being lessee of a warehouse and cellar, under a demise from B., and also lessee, under C., of other adjoining property, comprising a vault, D. became tenant from year to year to A. of the warehouse and cellar, and the vault, at an annual rent of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th October, 1845, A. became bankrupt, 92*l.* 10*s.* being at that time due as rent from D. to A. His assignees, upon being appointed, elected to take the property held under B., and on 26th of February, 1846, elected not to take the property held under C. At Christmas, 1845, rent to the amount of 114*l.* 7*s.* 6*d.* became due from A. to C., for which amount, on the 19th February, 1846, C. distrained upon the goods in the vault held by D., who, to relieve himself of that distress, paid that sum to C. An action having subsequently been brought by the assignees of A. against D., to recover the 92*l.* 10*s.*, and also 35*l.* for a quarter's rent, due at Christmas, 1845, for the warehouse and cellar:—Held, that D. was not entitled in such action to avail himself of the payment of 114*l.* 7*s.* 6*d.*, made by him to C. *Graham v. Allsopp*, 8 Exch. 186; 18 L. J., Exch. 85.

On a bill in equity for an injunction to restrain proceedings at law for rent, on the ground of an agreement under which the landlord was indebted more than the amount of the rent:—Held, that it was a legal set-off. *Townrow v. Benson*, 8 Madd. 203.

A. rented land of B., who was trustee of property (a part of which was this land), the rents of which B. was to pay in certain shares; one of those shares belonged to the wife of A.; B. having in his hands a greater amount due to A. in right of his wife than the rent amounted to:—Held, that this could not be set off against the rent without a special agreement to that effect. *Wilson v. Davenport*, 5 C. & P. 581—Parker.

Where a tenant of leaseholds, who had paid

certain rents to one of the persons beneficially entitled thereto, filed a bill against the landlord, claiming to set off such payments and a private debt due from the landlord, against the rent due to the landlord as trustee, a demurrer for want of equity was allowed. *Pratt v. Keith*, 10 Jur., N. S. 305; 33 L. J., Chanc. 528—V. C. K.

By an agreement that a lessee should spend 200*l.* in repairs, to be inspected and approved of by the lessor, and to be done in a substantial manner, the lessee was to be allowed to retain the sum out of the first year's rent of the premises:—Held, that the lessor's approval was not a condition precedent to the lessee's retaining the rent. *Dallman v. King*, 4 Bing. N. C. 105; 5 Scott, 382; 3 Hodges, 283.

As to right of tenants to deduct rates and taxes from rent,—see this title, VI., 2.

**Effect of payment and receipt.**—Submitting to a distress or paying rent is only a *prima facie* evidence of a landlord's title as against a tenant. *Cox v. Knight*, 18 C. B. 645; 25 L. J., C. P. 314.

Where the only evidence of a tenancy is payment of rent, the person paying is in all cases at liberty to explain the payment and to show on whose behalf it was received. *Doe d. Harvey v. Francis*, 2 M. & Rob. 57—Patteson.

Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made, for the purpose of repelling such implication. *Doe d. Lord v. Crago*, 6 C. B. 90; 12 Jur. 705; 17 L. J., C. P. 263.

In an action by overseers for use and occupation, and for rent of parish lands, evidence that the defendant and his ancestors had for upwards of a century, up to the last ten years, paid rent for the land as "common land" (he refusing to produce the deeds under which he professed to hold), is sufficient evidence to go to the jury, in the absence of any evidence that the payments were made by way of chief rent or rent-charge. *Harden v. Heaketh*, 28 L. J., Exch. 137.

A payment of rent by mistake or misrepresentation, to a person not entitled to demand it, does not preclude the tenant from showing that the person to whom it was paid was not entitled to it. *Rogers v. Pitcher*, 1 Marsh. 541; 6 Taunt. 202.

The receipt of rent is no waiver of a continuing breach of covenant. *Doe d. Batter or Baker v. Jones*, 5 Exch. 408; 19 L. J., Exch. 405.

In 1635 the Earl of Pembroke became tenant, either at will or from year to year, of six acres and a half of charity lands lying interspersed within his Roehampton estate, for which 6*l.* per annum had ever since been paid. In course of time this estate became split up into several portions, passing into the hands of new purchasers from time to time. From recitals in early conveyances it appeared that the whole estate was treated as subject to this

charge of 6*l.* per annum; together with three other perpetual charges of 40*l.*, 10*l.*, and 1*l.* per annum. According as parts of the estate were sold off, those parts were exonerated from these charges; until at last the mansion-house and thirty-one acres of the estate, the property of the defendant, alone remained charged therewith. The defendant and his ancestor had paid this 6*l.* per annum for many years. Upon an information by the trustees of the charity for a commission to mark out the boundaries of the six acres and a half:—Held, that although the defendant had for a long series of years paid the 6*l.* to the parish, upon receipts purporting to be for rent of parish land, he was not precluded from saying that he did not hold the land; and that he was at liberty to refer to his title-deeds to show the animus solventis, and to rebut the entries in the parish books, which were relied on to show that he had by his payments admitted himself to be an occupier of parish land. *Att. Gen. v. Stephens*, 6 De G., M. & G. 111; 2 Jur., N. S. 51; 25 L. J., Chanc. 888.

The plaintiffs were children of L. The tenant paid rents to an agent of the family, who gave a receipt "on account of the family of the late Mrs. L."—Held, evidence of a joint letting, and of a tenancy to them jointly. *Last v. Dinn*, 28 L. J., Exch. 94.

B., having leased his land to the plaintiff at a rent payable quarterly, subsequently mortgaged the land to the defendant, who allowed B. to remain in receipt of the rent. Subsequently to the mortgage, B. applied to the plaintiff, who was not aware of the mortgage, to pay him a year's rent in advance, and the plaintiff did so. After the payment, and before the rent had become due, the defendant gave notice to the plaintiff to pay the rent to him, and the plaintiff refusing to pay it, the defendant distrained for it:—Held, that payment of the rent before it became due was not a good payment as against the mortgagee, and that the plaintiff was still liable to pay him the rent. *De Nicholls v. Saunders*, 5 L. R., C. P. 589; 39 L. J., C. P. 297; 18 W. R. 1106.

An alteration in the landlord's receipts for rent, of the names of the occupying tenants, does not, unless known to have been assented to by all the parties interested, afford any evidence from which can be inferred either a change of the tenancy or a transfer of the legal rights. *Bourke v. Bourke*, 8 Ir. R., C. L. 221—C. P.

As to confirmation of lease by receipt of rent,—see this title, I., 2.

As to tenancy from year to year, arising from receipt of rent,—see this title, XVI.

**Recovery back by tenant, of money paid as rent.**—If A., who is tenant for life, subject to forfeiture, with remainder over to B., leases to C. for a term, and afterwards, apprehending that he has forfeited, acquiesces in B.'s claiming and receiving the rent from C., his executor may, on showing that he

acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B. *Williams v. Bartholomew*, 1 B. & P. 326.

Where a tenant *pur autre vie* pays rent by mistake, after the life has dropped, he may recover back the rent, as money had and received, such action not being brought for the purpose of trying the title to the land. *Barber v. Brown*, 1 C. B., N. S. 121; 3 Jur., N. S. 18; 20 L. J., C. P. 41.

As to recovery of money paid as rates and taxes,—see this title, VI., 1.

### 5. Remedies for Recovery.

#### (a) Actions.

**When action lies; defenses, &c.]**—An action lies for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor, under such re-entry, is to have the premises again, "as if the indenture had never been made." *Hartshorne v. Watson*, 4 Bing. N. C. 178; 5 Scott, 506; 6 D. P. C. 404; 1 Arn. 15; 2 Jur. 155.

Where premises are demised by indenture at an entire rent, and there is a covenant by the lessee to pay such rent, no action for rent in arrear can be brought on such covenant, unless the lessee has been let into the full possession of the premises demised. *Holgate v. Kay*, 1 C. & K. 341—Rolfe.

Where, in such an action, the defendant in his plea sets forth the lease, and then avers, that "he entered and was possessed" of the premises thereunder, this will not estop him from proving, that, when he entered, he found some part of the premises in the possession of a third party under an adverse title. *Id.*

By a lease it was stipulated that the lessees should be at liberty to retain a rent of 1,100*l.* a year, or any part thereof, upon giving the lessor a bond to pay whatever they so retained, at the end of seventeen years, with interest. The lessees having omitted to pay the rent or give a bond, and the lessor having sued for the rent, the court refused to stay proceedings, on an affidavit, that, since the commencement of the suit, the lessees had executed and tendered to the lessor a bond for the amount retained and to be retained. *Jones v. Wingfield*, 3 M. & S. 846; 10 Bing. 308.

In an action for rent, where the title to the land is not in question, the tenant is estopped from saying the lease is not a good one; as that being a lease for lives it could not be granted without livery of seizin, or by lease and release, or bargain and sale; and that being a lease of a freehold it could not commence in futuro; for let the lease be what it will, the covenant is good; and, if otherwise, the tenant might enjoy the land, and yet the landlord have no remedy for his rent. *Monroe v. Kerry*, 1 Bro. P. C. 67.

S. and M. carried on business in premises rented by M. of C. Being about to dissolve partnership, their respective attorneys gave a

joint order to an auctioneer to take possession of the goods upon the premises, to "realize the same with all convenient dispatch, and to hold the proceeds as stakeholder until we shall join in directing you as to the disposition thereof." The auctioneer took possession, and sold the goods by auction, under conditions, one of which was as follows:—"Each lot shall be paid for immediately after the sale and previously to its removal. Each and all lots shall be taken to be delivered at the fall of the hammer, after which time they shall remain and be at the exclusive risk of the purchasers, and the auctioneer shall not be called upon for compensation for any injury or loss sustained after that time." After the lots were sold, but before all had been taken away by the purchasers, the agent of C. told the auctioneer that he could not allow the things to go until he was paid rent then in arrear. The rent was the private debt of M., who asked the auctioneer to pay it out of the proceeds of the sale. S. gave him notice not to pay the rent, and the attorneys gave him notice to pay the net proceeds to S., he being entitled to the whole. The auctioneer paid the rent to C., and the balance of the proceeds to S.:—Held, that the auctioneer was not justified in paying the rent, and that S. was entitled to maintain an action against him to recover the residue of the proceeds. *Sweeting v. Turner*, 41 L. J., Q. B. 58; 7 L. R., Q. B. 310.

The 8 Anne, c. 14, s. 1, applies only to a case where there is a subsisting tenancy; and therefore, where the sheriff seizes goods after the tenancy has been determined, he will not be liable to an action for selling the goods upon the land without paying over a year's arrears of rent to the landlord. *Cox v. Leigh*, 48 L. J., Q. B. 123; 9 L. R., Q. B. 333; 22 W. R. 780; 30 L. T., N. S. 494.

As to effect of assignment of lease,—see this title, VIII.; of rent,—see this title, IX.

As to limitation of actions for rent,—see LIMITATION OF ACTIONS AND SUITS.

**Form of action.**—[By 8 Anne, c. 14, s. 4, debt may be brought against tenants for lives for rent.]

In debt for rent by the assignee of the lessor, the venue is local, but, in covenant under the same circumstances, it is transitory. *Thrane v. Cornwall*, 1 Wils. 165.

The assignee of rent may maintain debt for arrears of the rent. *Allen v. Bryan*, 5 B. & C. 512.

Debt lies on an express covenant for payment of a freehold rent charged on land conveyed in fee. *Varley v. Leigh*, 2 Exch. 446; 17 L. J., Exch. 280.

A landlord cannot maintain an action of covenant for rent against an under-tenant. *Halford v. Hatch*, 1 Dougl. 183.

**Declarations.**—In schedule B., Common Law Procedure Act, 1852, the following form, No. 23, of count upon a lease for rent, is given: "That the plaintiff let to the de-

fendant a house, No. 401 Piccadilly, for seven years, to hold from the — day of —, A. D. —, at £— a year, payable quarterly, of which rent — quarters are due and unpaid."

A declaration for rent stated a demise of a messuage, land, and premises with the appurtenances. The proof was of a demise of a messuage and land, together with the furniture, utensils, and implements:—Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of the real property, and therefore there was no variance. *Farewell v. Dickenson*, 6 B. & C. 251; 9 D. & R. 345.

The proper mode of declaring in an action on a covenant in a lease, is to set out, that by indenture certain premises therein mentioned were demised, without stating them particularly, subject among other things to a proviso, setting out the substance of the covenant and the breach. *Dundas v. Weymouth*, Cowp. 665.

A declaration at the suit of the executor of a termor, for a breach of covenant after the death of the termor, should state the interest and title of the latter in the premises. *Mackay v. Mackreth*, 2 Chit. 461; 4 Dougl. 213.

A declaration for rent, by the assignee of a reversion for the life of a third person, against the assignee of the term, omitted to aver that the cestui que vie was living when the rent accrued due:—Held, that the continuance of the life was not to be implied from the mere assertion of title; and an averment in the breach, that, "after the plaintiff became so seized the rent became due, and still is in arrear to the plaintiff," was insufficient, and that the declaration was bad on general demurrer. *Fryer v. Coombs*, 4 P. & D. 120, n.; 11 A. & E. 403.

In an action for non-payment of rent, on an indenture, by assignee of the lessor against the lessee, the declaration alleged that the lessor was possessed for the remainder of a term of 23 years, commencing from the 25th December, 1797, and that, on the 7th of March, 1811, he, by indenture, demised to the defendant to hold from the 20th of December then last past. Plea, that the lessor was not at the time of making the indenture possessed for the residue of the term as alleged:—Held, that such plea was good on general demurrer, as the averment in the declaration was material and traversable. *Carvick v. Blagrove*, 4 Moore, 303; 1 B. & B. 531.

**Pleas.**—In an action on a covenant for seven quarters' rent, a plea showing a surrender before the last four of the seven quarters rent accrued, is bad on demurrer, because it does not go to the whole breach, and the breach is not entire, but part of it may be proved. *Barnard v. Duthy*, 5 Taunt. 27.

If both lessee and lessor sign a lease, the former is estopped to plead nil habuit in tene-



mentis to an action of debt for rent by the lessor. *Wilkins v. Wingate*, 6 T. R. 62.

Riens in arrears is a good plea to an action of debt for rent. *Warner v. Theobald*, Cowp. 588.

If one is sued for rent he cannot, under a plea of never indebted, avail himself of a part payment of money obtained under a distress, or of a judgment obtained against him in a county court for part of the same rent. *Harmer v. Bean*, 3 C. & K. 307—Parke.

A declaration alleged a demise to the defendant of a messuage for forty-five years, at a rent payable quarterly, and averred that two years and a quarter's rent was due. Plea, that before that rent became due, it was agreed that the defendant should deliver up the messuage, and that, in consideration thereof, the defendant should be discharged from all liability to pay the rent which should subsequently accrue; that the defendant did deliver up the premises, and that the plaintiff accepted the possession thereof, and that the tenancy, and the defendant's interest in the premises, were thereby then surrendered and extinguished:—Held, after verdict, that the plea did not set up a surrender of the tenancy, but afforded a valid excuse for the non-payment of the rent. *George v. Wright*, 1 W., W. & H. 266; nom. *Gore v. Wright*, 3 Nev. & P. 243; 8 Ad. & E. 118; 2 Jur. 840.

Action for 163*l.* 10*s.* for fifty-two weeks' rent on a parol demise for twelve months, from the 25th of February, 1839 (Monday), at 8*l.* 3*s.* per week. A plea, as to so much of the rent as accrued due before and on the 27th of July, 1839 (Saturday), payment and acceptance in satisfaction, is bad, as no weekly rent could have become due on the latter day, and no apportionment of the rent for the fraction of a week was shown. *Dunn v. Di Nuovo*, 3 M. & G. 105; 3 Scott, N. R. 487.

Action on an indenture, whereby the tenant covenanted to pay the rent of 50*l.* half-yearly, and, over and above the reserved rent, the further yearly rent of 5*l.* for every acre of the demised premises which the defendant should convert into tillage, over and above one-third part thereof. Breach assigned for over-tillage, whereby the defendant became liable to pay 75*l.* additional rent. Pleas, first, that the plaintiff, with a full knowledge of the supposed breaches of covenant, accepted and received from the defendant 25*l.* as and for all the rent due in respect of the premises, up to and inclusive, &c. (covering the time alleged in the breach), without demanding or requiring the payment of such penalty or additional rent, and thereby then and there waived, gave up, and dispensed with his right to receive or recover any nomine pœnæ, or penalty, or such additional rent; and, secondly, that the plaintiff, with a full knowledge, waived, gave up, and dispensed with all claim or right on his part to receive, recover, or to be paid such penalty, nomine pœnæ, or additional rent:—Held, that both

pleas were insufficient. *Denton v. Richmond*, 1 C. & M. 784; 3 Tyr. 630.

In an action for non-payment of rent, on an indenture by husband and wife, and under seal of the wife (according to the provisions of the 32 Hen. 8, c. 28, s. 3), the declaration stated that the husband and his wife, since deceased, demised the premises to the defendant for twenty-one years, and that he covenanted to pay rent to the husband and wife, and heirs of the wife; that the wife died, and that, after her decease, rent became due to her husband: plea, that the husband never had anything in the premises, but in right of his wife, whose estate they were, and that she died before the rent became due, without issue, and that her heir threatened to eject the defendant unless he would attorn and become tenant to him, and that he was accordingly obliged to do so:—Held, that it was not necessary for the defendant to show actual eviction by the heir, and that the plea was a discharge to the action; on the grounds, that the lease was not voidable by the heir, but was a good and subsisting lease, and that he was only entitled to the rent, and could not have entered to evict or eject the defendant without being considered as a trespasser. *Hill v. Saunders* (in error), 7 D. & R. 17; 4 B. & C. 529; 9 Moore, 288; 2 Bing. 112; 1 C. & P. 80.

To a declaration by A. against B. for 101*l.* 5*s.*, due for two and a half years' rent under a demise by deed, B. pleaded, as to 40*l.* 10*s.*, that, before the making of the deed, A. conveyed parcel of the premises to C. in fee, who devised the same to D., his wife, and their heirs; that, after the commencement of the suit, D. and E. gave notice of their title, and required of him payment of such portion of the rent not paid over to the plaintiff at the time of such notice as might, on a just apportionment, be the just proportional part thereof in respect of the parcel of the premises; and D. and E. then gave notice to and threatened B., that, if he should neglect or refuse forthwith to pay over such proportional part to D. and E., they would immediately eject and expel him from the parcel; that 40*l.* 10*s.* was the sum which, upon a just apportionment of the rent, would be and was the proportional part of the rent in respect of the parcel, and was, at the time of the notice, unpaid to A.; that the rent sued for accrued after the death of C.; that, if B. had not paid the 40*l.* 10*s.* to D. and E., they would have proceeded to eject the defendant from the parcel of the premises; wherefore B., after the commencement of the suit, necessarily and unavoidably paid them that sum; and that A. never had anything in the parcel of the premises, except as appeared in the plea:—Held, that this was neither a good plea of eviction, the notice being subsequent to the rent becoming due, nor a good plea of payment, inasmuch as the alleged payment was not in satisfaction of any charge upon the land, or of any debt due from A. *Boddlie*

*v. Campbell*, 1 M. & W. 386; 2 D. & L. 66; 8 Scott, N. R. 164; 8 Jur. 475; 13 L. J., C. P. 142.

Action for rent due on a lease. The declaration stated that one Lawless, being entitled to a certain estate, mortgaged the premises to O'Brien, and that afterwards Lawless and O'Brien demised to the defendant, who entered upon the premises demised and became thus possessed of the same; that O'Brien's interest vested in the plaintiff, and that a half-year's rent was due to the plaintiff on the demise. A plea alleged that, before the demise, O'Brien falsely and fraudulently represented that Lawless was entitled to the lands in the lease mentioned, as devisee under the will of his father, and that his will had been duly proved, and that by such false and fraudulent representations the defendant was induced to accept the lease and enter into the covenants therein contained, and averred that Lawless was not so entitled as owner, and the defendant himself, as O'Brien well knew, was entitled to the lands, as heir-at-law. On demurrer, the plea was held bad, for not stating that the defendant repudiated the lease and derived no benefit under it. *Meldon v. Lawless*, 5 Ir. R., C. L. 547, n.—C. P. S. P., *Anderson v. Costello*, 5 Ir. R., C. L. 544.

**Evidence.**—In an action for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved the same to have been executed by the defendant:—Held, that although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible as a counterpart. *Hughes v. Clark*, 10 C. B. 905; 15 Jur. 480.

In an action for rent upon an indenture of lease, the defendant pleaded non demisit:—Held, that the counterpart was sufficient evidence of the demise. *Houghton v. Kenig*, 18 C. B. 235; 25 L. J., C. P. 218.

Action for rent on a lease. Plea, that, before the lease was made, P. impleaded the plaintiffs, and had judgment of elegit against their lands; that the inquisition found the plaintiffs seized of the demised premises then leased to B., subject to two mortgages for years; that the sheriff delivered the premises to P., to hold the same till his damages and costs should be levied; that before the rent became due the defendant was evicted by P., who entered, and ejected, expelled, put out, and removed the defendant therefrom, and kept and continued him so ejected; that the sum of 1,000*l.* was still due to P. which was not levied. At the trial, the lease, elegit, and inquisition were put in, and it was proved that P. had called on the defendant to pay him rent, or he, P., would turn him out; on which the defendant attorned to him without privity of the plaintiffs, his lessors:—Held, that the plaintiffs were entitled to recover, as P.'s elegit only entitled him to the reversion expectant on the mortgages by the lessors.

*Pool (Mayor, &c.) v. Whitt*, 15 M. & W. 571; 16 L. J., Exch. 229.

Held, also, that the expulsion as pleaded was not established by the evidence. *Ib.*

#### VIII. ASSIGNMENT OF TERM; UNDERLETTING; DEATH OF TENANT.

##### 1. Covenants and other Contracts against Assignment or Underletting.

**General principles.**—The power of assignment is incident to the estate of a lessee, without the word "assigns," unless expressly restrained. *Church v. Brown*, 15 Ves. 264. And see *Greenaway v. Adams*, 12 Ves. 395.

A contract to grant a lease, with common and usual covenants, does not comprise a covenant not to assign without a license. *Henderson v. Hay*, 3 Bro. C. C. 632. S. P., *Church v. Brown*, 15 Ves. 258; *Buckland v. Papillon*, 1 L. R., Eq. 477; 12 Jur., N. S. 155; affirmed on appeal, 12 Jur., N. S. 992; 2 L. R., Ch. 67; 30 L. J., Chanc. 81.

A proviso against assignment, without license, in a lease to the lessee, his executors, administrators, and assigns, is not repugnant for the construction is that it extends to such assigns only as he may lawfully have, viz., by license or by law, as assignees in bankruptcy. *Wetherell v. Geering*, 12 Ves. 504.

A proviso in a lease, for re-entry upon assignment by the lessee, his executors, administrators, or assigns, without license, ceases by assignment with license, though to a particular individual. *Brummell v. Macpherson*, 14 Ves. 173.

Where there is a right of entry given for assigning or underletting, if a person is found in the premises, appearing as the tenant, it is *prima facie* evidence of an underletting sufficient to call upon the defendant to show in what character such person was in possession, as tenant or as servant to the lessee. *Doe d. Hindly v. Rickarby*, 5 Esp. 4—*Alvanley*.

But it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger. *Doe v. Payne*, 1 Stark. 86—*Ellenborough*.

And such evidence would not be sufficient, even if the tenant had covenanted not to part with the possession. *Ib.*

**Upon whom binding; covenants running with the land.**—Semble, that a covenant by a lessee, that he, his executors and administrators, shall not assign without license, is not binding upon the assignee of the lessee. *Paul v. Nurse*, 2 M. & R. 525; 8 B. & C. 486.

A covenant that the lessee, his executors or administrators, will not assign, does not bind his assignees. *Doe d. Cheere v. Smith*, 5 Taunt. 795; 1 Marsh. 350; 2 Rose, 280.

If a lease contains a proviso that the lessee and his administrators shall not set, let, or assign over the whole or part of the premises without leave in writing, on pain of forfeiting the lease, the administratrix of the lessee

cannot underlet without incurring a forfeiture. *Roed. Gregson v. Harrison*, 2 T. R. 425.

A parol license to let part of the premises does not discharge the lessee from the restriction of such a proviso. *Id.*

Executors may dispose of a lease for years as assets, notwithstanding a proviso or covenant that the lessee shall not alien. *Seers v. Hind*, 1 Ves. 295.

An option given to a tenant to call for an extended lease, will pass to his assignees in bankruptcy, and may by them be assigned to a purchaser. *Buckland v. Papillon*, 1 L. R., Eq. 477; 12 Jur., N. S. 155; affirmed on appeal, 12 Jur., N. S. 902; 2 L. R., Ch. 67; 36 L. J., Chanc. 81.

But such would not have been the case, if the tenant had been restrained from alienation. *Id.*

A railway company arranged by private contract the price of the interest of a tenant in land they required, there being a covenant in his lease not to assign without the consent of his landlord:—Held, that the covenant was abrogated so as to enable the tenant to assign to the railway company without the consent of his lessor. *Slipper v. Tottenham and Hampton Junction Railway Company*, 36 L. J., Chanc. 841; 4 L. R., Eq. 113—R.

By a deed dated March 1st, 1832, the defendant leased a farm for fourteen years; the lease contained a proviso for re-entry by the lessor if the lessees should assign without his license, and a covenant by the lessees not to assign; also a covenant by the lessor at the expiration of the demise to pay for certain things at a valuation. After the expiration of the term the lessees continued to occupy the farm as tenants from year to year on the terms of the lease. In 1864, they by deed assigned their interest in the farm, with their farming stock and valuations, to the plaintiff, in order to raise a sum of money to be paid to their creditors under a composition deed executed at the same time. The plaintiff entered into occupation of the farm but never paid rent. On the 18th March, the defendant, having no knowledge of the assignment, gave the lessees notice to quit, and the plaintiff, as assignee, gave him a similar notice:—Held, that the plaintiff could not maintain an action against the defendant on the covenant for a valuation. Per Mellor and Lush, JJ., on the ground that there was no new contract between the plaintiff and defendant, and that the right of action did not pass from the lessees to the plaintiff by the assignment of the tenancy created by parol between the lessor and lessees. Per Shee, J., on the ground that the lessees, having no right to assign without the license of the lessor, could not transfer any interest to the plaintiff. *Elliott v. Johnson*, 8 B. & S. 38; 2 L. R., Q. B. 120; 36 L. J., Q. B. 41; 15 W. R. 253.

A first count was upon a covenant in a lease that the lessees and their assigns would maintain and keep in repair the forge and buildings demised, and all buildings which should be erected during the demise,

and all additions and improvements thereto, and would maintain and keep in good working order the fixtures, steam engines, tools, utensils and other articles demised, and also which might during the demise be brought or set up on the premises, and would replace and make good all such fixtures, engines, tools, utensils and other articles as should be broken or worn out. The second count was upon a covenant that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor:—Held, first, that so much of the covenant in the first count stated as related to buildings and to machinery, tools and utensils, which were tenant's fixtures, ran with the land. *Williams v. Earle*, 9 B. & S. 740; 87 L. J., Q. B. 281; 3 L. R., Q. B. 739; 16 W. R. 1041; 19 L. T., N. S. 238.

Held, secondly, that so much of it as related to tools and utensils, which were not fixtures, did not run with the land. *Id.*

Held, thirdly, that the assignee was not liable on this count for breaches of the covenant after an assignment by him without the consent of the lessor. *Id.*

Held, fourthly, that the covenant mentioned in the second count ran with the land and bound an assignee to whom the premises had been assigned with the consent of the lessor. *Id.*

Held, fifthly, that the lessor could recover damages indirectly in respect of those breaches of covenant which had already occurred, and future breaches; the measure of the damages being such a sum as would, so far as money could, put the plaintiff in the same position as if he had retained the liability of the defendant instead of having an inferior remedy against a person less able to perform the covenants or compensate for breaches of them. *Id.*

**What amounts to a breach.]**—A covenant not to assign or otherwise part with the premises, or any part thereof, for the whole or any part of the term, is broken by an underlease. *Doe d. Holland v. Worsley*, 1 Camp. 20—Ellenborough.

Although underleases are not within the general words of provisos concerning assignments. *Kinnersley v. Orpe*, 1 Dougl. 55. S. P., *Church v. Brown*, 15 Ves. 264.

A covenant not to assign, transfer, set over, or otherwise do or put away the lease or premises, does not extend to an underlease for part of the term. *Crusoe d. Blencowe v. Bugby*, 2 W. Bl. 700; 3 Wils. 234.

A lessee who covenanted "not to let, set, or assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c., with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold:—Held, to be no forfeiture of the lease. *Doe d. Mitchinson v. Carter*, 8 T. R. 57.

But it being found by verdict that the:

tenant gave such warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment:—Held, that this was in fraud of the covenant, and the landlord, under a clause of re-entry in the lease for breach of the condition, might recover the premises in ejectment from a purchaser under the sheriff's sale. *Doe d. Mitchinson v. Carter*, 8 T. R. 800.

A lease of the opera-house contained covenants on the part of the lessee; Secondly, not to grant away, assign, dispose of, &c., the stalls or boxes, "for any longer period than one year or season." On the 21st of December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the first of August, 1852, he made another lease of the same boxes, to a different person, with this habendum, "from the 1st of February now next ensuing, or from such subsequent day during the year, upon which the theater shall be opened, and thenceforth for the full term of one year, to be computed from that day:—"Held, that this was not a breach of the covenant. *Croft v. Lumley*, 6 H. L. Cas. 672; 4 Jur., N. S. 903; 27 L. J., Q. B. 821.

Thirdly, "not to charge nor incumber the theater, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent-charges or any other incumbrance whatever." The lessee was greatly in debt. In respect of his debts, he granted warrants of attorney (one of which was to secure payment of bills, not then due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and be registered), and judgments were signed against him, on those warrants of attorney, and upon judge's orders, and registered:—Held, that no breach of this covenant had been committed. *Id.*

Demise for years to S., and S. covenanted that he, his executors, administrators, or assigns, would not assign the indenture, or his or their interests therein, or assign the premises to any person whatsoever, without consent in writing of the lessor; proviso, that in case S., his executors, administrators, or assigns, should part with his or their interest, contrary to his covenant, that the lessor might re-enter. S. deposited the lease as a security for money borrowed, and became bankrupt, and the lease was sold by direction of the Chancellor to pay that debt:—Held, that the assignees under the commission might assign the lease to the vendee, without the consent of the lessor. *Doe d. Goodbehare v. Bevan*, 3 M. & S. 353; 2 Rose, 456.

Letting lodgings is not a breach of a covenant not to underlet. *Doe d. Pitt v. Laming*, 4 Camp. 77—Ellenborough.

Where a lessee of a house and a garden for a term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises or any part thereof, any trade or business whatsoever, without the license of the lessor,"

and afterwards, without the license of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises:—Held, that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for re-entry for non-performance of covenants. *Doe d. Bish v. Keeling*, 1 M. & S. 95. And see *Jones v. Thorne*, 8 D. & R. 152; 1 B. & C. 715.

Where a lease contained a proviso for re-entry, in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof, or convey to any person whomsoever, for all or any part of the term, without the license of the lessor, in writing; and the tenant, without such license, agreed with a person to enter into partnership with him, and that he should have the use of a back chamber and some other parts of the premises exclusively, and of the rest jointly with the tenant, and accordingly let him into possession:—Held, that the lessor was entitled to re-enter. *Roe d. Dingley v. Sales*, 1 M. & S. 297.

Proviso in a lease for re-entry, and that the lease should be void, if the lessee assigned without license. The lessee by deed assigned all his property, real and personal, to trustees, for the benefit of his creditors, and was afterwards declared a bankrupt:—Held, that the deed of assignment, being an act of bankruptcy, did not operate as a valid conveyance of the lessee's interest under the lease, and that therefore it did not work a forfeiture. *Doe d. Lloyd v. Powell*, 8 D. & R. 35; 5 B. & C. 308.

A covenant in a lease of a chop-house, not to let, set, assign, transfer, set over, "or otherwise part with the premises demised, or that present indenture of lease," is not broken by proof of a deposit of the lease with the brewers of the lessee, as a security for money advanced and beer supplied to the house, as it could not be deemed to be a parting with the premises within the meaning of the covenant. *Doe d. Pitt v. Hogg*, 4 D. & R. 226; 1 C. & P. 160; *S. C.*, nom. *Doe d. Pitt v. Laming*, R. & M. 86.

A. and B., partners in trade, were assignees of a lease which contained a covenant by the lessee, for himself and his assigns, that he would not, neither should his executors, administrators, nor assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A. assigned all his interest in the premises to B.:—Held, a breach of the covenant. *Varley v. Coppard*, 7 L. R., C. P. 505; 20 W. R. 972; 26 L. T., N. S. 882.

**License or consent of landlord.]**—If the vendor of a lease, in which is a covenant not to assign, contracts to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment. *Lloyd v. Crispe*, 5 Taunt. 249.

A lease contained a covenant not to assign without the license of the lessor, with a proviso for re-entry on breach. The lessee

became bankrupt, and the assignees assigned to the defendant, who contracted to sell the term to the plaintiff. The plaintiff required the defendant to obtain the license of the lessor, which the defendant failed to do:—Held, that the defendant was bound to obtain the landlord's license to assign, as the assignment by assignees was no breach of the covenant. *Winter v. Dumerque*, 12 Jur., N. S. 726; 14 W. R. 699—Exch. Cham.

A. assigned his effects to B. for the benefit of his creditors, and a lease of a farm from C., which contained a covenant not to assign without C.'s consent in writing. B. agreed to assign the lease to D.'s nominee, D. to pay the expense of the assignment, and 180*l.* on a day certain for the improvements and manure; to take the crops at a valuation, and to have immediate possession:—Held, that, to support an action on this agreement, B. must show that he had obtained C.'s consent in writing to the assignment, though D. had taken possession of the premises, had cut down the crops, and had paid part of the 180*l.* to B. *Mason v. Corder*, 2 Marsh. 332; 7 Taunt. 9.

A lease contained a covenant by the lessee not to assign without license, and the lessor covenanted not to withhold his license to assign unreasonably or vexatiously:—Held, that it was unreasonable and vexatious in the lessor to refuse his license to assign to a person wholly unobjectionable, his object in refusing the license being, avowedly, his wish to get a surrender of the lease for the purpose of rebuilding. *Lehmann v. McArthur*, 8 L. R., Eq. 746; 15 W. R. 551; 16 L. T., N. S. 196—V. C. S.

The lease of a farm contained a covenant by the lessees, "that they would not assign or otherwise part with possession of the premises without the written consent of the lessor," with a proviso that "in case the lessees should fail in the observance or performance of any or either of the covenants and agreements on his or their part," it should be lawful for the lessor to re-enter. The lessees sold their interest in the lease to W., and the lessor in a letter consented that W. should take the farm "on the same conditions and in accordance with the lease." W. entered and took possession of the farm, but no assignment of the term was executed to him:—Held, that there was no such breach of the covenant not to assign without the written consent of the lessor, as to enable him to maintain ejectment; first, because W. appeared to have entered into possession at the instance of the lessor rather than of the lessees; and, secondly, because the consent to the assignment did not prohibit the lessees from parting with possession of the premises till a lease had been executed. *West v. Dobb*, 89 L. J., Q. B. 190; 10 B. & S. 987; 5 L. R., Q. B. 460. See *S. C.*, 23 L. T., N. S. 76; 18 W. R. 1167—Exch. Cham.; 33 L. J., Q. B. 289; 9 B. & S. 755; 4 L. R., Q. B. 634; 20 L. T., N. S. 787; 17 W. R. 879.

• In a lease, when there is a covenant not to

sublet without consent, but such consent must not be withheld except on reasonable objection, and a heavy rent is reserved by the lease, very strong ground for refusing the consent must be shown, as the refusal throws a heavy burden of rent on the lessees. *Sheppard v. Hong Hong and Shanghai Banking Corporation*, 20 W. R. 459—V. C. M.

A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:—Held, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent. *Treloar v. Bigge*, 9 L. R., Exch. 151; 22 W. R. 848; 43 L. J., Exch. 95.

An arbitrary refusal is equivalent to an "unfair and unreasonableness" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary." *Id.*

A lease of mines contained a covenant that the lessee should not, without the consent of the lessor, let or assign the mines. The lessor granted to the lessee a license to sublet a part, but the license provided that this should not authorize any further letting or assigning of the part of the mines, the subject of the license, without such consent as was required by the lease. The lessee then agreed to sublet to an under-lessee the part of the mines the subject of the license, the underlease to contain provisions in all respects like those in the original lease:—Held, that, according to the agreement, the underlease ought to contain a covenant by the under-lessee against letting or assigning without the consent of the lessee, and not a covenant against letting or assigning without the consent of the lessor. *Williamson v. Williamson*, 9 L. R., Ch. 729; 43 L. J., Chanc. 738; 31 L. T., N. S. 291; reversing the decision of Bacon, V. C., 30 L. T., N. S. 154; 17 L. R., Eq. 540; 23 W. R. 682; 43 L. J., Chanc. 382.

As to forfeiture for breach of covenant against assignment,—see this title, XIII.

## 2. Contracts to assign; and Instrument of Assignment.

**Distinction between assignments and agreements to assign.**—A. agreed, in consideration and on payment of 200*l.* at stipulated times, to assign to B. the lease of certain premises, for the residue of a term of which A. was assignee, at the yearly rent of 100*l.*, and under and subject to the covenants, provisos, and agreements in the original lease; and B. agreed to accept the lease on payment of the 200*l.* and interest, and in the mean-

time, and until such assignment was made, to pay the rent and perform the covenants in the lease, and from the same to save harmless and indemnify A.; with a proviso, that, in case of default in payment of any or either of the installments of the 200*l.*, A. should be at liberty to re-enter:—Held, that this was not an absolute assignment, but only an agreement to assign on a given event. *Hartshorne v. Watson*, 7 Scott, 494; 5 Bing. N. C. 477; 2 Arn. 70.

**Construction and effect of agreements to assign.**—A. agreed to execute to B. an effectual assignment of the two leases of a house and shop, "as he holds the same for a term of twenty-eight years," and B. agreed to accept "a proper assignment of the leases as above described, without requiring the lessor's title."—Held, that B. was bound to take an assignment of two consecutive leases, though the second was void, being under a power which had not been pursued. *Spratt v. Jeffery*, 5 M. & R. 188; 10 B. & C. 249. See *Shepherd v. Keagley*, 1 C., M. & R. 117; *Waddell v. Wolfe*, 43 L. J., Q. B. 188, 140.

An averment on a declaration that the plaintiff was possessed of premises for the remainder of a certain term of years, then unexpired therein, which he agreed to assign, is supported by evidence of a tenancy from year to year. *Botting v. Martin*, 1 Camp. 817—Macdonald.

A., the defendant in an action on a lease, in consideration of B.'s withdrawing the record, undertook to pay B. certain moneys, B. undertaking to discharge A. from liability to the covenants of the lease, upon his assigning all his interest in the lease:—Held, that the assignment of the lease was not a condition precedent to the discharge; and that, therefore, in an action against B. on the contract, it was not necessary to aver that the defendant had assigned. *Phelps v. Protheroe*, 16 C. B. 770; 1 Jur., N. S. 1170; 24 L. J., C. P. 225.

In an agreement for the assignment of a lease of a public-house, it was agreed that the intended assignee should take the lease, subject to the payment of the yearly rent and to the performance of the covenants thereby reserved and contained, such covenants being common and usual in leases of public-houses. The lease contained the following clause: "Provided always, and these presents are upon the express condition, that all and every underlease or underleases, deed or deeds of assignment of the premises, or of the devolution of the same by will or act of law, shall be left with the solicitor to the lessor within two calendar months from the date thereof, for the purposes of registration." In an action by the intended purchaser to recover his deposit, the jury found that the above clause was not common or usual in leases of public-houses:—Held, that the clause in question was included in the word "covenant" as used in the contract between the parties, and that the intended assignee was discharged from

his agreement to accept an assignment of the lease. *Brooks v. Drysdale*, 37 L. T., N. S. 467—C. P. Div.

**Instrument of assignment; and operation and effect, generally.**—[By 29 Car. 2, c. 8 (the Statute of Frauds), s. 8, *no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.*

By 8 & 9 Vict. c. 106, s. 8, *an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and not being an interest which might by law have been created, without writing, made after the 1st of October, 1845, shall be void at law, unless made by deed.*]

The assignment of a parol lease from year to year, otherwise than by deed or note in writing, is void under the Statute of Frauds. *Botting v. Martin*, 1 Camp. 818—Macdonald.

Where a person transfers all his interest in a term to another, reserving rent to himself, it does not operate as an assignment, but as an under-lease. *Preecs v. Corrie*, 2 M. & P. 57; 5 Bing. 24. See *Barrett v. Rolph*, 14 M. & W. 848; 14 L. J., Exch. 308.

One who had a term, which expired on the 11th November, let the premises orally from the 11th September to the 11th November for 270*l.*, payable immediately:—Held, that this was a lease of which parol evidence might be given, and not an assignment requiring a writing. *Id.*

L., being seized in fee, demised to B. for twenty-one years from June, 1814; B. demised to M. for twenty-one years from June, 1814, wanting twenty-one days, and then by deed-poll granted to L. the indenture of lease to M., the premises thereby granted, and the rent reserved, to hold to L., his executors, &c., for the term mentioned in the demise to M.; L., by lease and release, conveyed the premises, the reversion and reversions, rents, issues, and profits, and all his interest in fee, to the plaintiff by way of mortgage; M. assigned his term to the defendant by way of mortgage, but the defendant never entered:—Held, that the conveyance in fee from L. to the plaintiff passed the chattel interest created by B., as well as the fee, and that it was well described in the declaration as an assignment of the chattel interest. *Burton v. Barclay*, 7 Bing. 745; 5 M. & P. 785.

A lessee for years under-demised for a term longer than the residue held by him, the under-lessee covenanting to pay to the lessee, his executors and administrators, the yearly sum of 75*l.*, by quarterly payments:—Held, that notwithstanding the instrument amounted to an assignment, inasmuch as all the lessee's term was thereby conveyed, an action of cov-

enant lay at the suit of the executor of the lessee, to recover arrears of this rent accruing during the continuance of the lessee's term. *Baker v. Gosling*, 4 M. & Scott, 539.

A grant by lessees for lives of all their estate, right, title, interest, &c., in the premises, to one and his executors, habendum to him and his executors for ninety-nine years, if the lives should so long continue, in as large, ample, and beneficial way, &c., as the grantors, their heirs, &c.:—Held, no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease. *Derby v. Taylor*, 1 East, 503.

An assignment of a term to the defendant for certain premises indorsed on the back of the lease, which was executed by the plaintiff, but not by the defendant, is evidence for the plaintiff to show that he has performed his part of an agreement to assign the lease. *Hawkins v. Sherman*, 3 C. & P. 459—Tenterden.

A parol assignment by a sheriff of a leasehold seized by him under a f. fa. is void by the Statute of Frauds, even although the assignee has paid rent to the head landlord. *Doe d. Hughes v. Jones*, 9 M. & W. 372; 6 Jur. 802; 12 L. J., Exch. 205; 1 D., N. S. 352.

A demise by an assignee of a part of the premises held by him, at a different rent (payable to himself), and for a period longer than his own term, operates in law as an assignment, and may be so treated in pleading. *Wollaston v. Hakewill*, 3 M. & G. 297; 3 Scott, N. R. 593.

A demise for a term of years, if it is by deed, and for the whole term which the lessor has in the premises, operates as an assignment. *Beardmore v. Wilson*, 38 L. J., C. P. 91; 17 W. R. 54; 19 L. T., N. S. 282; 4 L. R., C. P. 57.

An under-lease of the whole term amounts to an assignment. *Ib.*

Action by the assignee of the reversion of a lease on a covenant to repair. The defendant was the representative of an assignee of the lease, and had made an under-lease ending at the same date as the original term:—Held, that the under-lease amounted to an assignment, and that the assignee of the reversion was not entitled to recover. *Ib.*

An under-lease subject to, and to commence at the expiration of, an existing under-lease between the same parties, and to last for the residue of the sub-lessor's term, does not amount to a transfer of the original lease so as to destroy the sub-lessor's reversion. *Hyde v. Warden*, 37 L. T., N. S. 567—C. A.

C. assigned by deed a lease for the lives of W., J. and H., to hold for the lives of W., J. and H., and the survivors and survivor of them, and covenanted that the lease "was a good, valid, and subsisting lease in the law for the lives of W., J. and H., and the survivors and survivor of them, and was not forfeited, surrendered, or become void or voidable." J. died before the making of the deed:—Held, that there was no breach of the covenant, as C. only undertook that the lease

was subsisting, and not that the three lives were in existence at the date of the covenant. *Coates v. Collins*, 41 L. J., Q. B. 90; 7 L. R., Q. B. 114; 26 L. T., N. S. 134; 20 W. R. 187—Exch. Cham.

A termor of years in premises belonging to B., mortgaged to C. by way of security for debt, the furniture on the premises, with all the freehold hereditaments, goods, and personal property, to which the termor was or might be entitled, except any leaseholds, or any portion of the term or terms for which such leaseholds might be holden, which C., by indorsement on the deed, should declare not to be therein included. The mortgage deed was dated 11th March, 1869. A quarter's rent on the premises became due 25th March. C. was apprised for the first time of the lease held by the termor on the 8th July, and at once indorsed the deed to the effect that the lease was not included in it:—Held, in action for rent by B., that the lease passed under personal property; that, moreover, the words of the exception evidenced such intention; that the lease at once on execution of the deed vested in C.; that C. could not by the indorsement divest himself of it, and so defeat the rights of B., a stranger to the deed. *Debenham v. Digby*, 21 W. R. 359; 28 L. T., N. S. 170—Exch.

When a lease is held at a full or substantial rent, and contains onerous covenants on the part of the lessee, an assignment (free from actual fraud) to an assignee, who subjects himself to the performance of the covenants, is not voluntary. *Greer, In re*, 11 Ir. R., Eq. 502—Bank.

**Pleading and proof of assignment.**—[The plaintiffs declared upon an indenture made by H. to S. of premises, to hold from Midsummer, 1786, for ninety-nine years, deducing their title to the reversion from the lessor by various mesne assignments, and alleging that "all the estate of S. of and in a great part of the premises, with the appurtenances, by assignment, came to and vested in the defendant, whereupon and whereby the defendant became and was possessed of that part of the premises, and continued so possessed until the commencement of the suit;" and assigned breaches of covenant. The defendant traversed "that all the estate of S. of and in that part of the premises, by assignment, came to and vested in her, as alleged," upon which issue was joined:—Held, that the affirmative of this issue was sustained by proof that the defendant was the executrix of an assignee, though she had never entered or taken the profits. *Wollaston v. Hakewill*, 3 Scott, N. R. 593; 3 M. & G. 297.

In an action for rent on a lease, by the lessor against the assignee of the lessee, the declaration stated that all the estate of the lessee came to and vested in the defendant, which allegation the defendant traversed. The defendant was assignee of only a part of the demised premises:—Held, that there was a fatal variance, and that the issue must be

found for the defendant. *Curtis v. Spitty*, 1 Scott, 737; 1 Bing., N. C. 756; 1 Hodges, 153.

In an action against an assignee of a lease, the locality of the premises not being stated in the declaration, the question of venue does not arise at the trial on a denial of the lease. Some only of the lessees having executed the assignment, but the defendant and another assignee having executed, and the other having entered:—Held, that the defendant, on a plea denying that the estate of the lessees had come to him, was liable as assignee. *Electric Telegraph Company v. Moore*, 2 F. & F. 363—Wightman.

### 3. Rights and Liabilities of Parties after Assignment.

**Upon covenants in lease, in general.]**—The assignee of a lease is not liable to the original lessor for the breach of a covenant which does not run with the land, unless he is expressly named in the lease as a covenantor. *Grey v. Cuthbertson*, 2 Chit. 482; 4 Dougl. 351.

Nor is he liable for a breach in the lessee's time when he comes into possession afterwards. *St. Saviour's, Southwark v. Smith*, 3 Burr. 1271; 1 W. Bl. 351.

**Restrictive covenants; use of premises.]**—A restrictive covenant in an assignment of a lease may be enforced by the covenantee against persons with constructive notice, though he has no reversion. *Clements v. Welles*, 1 L. R., Eq. 200; 35 L. J., Chanc. 265; 19 L. T., N. S. 548—R.

C., being lessee of a house, assigned the lease to W., by a deed by which he covenanted that he, his executors, administrators or assigns, or under-tenants, would not use the premises as a hair-dresser's shop. He afterwards under-leased the house, and assigned his reversion. The defendant, having constructive notice of the covenant, purchased the under-lease, and, with the license of the reversioner, began to use the house as a hair-dresser's shop:—Held, that C. was entitled to an injunction to restrain him from so doing. *Id.*

When, in a lease, the lessee having covenanted to use the demised premises as a public-house, the lessor covenants not to build or keep any house for the sale of spirits or beer within half a mile of the demised premises, the lessor's covenant does not run with the land so as to enable the assignee of the lease to sue him upon it. *Thomas v. Hayward*, 4 L. R., Exch. 811; 38 L. J., Exch. 175; 20 L. T., N. S. 814.

In 1853, A. demised a plot of land with a house thereon for ninety-nine years to B., who entered into restrictive covenants for himself, his executors, administrators and assigns, with A., his heirs and assigns, not to build further on the land without first submitting the plans for A.'s approval, and not to do anything which would be a nuisance

to or would diminish the value of the adjoining land. In 1858, A. demised the adjoining land for ninety-four years to C., who had built a house on it under a building agreement with A., and who entered into restrictive covenants similar in purport and effect to those in B.'s lease. C. took his lease without notice of the covenants in B.'s lease, and with the general intimation that B. was intending to build on his land. In 1875 the assignees of B.'s lease commenced to build so as to obstruct the access of light and air to the windows in the house demised to C. On action brought by C.'s assignee to restrain A. from giving his consent to building plans, and B.'s assignees from continuing to build:—Held, that the assignee of C.'s lease was not entitled to the benefit of the restrictive covenants in B.'s lease. *Minter v. Hansard*, 34 L. T., N. S. 719—V. C. B.

**Repairs.]**—Where, in an action of covenant against an assignee of a lease, the plaintiff declared that all the right, &c., vested in the defendant by assignment, and that afterwards the premises were out of repair, and the defendant pleaded that for one period he was possessed of one-sixth of the premises as tenant in common with A., B. and C., and for another period of one-third as tenant in common with B. and C., and that no more or greater interest in the premises ever came to him by assignment:—Held, that the plea was bad in substance, as it could not be a bar to the whole action. *Merceron v. Dowson*, 5 B. & C. 479; 3 D. & R. 261.

A lessee by deed-poll assigned his interest in the demised premises to A., subject to the payment of rent and the performance of the covenants contained in the lease. A. took possession, and occupied the premises, under this assignment, and before the expiration of the term assigned to a third person. The lessor sued the lessee for breaches of covenant committed during the time that A. continued assignee of the premises, and recovered damages against the lessee:—Held, that the lessee might maintain an action upon the case founded in tort against A. for having neglected to perform the covenants during the time he continued assignee, whereby the lessee sustained damage. *Burnett v. Lynch*, 5 B. & C. 589; 8 D. & R. 368.

Where a lessee, who was bound by a covenant to repair premises demised to him, underlet part of them with a similar obligation by his tenant to repair them within three months after notice given to him for that purpose; and the premises underlet becoming out of repair, the superior landlord gave notice to his immediate tenant to repair them at the peril of forfeiting his lease; and the under-tenant, after receiving notice to repair, neglected to do so within three months, whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises, and put them into a tenable repair:—Held, that his under-tenant was liable to pay him the whole expense so incurred, although the



former had sold his interest in the premises to a purchaser, who had entirely rebuilt them before the action for the recovery of such expense was brought. *Colley v. Streeton*, 3 D. & R. 522; 2 B. & C. 273.

A. agreed to take an assignment of a lease of a house which was out of repair, from B., and it was stipulated that all outgoing should be paid by B. up to the 23d April; and by an assignment indorsed on the lease (executed by B. but not by A.), B. assigned the residue of the term, subject to the performance of all the covenants in the lease, which, from the 22d day of April, ought to be observed on the part of the tenant. The lease contained a covenant to keep the premises in repair, and so to deliver them up; and, after the assignment the reversioner sued B., and recovered for dilapidations which occurred before April 22d.—Held, that B. could not maintain an action against A. for these dilapidations, even though it could be proved that A. gave a smaller price, because the premises were out of repair. *Hawkins v. Sherman*, 3 C. & P. 459—Tenterden.

B., having a term of sixty-one years in land, granted an annuity to W., and, for securing payment, assigned the term, wanting one day, to R. R. then, at the request of W. and of B., demised, and B. demised and confirmed, the premises to S. for thirty-one years, paying rent to W. while the land remained subject to the annuity, and afterwards to B. S. covenanted with W. and R., and their respective executors, and also with B., to pay the rent while the land was subject to the annuity to R., and afterwards to B., and also to repair the premises. The premises came by assignment to G., who failed to repair. W. being dead:—Held, that an action for breach of the covenant to repair was properly brought against G. by R. and B. jointly. *Wakefield v. Brown*, 9 Q. B. 209; 10 Jur. 853; 15 L. J., Q. B. 373.

On a covenant by a lessee, not naming assigns, to repair and yield up in repair all buildings and erections, an assignee is liable in respect of the non-repair of buildings erected during the term. *Minshull v. Oakes*, 2 H. & N. 793; 4 Jur., N. S. 170; 27 L. J., Exch. 194.

A covenant to yield up in repair at the end of a term runs with the land, and binds an assignee, though not named. *Martyn v. Clue*, 18 Q. B. 661; 23 L. J., Q. B. 147.

A declaration by an assignee of part of the reversion, for non-repair of premises, stated that G. held the premises under a lease for ninety-nine years, which expired on the 25th December, 1849; that during the time he so held the premises he granted an underlease to V. and S. for twenty-five years and a quarter from the 25th December, 1823, by which V. and S. jointly and severally covenanted with G. that they would during the term repair, and at the end of the term deliver them up in repair to G.; that during the underlease to V. and S., G. granted his reversion to S. and the plaintiffs, whereupon the term in the

underlease was, as to one undivided sixth part, merged in the reversion, and S. and the plaintiffs became, as joint tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint tenants, possessed of the reversion of two other undivided sixth parts; that V. afterwards assigned to S. his interest in the underlease granted to him and S., whereupon the term as to one undivided sixth part, merged in the reversion in the three sixth parts, whereof S. and the plaintiffs were possessed, and that S. died before the determination of the underlease; and alleged as a breach the non-performance by V. of the covenant to repair after S.'s death, and to leave in repair. Plea, that after G. demised to S. and V., and before the assignment to S. by V., V. and S. demised the premises to T. for twenty-three years from the 25th June, 1825, with covenants by T. to keep and leave in repair; that T. died; and that L. the original lessor sued the plaintiffs for non-repair, and that such action was settled by an agreement, without the privity or consent of V., whereby the representatives of T. agreed to pay 300*l.* and to give up possession to L., and the plaintiffs agreed to pay S. 200*l.*, and to deliver up the lease to a third person in trust for L., but to be produced for the purpose of supporting any claims against V. relating to the premises, and that when such claims should have been satisfied, the plaintiffs would concur in surrendering their estate or interest in the lease; and that in pursuance of the agreement, possession was delivered to L., and that thereby V. had been prevented from performing his covenant:—Held, that the plea was bad, inasmuch as the agreement and the delivery of possession to L. did not operate as a surrender of all the plaintiff's interest, and was not so intended to operate; and the defendant, not being a party to the agreement, might, at the expiration of the underlease to T., have entered for the residue of the term granted to him and S., and performed his covenant to repair. *Badeley v. Vigurs*, 4 El. & Bl. 71; 2 C. L. R. 1627; 1 Jur., N. S. 159; 23 L. J., Q. B. 377.

**Rent.**—The lessee, under express covenant to pay the rent and perform the covenants, is liable during the whole term, notwithstanding assignments. *Staines v. Morris*, 1 Ves. & B. 9.

A common assignment by a lessee, without acceptance of rent from the assignee by the lessor, or some other evidence of his assent, is not sufficient (though the lessor has notice) to discharge the lessee from an action of debt. *Wadham v. Marlow*, 4 Dougl. 54; 1 H. Bl. 488, n.; 2 Chit. 600; 8 East, 314.

A lessee cannot plead to an action on a covenant for rent an assignment and tender by the assignee. *Orgill v. Kemshead*, 4 Taunt. 642.

The assignee of a lease for years, who has assigned over, is discharged from the covenant to pay rent before the entry of his as-

signee. *Walker v. Reese*, 3 Dougl. 19; 2 Dougl. 461, n.

An assignee is not liable for rent accruing after an assignment, even though such assignment is wrongful. *Paul v. Nurse*, 2 M. & R. 525; 8 B. & C. 486.

In an action on a covenant for rent against an assignee, an assignment to a feme covert before the rent accrued is a good plea in bar. *Barnfather v. Jordan*, 2 Dougl. 452.

A. being assignee of a lease, put it up by auction: B. became the purchaser, paid a deposit, and ordered an assignment to him to be prepared by A.'s solicitor, which was accordingly prepared and executed by A.; but, instead of its being delivered to B., it remained in the possession of the solicitor, who claimed a lien for the expense of preparing it:—Held, that to an action against A. as assignee of the term, for rent accruing due after he had executed the assignment, these facts were sufficient to support a plea, that before the rent became due he had assigned to B. *Odell v. Wake*, 3 Camp. 394—Ellenborough.

The lessee of coal-mines, for a term of years, by indenture assigned the same for the residue unexpired of the term to the defendant, who thereby covenanted with the lessee to pay the rents, &c., by the original indenture reserved, so long as the defendant should be in possession, or receipt of the rents, produce and profits of the premises, and at all times effectually to keep harmless and indemnified the lessee from and against all the rents, covenants, &c., of the original lease, and against all actions in respect of the same. To a declaration assigning as a breach non-payment by the defendant of rents due while he was in possession or receipt of the rents, produce and profits, per quod the lessee was forced to and did pay the rents, and was put to great charges, together with a breach of the covenant to indemnify the lessee against the consequences of such non-payment by the defendant; plea, that the defendant was not in possession when the rents became due:—Held, that the restrictive words "so long as the defendant should be in possession or receipt of the rents, produce and profits," contained in the first covenant, did not extend to the covenant to indemnify, and that such a plea was no answer to the breach to that covenant. *Crossfield v. Morrison*, 7 C. B. 286; 18 Jur. 565; 18 L. J., C. P. 185.

When a lessee grants an underlease, reserving a rent which is incident to the reversion on the underlease, the rent, the reversion, and the benefit of the covenants will not pass by a subsequent mere assignment of the term, nor unless expressly assigned. *Franklin v. Hovos*, 19 W. R. 581; 24 L. T., N. S. 348—V. C. 8.

Upon an assignment of a lease to a purchaser, the absence of the counterpart of an underlease of a portion of the property comprised in the lease, is notice to the purchaser of the title of a person holding such counterpart by way

of equitable mortgage, and if the purchaser does not inquire, or obtain possession of such counterpart, he will be guilty of gross negligence, and will, therefore, be postponed to the equitable mortgagee. *Id.*

A lessee of a messuage and premises for a term of years assigned the unexpired residue to one who was afterwards adjudicated bankrupt under the act of 1869. The trustee in bankruptcy disclaimed the lease:—Held, that the lessor could maintain an action on the covenants in the lease against the lessee for the rent which became due between the adjudication and the disclaimer. *Smyth v. North*, 41 L. J., Exch. 103; 7 L. R., Exch. 242: 20 W. R. 683.

In an action against the assignee of a lessee pour autre vie for rent which accrued due after the assignment, if the defendant is entitled to plead that he is in only as heir, and that the estate of the lessee was of less value than the rent reserved, he ought to aver that this was so down to the time of the commencement of the action. *De la Poer v. Kirwan*, 9 Ir. R., C. L. 519—C. P.

**Operation of assignments by way of mortgage, or equitable assignments.]—**An action of covenant for non-payment of rent lies against an assignee of a lease to whom an assignment has been made by way of mortgage security, although he has never entered nor taken actual possession. *Williams v. Bosanquet*, 3 Moore, 500; 1 B. & B. 238.

A mortgagee of a leasehold estate by assignment is liable, so long as he has the legal estate, to perform the covenants of the lease, although he does not take possession. *Stone v. Evans*, Peake's Add. Cas. 94—Kenyon.

Although it was once held, that if a term was assigned by way of mortgage, with a clause of redemption, the lessor could not sue the mortgagee as assignee of all the estate, right, title, interest, &c., of the mortgagor, even after the mortgage had been forfeited, unless the mortgagee had taken actual possession. *Eaton v. Jacques*, 2 Dougl. 455.

If a leasehold interest is assigned by way of mortgage, the assignee, unless there is a special provision to the contrary, takes the interest subject to all the covenants and obligations of the original lessee. *Luig v. Homan*, 4 Bligh, N. S. 380.

In an action for use and occupation, under the issue of non assumpsit, the defendant may give in evidence that the plaintiff had mortgaged the premises before the defendant came into occupation, and that the mortgagee had given notice to the defendant not to pay to the plaintiff any rent becoming due after such notice. *Waddilove v. Barnett*, 2 Bing. N. C. 538; 2 Scott, 763; 4 D. P. C. 347.

Obedience to the mortgagee's notice as to rent due before the notice, must be specially pleaded. *Id.*

W., a lessee of premises for a term of seventy five years, mortgaged the lease to T., and joined with him in an indenture, by which, after reciting the mortgage, the prem-

ises were demised to J. for twenty-one years. The mortgage was assigned to S., and by indenture, to which S. and W. were parties, after reciting the lease to J., that lease was assigned to M. This assignment contained a covenant by M. and W., that M. would not demise or assign the premises without the license and consent of W., with a proviso for re-entry if he did. M. paid rent to W., and afterwards assigned the premises to K. without the license or consent of W. In ejectment by S. and W.:—Held, first, that M. was not estopped from showing that W. was not the legal owner of the reversion, but mortgagor only, and that W., having a mere equitable interest, could not recover. *Saunders v. Morryweather*, 3 H. & C. 902; 13 W. R. 814.

Held, secondly, that S. could not recover, because no right of re-entry was reserved to him. *Id.*

The plaintiff, in consideration of 530*l.* to be paid by A., demised to him premises for the term of fifty-five years, at the yearly rent of 84*l.*, and subject to covenants to repair, &c. The consideration not having been paid, A. assigned to the plaintiff the residue of the term then unexpired, subject to the rent and covenants, and with a power of sale. In pursuance of that power the plaintiff, in consideration of 500*l.*, "bargained, sold, assigned, transferred and set over to the defendant the premises, to hold for the residue of the term of fifty-five years," subject to the yearly rent of 84*l.*, and the covenants contained in the lease, to A.; and the defendant covenanted to pay the rent and perform the covenants. The defendant having entered on the premises:—Held, that, although the mortgage by A. operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants. *Cottes v. Richardson*, 7 Exch. 143; 21 L. J., Exch. 52.

A deposit of a lease by way of equitable mortgage does not render the depositary liable for the rent and covenants. *Moore v. Choat*, 8 Sim. 508; 3 Jur. 220.

A lessee of a factory deposited the lease, by way of equitable mortgage, and upon the landlord distraining for rent in arrear, the deposittee of the lease paid the rent in arrear to the landlord, entered into possession of the factory, sold some of the machinery, including some fixed to the freehold, and otherwise acted as the owner of the lease, and was accepted by the landlord as such owner:—Held, that the landlord had no equity to compel the deposittee of the lease to take a legal assignment of the lease. *Moore v. Greg*, 2 De G. & S. 334.

An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease. *Cox*

*v. Bishop*, 8 De G., M. & G. 815; 3 Jur., N. S. 490; 26 L. J., Chanc. 389.

The lessee of a public-house in London executed at the public-house, and at the time of entering into possession, a mortgage of his lease in favor of the brewer by whom the house was supplied with beer, to secure a sum already advanced, and future advances, not to exceed in the whole a given sum. At the same time and place he charged the lease, "subject to the security already given" to the brewer, with the repayment to the distiller who supplied the house with spirits of an advance made by him. The mortgage and charge were both executed in the presence of the solicitors of the brewer and distiller, and the latter there and then gave to the former a formal notice of the charge in favor of his client. Afterwards the publican became indebted to the brewer for the price of beer supplied to the house. The lease having been sold by the brewer under a power of sale in his mortgage:—Held, that, in the absence of any express agreement, the distiller was entitled to be repaid his advance out of the purchase-money in priority to the debt which had been incurred to the brewer subsequently to the time when notice was given to him of the distiller's charge; and that this priority was not affected by a custom of trade alleged to exist between publicans, brewers and distillers in London. *Menzies v. Lightfoot*, 11 L. R., Eq. 459; 40 L. J., Chanc. 561; 19 W. R. 578; 24 L. T., N. S. 695—R.

**Remedies of lessee against his assignee or under-lessee.**—An assignee who takes leasehold premises by an indenture indorsed on the lease, subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease, is not liable in covenant to the lessee, for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Wolveridge v. Steward*, 1 C. & M. 644; 3 Tyr. 637; 8 M. & Scott, 561—Exch. Cham.

If the original lessee is obliged to pay ground-rent, he may recover it from the assignee in possession. *Stone v. Evans*, Peake's Add. Cas. 94—Kenyon.

A messuage and premises were demised to the plaintiff, by a lease dated the 10th May, 1828, for the term of twenty-one years from the 25th March then last; which lease contained covenants to paint the outside of the premises once in every three years, and the inside once in every seven years, and to repair and keep in repair the premises, and also to do any repairs which on a view of the premises by the lessor should be found wanting, of which notice should be given. By a lease dated the 15th June, 1830, the plaintiff demised the premises to the defendant for the residue of the term, wanting ten days, containing covenants, with the exception of the stipulation as to painting the outside wood-work, in precisely the same terms as those contained in the original lease. The

original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defense of the action. The defendant denied that any notice to repair had been given, and insisted that the premises did not require it; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice, that, as he had denied that any notice to repair had been served, and insisted that the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was, that the original lessors recovered 68*l.* damages, and 85*l.* 12*s.* for costs, and he himself incurred costs amounting to 53*l.* 14*s.* 4*d.*:—Held, that the plaintiff was not entitled to recover from the defendant the costs of defending the action, as they were not necessarily occasioned by the defendant's breach of the covenant to repair. *Walker v. Hatton*, 10 M. & W. 249; 2 D., N. S. 263; overruling *Neale v. Wyllie*, 3 B. & C. 533; 5 D. & R. 442. And see *Penley v. Watts*, 7 M. & W. 801; *Tindall v. Bell*, 11 M. & W. 228.

Held, also, that although the covenants contained in the sub-lease were (with the exception of that relating to painting) the same in words as those contained in the original lease, they were, in effect, substantially different, the periods at which the leases were granted being different. *Id.*

In an action by a lessee against an assignee for damages sustained by the former, in consequence of the neglect of the latter, while he continued assignee, to repair the premises, pursuant to a covenant in the lease, it appeared that in June, 1843, the plaintiff assigned the lease to the defendant; in October, 1851, the defendant assigned the lease to T.; and in June, 1852, T. assigned to H.; who in August, 1852, surrendered it to the ground landlord. It was proved that in July, 1852, the premises were dilapidated, but there was no evidence of their state at any prior time:—Held, that the plaintiff was entitled to recover substantial damages, and not nominal damages only. *Smith v. Peat*, 2 C. L. R. 424; 9 Exch. 161; 23 L. J., Exch. 84. S. P., *Mapleton v. Rowlings*, 3 C. L. R. 237—C. P.

The plaintiff being assignee of a lease which contained a covenant to repair, underlet the premises to the defendant, upon the terms that he should "maintain them in as good a state as they would be when repaired by him." Shortly after the defendant took possession, the premises, which were old and dilapidated, were destroyed by fire. The jury found that the cost of rebuilding them would be 1,635*l.*, but that they would be more valuable by 600*l.*:—Held, that the defendant was only bound to put the premises in the same state they would have been if he

had repaired them before the fire, and consequently he was liable to pay, as damages, 1,035*l.* only. *Yates v. Dunster*, 11 Exch. 15; 24 L. J., Exch. 227.

The defendant, under-lessee, who had covenanted with the plaintiff, his lessor, to keep, and at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord brought ejectment, and evicted the plaintiff and defendant:—Held, that the plaintiff was entitled to recover against the defendant substantial damages for the non-repair of the premises. *Davies v. Underwood*, 2 H. & N. 570; 3 Jur., N. S., 1223; 27 L. J., Exch. 113.

A lessee of premises assigned his lease to A., who assigned to persons, who committed breaches of covenant and then assigned over. The lessee was subsequently sued by the lessor for the breaches of covenant committed by the assignees, and was compelled to pay:—Held, that the lessee was entitled to recover from the assignees the amount which he had been compelled to pay to his lessor. *Moule v. Garrett*, 41 L. J., Exch. 62; 7 L. R., Exch. 101; 20 W. R. 416; 26 L. T., N. S. 367. And see *S. C. nom. Mule* or *Moule v. Garrett*, 39 L. J., Exch. 69; 13 W. R. 697; 23 L. T., N. S. 343.

The lessees of premises underlet them by a lease, in which there was the usual general covenant by the lessees to repair. The under-lessee having neglected to repair according to his covenant, the lessees entered and did the repairs themselves in order to save a forfeiture of their own lease, with which they had been threatened by their landlord, and then during the continuance of the lease to their under-tenant, the term of which had not expired, sued him for breach of such covenant to repair:—Held, that they could only recover nominal damages, since by having done the necessary repairs, they had at the time the action was brought sustained no injury to the reversion. *Williams v. Williams*, 43 L. J., C. P. 382; 9 L. R., C. P. 659; 30 L. T., N. S. 638; 23 W. R. 700.

In an action by the lessee against the assignee of a lease, for breach of a covenant in the deed of assignment to keep the demised premises in repair:—Held, that the lessee, in the absence of actual loss by him sustained, could recover no more than nominal damages, although the lessor had commenced an action against him for breach of the covenant contained in the lease. *Beattie v. Quirey*, 10 Ir. R., C. L. 516—Exch.

**Indemnities against payment of rent.]—**A lessee of a farm for an unexpired term at a yearly rent payable quarterly, gave up possession to the defendant, under an invalid assignment of the unexpired residue of the lease. He entered, occupied and paid the

reserved rent quarterly to the lessor for the lessee. The lessor never accepted or objected to the defendant as his tenant. The defendant quitted on a quarter-day without giving the lessee any notice to quit:—Held, that a promise by the defendant to indemnify the lessee against the rent for any period after the defendant had ceased to occupy, could not be inferred as a matter of law. *Crouch v. Tregoning or Tregonning*, 41 L. J., Exch. 97; 7 L. R., Exch. 88; 20 W. R. 536; 26 L. T., N. S. 286.

**Right of assignee to assign.**—There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession nor receives the lease. *Taylor v. Shum*, 1 B. & P. 21.

An assignee of a lease, containing covenants running with the land, is liable, after he has assigned over, for a breach incurred after the assignment to him, and before his assignment over. *Hurley v. King*, 2 C., M. & R. 18; 1 Gale, 100; 5 Tyr. 692.

#### 4. Effect of Death of Tenant.

**Rights and liabilities of personal representatives of deceased tenant.**—Where a tenant is in possession under an agreement, which is a mere agreement for a lease, until his death, his interest is then determined; and the lessor may maintain ejectment against his executrix, who has possessed herself of the premises. *Doe d. Bromfield v. Smith*, 6 East, 530; 2 Smith, 570.

In an action, charging the defendant in his own character, who was an administrator of the original lessee, for rent due after the intestate's death:—Held, that although the defendant had taken possession, yet, having proved that the premises had been productive of no profit to him, and that, eight months after the death of the intestate, he had offered by parol to surrender them to the plaintiff, such proof constituted a good defense to the action. *Hennant v. Bremridge*, 2 Moore, 94; 8 Taunt. 191.

An executor, who has occupied premises held by his testator under a lease, which covenants for payment of rent and taxes, and to keep the premises in repair, sued as assignee, in respect of the privity of estate, is liable on the covenant for payment of rent and taxes, to the extent only of the profits; but, for a breach of the covenant to repair, he is liable to the same extent that any other assignee is liable. *Trencere v. Morrison*, 4 M. & Scott, 603; 1 Bing. N. C. 89.

Semhle, that an offer by an executor to a lessor to surrender to him a lease granted to his testator, is an answer to an action against him as assignee for breaches of a covenant to repair, as to all breaches accruing after that offer. *Reid v. Tentarden*, 4 Tyr. 111.

To an action for rent against an assignee of a term, he pleaded that he was administrator; that the premises were of less value,

and had yielded less profit than the arrears of rent; that he had paid over to the plaintiff all the profit received from them, and had offered to surrender before any rent became due, and had fully administered:—Held, that the averment in the plea as to the value of the premises, was not supported by showing that the intestate had underlet them, and that the defendant had been unable to get the rent from the under-tenant; or by proof that they were out of repair, as the lease to the intestate contained a covenant to repair, and it was therefore the defendant's duty to repair them. *Hornidge v. Wilson*, 3 P. & D. 641; 11 A. & E. 645.

Where a lease for years, by which the rent reserved is more than the value of the premises, vests in an executor, the executor is liable, as assignee, for the amount of rent for which the premises could have been let. *Hopwood v. Whitley*, 6 C. B. 744; 6 D. & L. 342; 12 Jur. 1088; 18 L. J., C. P. 48.

Where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards her son-in-law took the premises with the assent of the landlord, and paid rent, and continued to occupy during the remainder of the term:—Held, first, that, there being no assignment in writing, he was not chargeable as assignee in fact. *Paull v. Simpson*, 9 Q. B. 335; 11 Jur. 13; 15 L. J., Q. B. 382.

Held, secondly, that he could not be considered an assignee in law, for, though the widow might have been chargeable as executrix de son tort, the defendant had not made himself executor de son tort by taking the premises after her. *Id.*

In an action by the plaintiff, as executor of an original lessee, against the executor of the assignee of the lease, upon a covenant by the assignee to indemnify the lessee against breaches of the covenants in the original lease, the defendant, under plene administravit, is protected by proof that he sold the lease in question, and had exhausted all the assets in his hands, by payment of simple contract debts, before the breaches of covenant declared on were committed. *Collins v. Crouch*, 13 Q. B. 542; 13 Jur. 361; 18 L. J., Q. B. 209.

The executor of an executor de son tort may become himself executor de son tort in respect of the estate of the original intestate; and where the father was executor de son tort with regard to a lease, and his son upon his death acted as agent to the mother till her death, and then continued in possession of the lease for the benefit of himself and the other children:—Held, that he became assignee of the lease, and liable upon the covenants therein. *Williams v. Heales*, 30 L. T., N. S. 20; 22 W. R. 317; 43 L. J., C. P. 80; 9 L. R., C. P. 177.

#### IX. ASSIGNMENT OF RENT OR OF REVERSION; ATTORNMEN; MERGER.

**Assignment of reversionary interest, and its effect, in general.**—A grantee of part of the grantor's reversionary interest in the whole of the property in which a particular

estate, as a term of years, has been created, is an assignee of the reversion within 32 Hen. 8, c. 34; but the grantee of the whole reversionary interest in part of the property is not such an assignee. *Wright v. Burroughes*, 8 C. B. 685; 4 D. & L. 438; 12 Jur. 968; 16 L. J., C. P. 6.

The 32 Hen. 8, c. 34, applies only to demises by deed. *Standen v. Christmas*, 10 Q. B. 135; 11 Jur. 694; 16 L. J., Q. B. 265.

It is no defense to an action on an indenture of lease by the trustee of a party who has become bankrupt, that the lessees have performed their covenants with the assignees of the *cestui que trust*. *Britten v. Britten or Perrott*, 2 C. & M. 597; 4 Tyr. 473.

A lessor of a term of years created by a writing not under seal, containing a particular contract of tenancy, conveyed the freehold to the plaintiff. The defendant afterwards and during the term paid rent to the plaintiff, and otherwise admitted him to be his landlord on the terms of the original demise:—Held, though the term of years first created was still unexpired, that there was evidence for the jury in support of the demise stated; and that, on their verdict of such a demise, the plaintiff had a right of action for the non-observance of such particular contract of tenancy. *Brydges v. Lewis*, 3 Q. B. 608; 2 G. & D. 703.

In 1703 a lessor, having only an equitable estate in a field, demised a portion of the field to a lessee for 99 years. In 1773 the lessor, having acquired the legal estate in the field, demised the residue of the field to the lessee for the same term, by an indenture, which recited the former lease, stipulated for its continuing in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion:—Held, that the assignee of the reservation could not sue the assignee of the lessee upon the covenants in the lease of 1762. *Whitton v. Peacock*, 2 Scott, 630; 2 Bing. N. C. 411.

C. granted and demised the exclusive right and license to take and kill game on land, with the use of a cottage, to the defendant for a term; and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land and hereditaments to the plaintiffs; and they brought an action, at the end of the term, against the defendant for a breach of his covenant:—Held, that the demise was not a mere license, but the grant of an incorporeal hereditament; that the covenant touched the hereditament demised, and by virtue of 32 Hen. 8, c. 34, the assignees of the reversion could sue upon it. *Hooper v. Clark*, 2 L. R., Q. B. 200; 36 L. J., Q. B. 79; 15 W. R. 247; 16 L. T., N. S. 152; 8 B. & S. 150.

In 1852, M. having a crown lease of premises, let them to the plaintiff for three years from the 24th June, by an agreement wherein

it was stipulated that he should do nothing contrary to the covenants and provisions in the lease from the crown. After the three years had passed, the plaintiff continued to occupy the premises as tenant from year to year, paying an annual rent from every 24th June. In September, 1869, M. assigned his interest in the crown lease to C., and subsequently gave notice to the plaintiff to pay his rent to C., from Michaelmas, 1869. This the plaintiff accordingly did, not receiving any notice to quit. In June, 1870, he was informed by the solicitors of C., that, as the interest of the latter under M.'s assignment expired in October, C. could not after that time treat the plaintiff as his tenant. The crown lease to M. expired on the 10th October, 1870, and in 1866, C. agreed with the crown for a new lease of the premises at the expiration of the old one. Both these facts were known to the plaintiff. A new lease was granted to C. by the crown when the former lease lapsed, and he having sublet the premises to the defendants, they evicted the plaintiff in 1870:—Held, that the plaintiff's tenancy terminated when the crown lease to M. ran out, and that the defendants were entitled to possession of the premises. *Weller v. Spiers*, 20 L. T., N. S. 866; 20 W. R. 772—Q. B.

The principle, that the assignee of a reversion is not bound by the terms in a lease not under seal, applies where the demise is of three windows in a factory, with the stipulation that the lessor shall provide steam power. *Smith v. Egginton*, 43 L. J., C. P. 140; 9 L. R., C. P. 145; 30 L. T., N. S. 521.

The question, whether the assignee of a reversion has adopted the terms of the demise entered into by his assignor, is one of fact, and is to be disposed of by the jury. *Id.*

B. demised, by an instrument not under seal, three windows in a factory to the plaintiff, and stipulated to supply steam power. B. at the time of the demise was mortgagor in possession. His mortgagees sold to the defendant, who did not accept rent from the plaintiff, but continued to supply steam power. Subsequently a dispute arose as to the terms upon which the plaintiff should continue tenant of the defendant, who thereupon cut off the steam power. The plaintiff having sued the defendant for cutting off the steam power:—Held, that no action would lie against him. *Id.*

As assignment by the lessor of the reversion in one of two farms, comprised in the same lease, to the lessee himself, does not destroy the lessor's right of re-entry over the other farm. *Hyde v. Warden*, 37 L. T., N. S. 567—C. A.

**Repairs.**—The 32 Hen. 8, c. 34, applies only to demises by deed, and an assignee of the reversion cannot maintain an action on a contract to repair made with the assignor. *Standen v. Christmas*, 10 Q. B. 135; 11 Jur. 694; 16 L. J., Q. B. 265.

But where the demise is not under seal, the

lessor may, notwithstanding he has assigned the reversion, sue the lessee on his contract to repair for a breach committed during the tenancy, but subsequently to such assignment. *Bickford v. Parson*, 5 C. B. 921; 12 Jur. 377; 17 L. J., C. P. 193.

A declaration by an assignee of part of the reversion, for non-repair of leasehold premises, stated that G. held the premises under a lease for ninety-nine years, which expired on the 25th December, 1849; that during the time he so held the premises he granted an under-lease to V. and S. for twenty-five years and a quarter from the 25th December, 1823, by which under-lease V. and S. jointly and severally covenanted with G. that they would during the term repair, and at the end of the term deliver the premises up in repair, to G.; that during the continuance of the under-lease to V. and S., G. granted his reversion in the premises to S. and the plaintiffs; whereupon the term in the under-lease was, as to one undivided sixth part, merged in the reversion, and S. and the plaintiffs became, as joint tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint tenants, possessed of the reversion of two other undivided sixth parts of the premises; that V. afterwards assigned to S. his interest in the under-lease granted to him and S.: whereupon the term as to one undivided sixth part merged in the reversion in the three sixth parts whereof S. and the plaintiffs were possessed, and the plaintiffs became, as joint tenants, possessed of the reversion of two of the last-mentioned three sixth parts; that S. died before the determination of the under-lease; and alleged as a breach the non-performance by V. of the covenant to repair after S.'s death, and to leave in repair:—Held, that the declaration was good, inasmuch as the whole of the reversion which remained was vested in the plaintiffs alone, in respect of which they were entitled to sue on the covenant to repair, as assignees, under 32 Hen. 8, c. 34, notwithstanding the partial merger of the term. *Budeley v. Vigurs*, 4 El. & Bl. 71; 2 C. L. R. 1627; 1 Jur., N. S. 159; 23 L. J., Q. B. 377.

Held, also, that under the conveyance by G. to S. and the plaintiffs one-third of the reversion was at once destroyed by coalescing with half the interest under the lease which was in S., and that consequently S. never took as reversioner; and there never was any suspension of the right of action by reason of S. being a party to sue and be sued. *Id.*

Held, also, that even if S. took and remained interested in one-sixth of the reversion, and that one-sixth was destroyed by the assignment to him by V., still the right of action for not leaving in repair, which arose only at the termination of the lease, never accrued to S., and therefore was never suspended. *Id.*

Held, also, that the plaintiffs might recover on the privity of contract transferred by 32 Hen. 8, c. 34, although there were an appor-

tionment of the covenant to repair; but that in this case there was no such apportionment, as the plaintiffs had the whole existing reversion, and were injured if the whole of the premises were not kept in repair. *Id.*

Held, also, that the plaintiffs might recover on the privity of contract transferred by the 32 Hen. 8, c. 34, where the entire interest in the covenant had not passed to them. *Id.*

A lease was granted of a piece of land, with two messuages thereon, in course of erection, with a covenant by the lessee to complete the messuages within two months, and also to "keep the messuages or tenements or premises in repair during the term," with a proviso for forfeiture for breach of any of the covenants. The premises never were furnished, and were much dilapidated:—Held, that a forfeiture was incurred by the breach of the covenant to repair, in respect of which forfeiture the assignee of the reversion might sue. *Bennett v. Herring*, 3 C. B., N. S. 370.

A declaration stated, that F. and G. being seized of an estate in fee demised by indenture to the defendant and his assigns leave to dig for clay therein, and make such adits, and erect sheds and buildings as he should think necessary for working the clay, and to hold the same for twenty-one years; that the defendant covenanted with F. and G., their heirs and assigns, to pay compensation to them, their heirs and assigns, for all such lands within the limits thereof, as he might injure by such digging, the amount in case of difference to be settled by arbitration, and that the defendant would keep all houses and sheds in good repair; that the defendant entered and got the clay, when F. and G., by indenture, granted and conveyed the lands to the plaintiff, his heirs and assigns forever, who thereby became seized in fee, and that the interest of the defendant was determined by a notice to quit. First breach, that the defendant, by digging for clay after the plaintiff so became seized, did injure and destroy part of the land, for which the plaintiff was entitled to a compensation; and although he appointed an arbitrator to ascertain the amount, yet the defendant refused to appoint one. Second breach, that the defendant did not keep the works in repair:—Held, that the claim to damages, in respect of the injury to the land, being merely a chose in action, did not pass to the plaintiff by the conveyance of the land to him, and that the agreement as to ascertaining the amount of injury was merely incidental, collateral, and annexed to the substantial matter, and was to be exercised by the person who was the owner of the land at the time the injury was done, and to whom the compensation ought to be made. *Martin v. Williams*, 1 H. & N. 817; 26 L. J., Exch. 117.

Held, also, that the conveyance of the land to the plaintiff during the existence of the term in the incorporeal hereditaments, was an assignment of the reversion within 32 Hen. 8, c. 34: that the covenant to repair, as it directly touched and concerned the thing de-

mised, was assignable with the reversion, and that the action might be brought in the name of the plaintiff, who was entitled to the benefit of the covenants. *Ib.*

The assignee of the reversion of a lease may maintain ejectment for breach of a covenant to repair, without giving the tenant notice of the assignment. *Sculcock v. Ilrston*, 1 L. R. C. P. Div. 106; 45 L. J., C. P. Div. 125; 24 W. R. 431; 34 L. T., N. S. 130.

**Right to rent, in general.**—A termor of mines granted a lease at a rent for a longer term than his term, reserving a royalty upon the ore and coal raised by him, or an annual sum in lieu thereof, if the royalties in any year should not amount to that sum; with power to distrain for the rents, reservations and royalties. During the continuance of the original term, he assigned by deed the rent and his estate in the premises:—Held, that his assignee could maintain an action for rent in arrear, after the assignment, and during the continuance of the original term. *Williams v. Illyward*, 5 Jur., N. S. 1417; 1 El. & Bl. 1040; 28 L. J., Q. B. 374; 7 W. R. 563.

The assignee of a lessor in a lease by deed, who has no estate in the land, has a reversion by estoppel as against the lessee, and may sue him on the covenants accordingly; and this applies to the case where a mortgagor makes a lease by deed, and assigns his equity of redemption with words that would pass a legal reversion in fee. *Cuthbertson v. Irving*, 4 H. & N. 742; 5 Jur., N. S. 740; 28 L. J., Exch. 306.

It makes no difference in this respect that the estates both of the mortgagor and mortgagee are equitable estates. *Ib.*

Tenants in common, assignees of the reversion of a lease, may join in suing, and be jointly sued, on covenants therein. *Womersley v. Dully*, 26 L. J., Exch. 219.

After twenty years' use of premises, converted into a shop, without license, contrary to a covenant in a lease, an assignee of the reversion cannot take advantage of a condition of re-entry for such use, subsequently to the assignment. *Gibson v. Dooy or Doeg*, 27 L. J., Exch. 37; 2 H. & N. 615.

Whether the benefit of such a condition runs with the land, and can be taken advantage of by the assignees of a reversioner, depends on the nature and character of the covenant, and whether it affects the use and enjoyment of the premises, and not whether it has, in fact, deteriorated the value. *Ib.*

Where rent has become due under a lease made by several joint tenants, an assignment of the reversion by one does not alter the nature of the by-gone rent, and therefore the right of distraining for it is gone. *Staveley v. Alcock*, 16 Q. B. 636; 15 Jur. 628; 20 L. J., Q. B. 320.

A. let a house to B. as tenant from year to year, and afterwards granted a lease by deed to C. of the house and other property, for twenty-one years:—Held, that this transaction

transferred the reversion of the house to C., and that A. could not recover against B. for rent due after the lease. *Harmer v. Bean*, 3 C. & K. 307—Parke.

In an action for rent on an indenture brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor nil habuit in tenementis. *Parker v. Manning*, 7 T. R. 537.

A. being tenant to B., under a lease containing covenants, by which the former was bound to fetch seventy five bushels of coal from Poole yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at 5s. per bushel, it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into, whereby A. agreed with B. that he would fetch and bring to the dwelling house of B., his heirs and assigns, seventy-five bushels of coals yearly, for twelve years (the term of the new lease) and yearly supply B., his heirs and assigns, with as much good wheat as he should want in his family, at 5s. per bushel. B. having parted with his reversion in the farm, and also quitted the mansion house in which he resided at the time when the agreement was made:—Held, that he was not entitled to maintain an action against A. for refusing to deliver the wheat at the stipulated price; that the agreement being entire must receive one uniform construction; and as it was clearly local in respect to the delivery of the coals, it could not be deemed personal with respect to the wheat. *Coker v. Guy*, 2 B. & P. 565.

Held, also, that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. *Ib.*

Where a termor makes a lease to A. for twenty one years, reserving rent "to herself, her executors, administrators and assigns," and the lessee covenanted to pay it "to her and her assigns," and she afterwards conveys the reversion expectant on the lease to trustees, in trust for the wife of A. during her life, the administratrix of the surviving trustee may sue the lessee for arrears of rent due as well before as after the decease of the intestate, for the purpose of defraying there-out expenses properly incurred on behalf of the property; and it is no answer for the lessee to allege, that with the consent of the intestate, and of the administratrix since the death, he had been allowed to pay over the rents to his wife, the money not being settled to her separate use. *Dollen v. Butt*, 4 Jur., N. S. 835; 27 L. J., C. P. 281; 4 C. B., N. S. 760.

In July, 1804, L. demised premises to the defendant for five years, at a rent of 55l. per annum, payable quarterly. Immediately after the grant of the lease the defendant advanced to L. 170l., on account of rent; and in September, 1805, L. mortgaged the prem-



ises to the plaintiff. In May, 1866, B., who claimed under a prior mortgage from L., dated in September, 1858, through C., his attorney, commenced an ejectment against the defendant to recover possession of the premises, but did not proceed with it; and on the 1st of November, 1866, the plaintiff's attorney wrote to the defendant: "Mr. C. has written to say his clients are no longer entitled to receive your rent. I therefore request that you will have the kindness to pay the same here by Monday next."—Held, that the pre-payment of rent was no bar to his claim to the rent accruing after the defendant had notice that the plaintiff was grantee of the reversion; and that the letter, coupled with the circumstances known to the defendant, that he was raising money by mortgaging his reversion, and that the plaintiff's claim for rent could hardly be founded upon any other alleged right than one resulting from a grant of the reversion, would warrant a jury in inferring that the defendant had notice that the plaintiff was such grantee. *Cook v. Guerra*, 7 L. R., C. P. 132; 41 L. J., C. P. 89; 20 W. R. 367; 26 L. T., N. S. 97.

**Apportionment of rent on assignment or severance of reversion.**—[By 22 & 23 Vict. c. 35, s. 8, where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re entry for non payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.]

Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee. *Flinn v. Calow*, 1 M. & G. 589.

Upon a joint demise by two tenants in common, in fee, with a general reddendum, not specifying to whom the rent is to be payable, the rent follows the reversion, and on the death of one of the tenants in common the reversion is split, and his share of it descends to his heir, who is entitled to the rent. *Beer v. Beer*, 12 C. B. 60; 16 Jur. 923; 21 L. J., C. P. 124.

As to apportionment of rent, generally,—see this title, VII., 3.

**When attornment is necessary; what amounts to an attornment, and its effect.**—[By 4 Anne, c. 16, s. 9, all grants or conveyances by fine or otherwise of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land, out of which such rent shall be issuing, or of the

particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.

By s. 10 it is provided, that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor or comisor, or by breach of any condition for non-payment of rent before notice shall be given to him of such grant by the comisor or grantee.

Whereas, the possession of estates in lands, tenements and hereditaments is rendered very precarious by the frequent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlord or landlords, lessor or lessors, who by that means are turned out of possession of their respective estates, and put to the difficulty and expense of recovering the possessions thereof by actions or suits at law: for remedy thereof, it is enacted, that all and every such attornment and attornments of any tenant or tenants of any messuages, lands, tenements or hereditaments within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, shall be absolutely null and void to all intents and purposes whatsoever; and the possession of their respective landlord or landlords, lessor or lessors, shall not be deemed or construed to be anywise changed, altered or affected by any such attornment or attornments:

Provided always, that nothing herein contained shall extend to vacate or affect any attornment made pursuant to and in consequence of some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited. (11 Geo. 2, c. 19, s. 11.)

Where rent is paid by succeeding tenants, after an adverse possession of twenty-three years, it does not amount to an attornment, unless the consent, or at least the knowledge, of the landlord can be shown. *Meredith v. Gilpin*, 6 Price, 146.

Pending a demise by deed from A. to B., a sequestration issued out of Chancery against A.: B. signed an unstamped paper, purporting that he attorned, and became tenant to the sequestrators, to hold on such terms as might be afterwards agreed on:—Held, first, that the sequestrators could not maintain use and occupation against B., because an attornment infers a continuance of a subsisting tenancy, which here would be created anew by the deed; secondly, that the sequestrators could take no estate, and consequently they had no estate to which an attornment would apply; thirdly, that the instrument, if it had any operation, would operate as a new demise, and could not be read without a stamp. *Cornish v. Searell*, 1 M. & R. 703; 8 B. & C. 471.

An attornment where a tenant merely puts one person in the place of another as his landlord, but continues to hold under the same terms and conditions as before, is a mere acknowledgment that the person making it is tenant, and it requires no stamp. *Doe d*

*Lindsay v. Edwards*, 5 A. & E. 95; 6 N. & M. 633; 2 H. & W. 139. S. P., *Doe d. Wright v. Smith*, 3 N. & P. 335; 8 A. & E. 255; 2 Jur. 854.

A tenant by elegit may distrain without attornment. *Lloyd v. Davies*, 2 Exch. 103.

A demise by way of grant for a term of years to commence immediately, made by a person entitled to an estate in tail in remainder, expectant upon the determination of a life estate during the lifetime of the tenant for life, operates as a conveyance of an estate for years carved out of the remainder, and vests the estate immediately in the grantee, without entry, by virtue of 4 Anne, c. 10, s. 2, which makes such a conveyance effectual without any actual attornment of the tenant of the particular estate upon which the remainder is expectant. *Doe d. Agar v. Brown*, 2 El. & Bl. 381; 23 L. J., Q. B. 432.

Avowry, in replevin, that Henry 8 was seized in fee of the shop in which, &c., and by letters patent enrolled, granted it to W., and the heirs male of his body, paying annually to the king a certain rent at Michaelmas. It then deduced title to the rent to Charles 2, and stated, that he, by letters patent enrolled, after referring therein to 22 Car. 2, c. 6, granted the rent to trustees mentioned in the statute, and their heirs, upon trust for Charles 2; that the trustees, by indenture, for considerations therein expressed, conveyed the rent to the dean and chapter of St. Paul's, whereupon and whereby the dean and chapter became and were seized as of fee in the rent, and they and their successors continued to be so seized until and at Michaelmas, 1845; an avowry was then made for six years' arrears of rent due to the defendants at the time when, &c.:—Held, that an express averment of attornment by the terre-tenant, upon the conveyance of the rent by the trustees, or some equivalent allegation, was necessary, because it could not be presumed that the conveyance was made after 4 Anne, c. 10, s. 9; and that the averment, that the rent was duly paid for a certain time, and that it was due and in arrear to the dean and chapter, was not an equivalent allegation, because, to make the payment of rent an attornment in law, it must be made to the grantee of the rent, and an attornment must be in the life of the grantee, and that an attornment could not be implied. *Vigers v. St. Paul's (Dean and Chapter)*, 14 Q. B. 909; 14 Jur. 1017; 19 L. J., Q. B. 64—Exch. Cham.

A. granted to B. a leasehold interest in premises for a term of thirty years, to be computed from the 10th of March, 1839. On the 10th November, 1846, B. demised to the defendant the same premises for the term of twenty-three years, reserving a rent, and afterwards assigned his interest to the plaintiff:—Held, first, that by the deed a rent was created, and that it was assignable; secondly, that the plaintiff, who was the assignee of the party to whom the rent was reserved, could maintain an action for the recovery of

it; and thirdly, that a privity was created between the plaintiff and the defendant, the same as if the defendant had actually attorned to the plaintiff, for, by the 4 Anne, c. 16, s. 9, attornment is unnecessary. *Williams v. Hayward*, 28 L. J., Q. B. 374; 1 El. & El. 1040.

An avowry stated a demise for two years, ending on the 29th of September, 1842. On the trial an attornment in writing, dated the 14th of October, 1842, was given in evidence, by which the plaintiff and others attorned tenants to the defendant for such parts of the premises as were in their occupation, and agreed to pay the rent set opposite to their names. Opposite to the defendant's name was written, "rent 55*l.*, from Michaelmas, 1840:"—Held, that the avowry was supported by the evidence. *Gladman v. Plumer*, 10 Jur. 109; 15 L. J., Q. B. 79.

A lessee, desiring to secure his premises for himself at the end of his lease, and being a bankrupt without a certificate, procured a friend to take the conveyance as trustee for him. This conveyance showed the legal estate to be outstanding in a person who could not be found. The lessee continued to occupy. The creditors' assignees, becoming aware of the circumstances, induced the trustee to convey his interest to them, and forced the lessee to attorn to them, and brought ejectment:—Held, that the assignees had a sufficient title. *Cooper v. Landa*, 14 W. R. 610; 14 L. T., N. S. 287—C. P.

A., in 1861, granted an under-lease to B. for twenty-one years from Michaelmas, 1861, at the yearly rent of 50*l.* In 1864, he granted an under-lease of the same premises to C. for twenty-one years from Michaelmas, 1863, at the same rent. B. never attorned to C.:—Held, inasmuch as there was no attornment, that the demise to C. did not pass the reversion to him, but only an interesse termini, and that, in order to establish C.'s under-lease, a surrender by B. to A., and not to C., was the effectual and proper course. *Edwards v. Wickwar*, 1 L. R., Eq. 403.

**What constitutes a merger; and effect of merger of estates upon rights and liabilities of the parties.**—[By 8 & 9 Vict. c. 108, s. 10, when the reversion expectant on a lease, made either before or after the 4th day of August, 1845, of any tenements or hereditaments of any tenure, shall after the 1st day of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.]

A. was lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809; in December, 1799, A. took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809; the lessor died in December, 1800,

and devised the premises to A., the lessee, for his life; by lease and release, A., in 1806, conveyed his life estate to B.:—Held, that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life *Doe d. Rawlings v. Walker*, 5 B. & C. 111; 7 D. & R. 487.

L., being seized in fee, demised to B. for twenty-one years from June, 1814. B. demised to M. for twenty-one years from June, 1814, wanting twenty-one days; and then by deed-poll granted to L. the indenture of lease to M., the premises thereby granted, and the rent reserved, to hold to L., his executors, &c., for the term mentioned in the demise to M.; L. conveyed the premises, the reversion and reversions, rents, issues, and profits, and all his interest, in fee to the plaintiff, by way of mortgage; M. assigned his term to the defendant by way of mortgage, but the defendant never entered:—Held, that the deed poll from B. to L. did not merge the chattel interest in the fee, or suspend the right to sue on the lease to M. *Burton v. Barclay*, 7 Bing. 745; 5 M. & P. 785.

A lease was granted in 1759 for 99 years, if certain parties should so long live. The lessees in 1818 demised the premises to P. for 62 years, from the 25th March, 1821, if their interest should so long continue, subject to a rent of 42*l.* and various covenants, with a proviso for re-entry in case of default. P. had already the reversion in fee, subject to a mortgage granted by him before the last-mentioned demise. By lease and release executed in 1820, to which the mortgagee was a party, P. in consideration of a sum of money (part of which went to discharge the mortgage) conveyed the premises in fee to a purchaser, to whom the mortgagee also assigned his term; and it was stipulated that the purchaser should retain 300*l.* of the purchase-money upon trust, that, if P. should pay the 42*l.* rent, and perform the covenants contained in the lease of 1818, the purchaser should pay over to him the 300*l.* at the expiration of the term, or extinguishment of the lease of 1759, and interest in the meantime:—Held, that the deed of 1818 was an assignment of all the interest of the then lease to P., and that, by the conveyance of 1820, that interest, as well as the reversion in fee, passed to the purchaser, and (the mortgage being at the same time put an end to) the term became merged in the inheritance; and consequently, that, as soon as the term became vested in the purchaser, P. was discharged from the rent and covenants, and entitled to the 300*l.* *Thorn v. Woolcombe*, 3 B. & Ad. 586.

By an indenture in 1742, the Broderers' Company demised a farm for 100 years, with a covenant for perpetual renewal. On the 25th of August, 1827, the party in whom the term vested assigned the residue to H. On the 28th of August, 1827, he assigned the residue of the term to mortgagees, with a proviso for redemption on payment of 5,000*l.* within twelve months. In May, 1828, a lease

of the premises was executed by H. and the plaintiff, for twenty-one years, under which the plaintiff entered into possession, and paid rent to H. up to 1835, and afterwards to the defendant. On the 12th of January, 1836, by an indenture between the mortgagees, H., the defendant, and the Broderers' Company, the mortgagees and H. surrendered to the company the premises, for the residue of the term, together with all covenants, to the intent that the residue of the term might be merged in the reversion, and the covenant for renewal be extinguished. On the 18th of January, 1836, the Broderers' Company demised the premises to H. for 100 years, and by an indenture of the 4th of February, 1836, the unexpired residue of the term became vested in the defendant. An action having been brought against him as assignee of H. for a breach of covenant:—Held, first, that H. did demise to the plaintiff, as the lease by him was good by way of estoppel. *Sturgeon v. Wingfield*, 15 M. & W. 224; 15 L. J., Exch. 212.

Held, secondly, that the reversion became vested in the defendant, as it was good by way of estoppel. *Id.*

Declaration in an action by the plaintiffs and P. on an indenture, by which, after reciting that they were owners of the premises subject to a mortgage for 3,500*l.*, the interest of which was payable half-yearly at the office of an attorney named, the plaintiffs and P. demised the premises to the defendant for seven years, yielding and paying the clear yearly sum of 153*l.* 11*s.* in part of interest on the mortgage. Breach, non-payment of rent; and an averment, that the plaintiffs had not, nor had either of them, after since the making of the indenture, any reversion of or in the premises, purported to be demised. Plea, the reversion in the premises expectant on the determination of the lease was in the plaintiffs and P., and after P.'s death was in the plaintiffs, who survived her; and, before breach, the plaintiffs conveyed their reversion to S., who became the assignee. Replication, no reversion was at the making of the indenture or since in the plaintiffs and P., nor since the death of P. in the plaintiffs:—Held, first, that the replication was not a departure from the declaration. *Parfeter v. Harris*, 7 Q. B. 708; 10 Jur. 260; 15 L. J., Q. B. 113.

Held, secondly, that the declaration was good, inasmuch as the facts disclosed in the lease did not estop the plaintiffs from saying that they had no reversion; and that, therefore, the covenant for payment of rent was a covenant in gross. *Id.*

Held, thirdly, that the plea was bad, inasmuch as the defendant was not at liberty to assume that there was a reversion. *Id.*

A., being tenant for life, in 1769 made a lease of premises, to commence in 1784, for the term of forty-six years, and died in 1775. B., the assignee of that term, in 1795 demised the premises to C., D. and E., whose assignees the plaintiffs were, for thirty-four years and three-quarters; and the plaintiffs, in 1812,

demised the premises to the defendant for eighteen years and a quarter. The declaration stated, that C., D. and E. were possessed of the premises for the residue of a term of thirty four years and three-quarters, and that the plaintiffs were possessed of the reversion of the premises. The judge ruled at the trial, that the interest of C., D. and E. was properly described in the declaration, and that the plaintiffs were possessed of the reversion. On motion for a new trial, on the ground of misdirection:—Held, that there was no ground for a new trial. *Ozley v. James*, 13 M. & W. 209; 13 L. J., Exch. 358.

Held, also, that the plaintiffs were possessed of the reversion. *Ib.*

B., after mortgaging premises in fee, demised them by deed to the defendant for thirty-one years. B. afterwards became bankrupt and died, and his assignees sold the premises to D.; and the mortgagee, being paid off, by the direction of the assignees, conveyed to D. in fee, the assignees also being parties and joining in the conveyance. D., after receiving rent for two years, gave the defendant notice to quit:—Held, that the lease being good against B., by estoppel only, D. was not estopped by it in consequence of the assignees of B. having joined in the conveyance to him, and might bring ejectment and an action for use and occupation. *Doe d. Dovens v. Thompson*, 9 Q. B. 1037; 11 Jur. 1007.

A., in May, 1823, demised premises to B. for eighty years, with a proviso for re-entry in case the lessee, his executors, &c., should exercise or carry on, or permit to be exercised or carried on, the business of a victualler or publican. B., in November, 1823, mortgaged to C., and in 1829, the mortgage term was assigned to D., and ultimately became vested in E. After B. had assigned to C., and when he had no reversion but a mere equity of redemption, he by indenture granted an under-lease for seventy-six years to F., with a proviso for re-entry similar to that contained in the original lease from A. Some of the mesne assignments were made subject to this under-lease. In ejectment by the legal representatives of E., for a breach of the covenant in the original lease in using the premises as a public-house or beer-shop:—Held, first, that the under-lease granted by B. operated merely as a demise by estoppel, inasmuch as he had not, at the time of making it, or since, any legal interest. *Doe d. Prior v. Ongley*, 10 C. B. 25; 20 L. J., C. P. 26.

Held, secondly, that the lessors of the plaintiff, or the persons under whom they claimed, not being parties to the under-lease, or to any of the assignments which recognized and referred to it, were not bound by any covenants contained therein. *Ib.*

Held, thirdly, that the payment to and acceptance by E. of rent, under the under-lease by B. to F., merely created a tenancy from year to year; and that such tenancy was well determined by a notice to quit, served

upon the attorney of the administratrix of the person who had paid the rent to the lessors of the plaintiff, and under whom the defendant claimed. *Ib.*

A lease of premises for a term of years was granted to K., L. and C. Some time afterwards L. granted a lease of the residue of the term, wanting one day, to the defendants, by whom the lease was executed, and rent was paid to L. Both leases contained covenants to repair and insure, and a proviso for re-entry for breach of either of them, but a performance of the covenant to insure in the lease to the defendants would not necessarily have included a performance of the corresponding covenant in the original lease. The premises being out of repair, and uninsured, the original lessor entered for a forfeiture. In an action by L. as reversioner against the defendants, for a breach of their covenants to repair and insure, and for damages sustained by his loss of the term:—Held, first, that the execution of the lease and payment of rent to L. by the defendants were evidence that L. was solely entitled to the reversion, upon the determination of the lease granted to the defendants. *Logan v. Hull*, 4 C. B. 598; 11 Jur. 804; 10 L. J., C. P. 252.

Held, secondly, that L. (a sub-lessor) could not recover against the defendants (sub-lessees) the value of the term granted by the original lease, which he had lost by the defendants' breach of covenants. *Ib.*

A corporation being seized in fee of a close, by a deed of the 17th February, 1800, demised the same to H. for a term of lives and years. By deed of the 23d July, 1803, H. assigned to C. his interest in the premises, to secure payment of 1,200*l.* lent by C. to H. By deed of the 10th February, 1804, reciting the two former deeds, and that H. agreed to sell part of the land to M. and W. for a sum out of which the sum due from H. should be paid to C., C. bargained, sold, assigned and transferred, and H. granted, bargained, sold, assigned and transferred to M. and W. part of the premises. In 1812, H. died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same after her death to J. and M. in manner following: "Upon trust to pay and apply the rents, issues and profits of the same to and for the life and benefit of my daughter Mary and her assigns, during her life, and independent of her present or any future husband; and, after her death, I give, devise, and bequeath my real and leasehold estates unto and equally among all and every the children of my daughter, share and share alike, as tenants in common." In 1816, the wife of H. died. By deed of the 11th December, 1817, the corporation assigned to the trustees the reversion in fee simple of the close:—Held, that, as the trustees took only an estate during the life of Mary, the lease for lives did not merge on the grant of the reversion. *Cooke v. Blake*, 1 Exch. 220; 17 L. J., Exch. 370.

### X. ESTOPPEL OF TENANT TO DISPUTE TITLE OF LANDLORD.

#### 1. How created.

**General principles.**—The doctrine of estoppel between landlord and tenant is founded upon the principle that a lessee, having accepted a lease, may not plead to the action of his lessor nil habuit in tenementis. *Lungford v. Selmes*, 3 Kay & J. 220; 3 Jur., N. S. 859.

A tenant may not deny his landlord's title, because, if that title is bad, the tenant's first duty is to give up the possession which he received from the landlord, and not to defend an action against him. *Agar v. Young*, Car. & M. 78—Erskine.

Where a lease purports to be made under a power contained in a will, the lessee is estopped, by his execution of the counterpart, from denying the execution of the will. *Bringloe v. Goodson*, 8 Scott, 71; 5 Bing. N. C. 738; 1 Arn. 322.

If one party takes an interest in land under another, although that interest is wrongfully acquired, he cannot afterwards dispute the title of the person under whom he took that interest. *Doe d. Johnson v. Baylun*, 4 N. & M. 837; 3 A. & E. 188; 1 H. & W. 270.

So long as a lessee continues in possession under the lease, he cannot set up any defense founded upon the fact that the lessor nil habuit in tenementis; and upon the execution of the lease there is, in contemplation of law, created in the lessor a reversion in fee-simple by estoppel, which passes by descent to his heir, and by purchase to his assignee or devisee, who may sue on the covenants in the lease. *Cuthbertson v. Irving*, 4 H. & N. 742; 5 Jur., N. S. 740; 29 L. J., Exch. 306; affirmed, 6 H. & N. 135; 6 Jur., N. S. 1211; 29 L. J., Exch. 485; 3 L. T., N. S. 335; 8 W. R. 704—Exch. Chanc.

**By payment of rent.**—Payment of rent is *prima facie* evidence of the title of the landlord. *Doe d. Chun v. Clarke*, Peake's Add. Cas. 239—Bayley.

A tenant who has paid rent cannot set up the title of a third person, in bar of an ejectment by his lessor. *Doe d. Brietows v. Pegge*, 1 T. R. 760, n.; 4 Dougl. 309.

P. and the plaintiff, occupied successively premises under a lease that had been granted in 1809, by parties having no right to make a lease. The defendant, in 1827, became possessed of the fee. In 1829 and 1831 respectively, the defendant distrained on P. and on N. for arrears of rent, which they paid:—Held, that these payments amounted to such an acquiescence by P. and N. in the title of the defendant, that they, and those deriving possession from or under them, were estopped from disputing it; and this although the defendant himself produced the lease of 1809, and failed to show that it had been assigned to him. *Cooper v. Blandy*, 4 M. & Scott, 562.

Land was vested in trustees to apply the rents to the repair of a parish church. Those trustees in 1818 demised to S. for ten years,

and again in 1828 for ten years more, which lease expired in 1833. During the lease S. assigned to the plaintiff, and after the expiration of it the plaintiff continued in possession under the trustees, paying rent to them. The trustees afterward, and after the 59 Geo. 3, c. 12, came into operation, viz., in 1842, assigned by deed to new trustees, two of whom were the churchwardens of the parish at the time that a distress for rent was made:—Held, that the payment of rent to the old trustees was evidence of a new taking under them as tenant from year to year, which precluded the plaintiff from contesting the title of the old trustees, and that the new trustees, who claimed under them by deed of assignment, had a good title by estoppel. *Gouldsworth v. Knights*, 11 M. & W. 337; 12 L. J., Exch. 283.

**By award.**—Where the lessor of the plaintiff and the defendant in ejectment have before referred their right to the land to an arbitrator, who has awarded in favor of the lessor, the award concludes the defendant from disputing the lessor's title in an ejectment. *Doe d. Morris v. Rosser*, 3 East, 15.

**By acknowledgment of title.**—Where a tenant occupied apartments in a house belonging to a wife, and paid rent to the husband, who subsequently granted a lease of the whole house to the plaintiff:—Held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title. *Rennie v. Robinson*, 1 Bing. 147; 7 Moore, 539.

The plaintiff had been let into possession of premises, as tenant for a year, by N., six months' notice to be given on either side, and had paid rent to him. Before the end of the year the defendant went to the plaintiff and claimed title, and desired that the rent in future should be paid to himself. The plaintiff, in order to be satisfied of the truth, went with the defendant to N., who admitted the defendant's title, and that the plaintiff must consider him landlord:—Held, that the plaintiff, who assented and subsequently paid rent to the defendant, could not contest his title. *Hall v. Butler*, 2 P. & D. 374; 10 A. & E. 204. See *Jew v. Wood*, 1 Craig & Ph. 185; 5 Jur. 954.

The defendant, in March, 1832, took premises from F. and B., "agents for the trustees of the joint estates of T. and S. B." Upon the trial of an action for use and occupation by the plaintiffs, "as trustees of the joint estate of T. and S. B." against the defendant, it appeared by the plaintiffs' own evidence, that, in 1831, they were trustees for the estate of S. B. only:—Held, that the defendant was estopped from taking advantage of this discrepancy, having in 1832 taken the premises of the plaintiffs as trustees of the joint estate. *Fleming v. Gooding*, 4 M. & Scott, 455; 10 Bing. 549.

G. demised premises to D., who entered and paid him rent. During the term, a third party, T., disputed G.'s title, and they

agreed to be bound by the opinion of a barrister, who decided in T.'s favor. G. thereupon delivered up the title-deeds, and permitted T.'s attorney to tell B., the tenant, that he must, in future, pay the rent to T. as his lord. D. then paid rent accordingly, but G. afterwards distrained upon him for the same rent:—Held, that G.'s claim of title as landlord to D. had expired; that his conduct amounted to an admission of that fact, and that D. was not estopped from alleging it; and, per Lord Denman, C. J., that G. was estopped from setting up his relation of landlord against the defendant, having himself induced D. to pay rent to another person. *Downs v. Cooper*, 2 Q. B. 256; 1 G. & D. 573; 6 Jur. 622.

An attornment by a tenant to a receiver appointed by the Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and the receiver, but do not inure to enable the person who is found ultimately to have the legal title to treat the tenant as his tenant, and to distrain for rent. *Evans v. Mathias*, 3 Jur., N. S. 793; 23 L. J., Q. B. 809; 7 El. & Bl. 590.

D. granted to A. a lease of premises for twenty-one years from the 29th of September, 1854, "subject, nevertheless, to an indenture of lease, bearing date the 15th October, 1847, and made between D., of the first part, J. D. and B. D., of the second part, and K., of the third part, whereby the premises were demised to K. for a term of twenty-one years, determinable and subject to the covenants and agreements therein mentioned." A. having paid rent under his lease:—Held, in an ejectment for breaches of covenant, that A. was estopped from setting up the prior lease. *Duke v. Ashby*, 7 Il. & N. 600; 8 Jur., N. S. 236; 31 L. J., Exch. 168; 10 W. R. 273.

By a deed made in 1840, S., in contemplation of his marriage, conveyed real estates to trustees to his own use until the marriage; and after the marriage, to the trustees, their executors, administrators and assigns, for a term of 500 years, without impeachment of waste, upon certain trusts, and immediately after the expiration, or sooner determination thereof, and in the meantime subject thereto, to the use of S. for life, without impeachment of waste, with remainder to other uses. It was also provided by the deed, that it should be lawful for S. during his life, from time to time, by deed either referring to or not referring to the power, to demise the estates for any term not exceeding twenty-one years, so that there should be reserved the best or most improved yearly rent, to be incident to the immediate reversion of the hereditaments so demised, that could be obtained for the same, and so that the lessee was not by any clause therein to be contained made punishable for waste, or exempted from punishment for committing waste. The marriage took place, and S. afterwards, by deed, leased the premises to the defendant for twelve years. By the lease, which did not refer to the deed of settle-

ment, the rent was reserved to S., his heirs and assigns; and it contained a covenant by the lessee to repair a blacksmith's shop, and all the glass and leadwork of the windows of the messuages, and all doors, the lessee being allowed sufficient bricks and timber for the repairs, and to yield up the premises so repaired at the end of the term to S., his heirs or assigns; there was also a covenant by S. that he would repair, except those repairs covenanted to be made by the defendant. S. died before the expiration of the term:—Held, that the lease was not in pursuance of the power, and void as between the trustees and the lessee; but that such a lease is good by way of estoppel between the parties to it, and, consequently, S. might have maintained an action upon it against the lessee for a breach of covenant by the lessee. *Fellows v. Gower*, 11 Exch. 274; 24 L. J., Exch. 289.

**Effect of mistake or misrepresentation.]—**Where a tenant, by mistake or misrepresentation, pays rent to a person not entitled to demand it, he is not precluded by such payment from giving evidence, on a plea of non tenuit, in replevin against the supposed landlord, to show that the latter is not entitled to the rent. *Rogers v. Pitcher*, 1 Marsh. 541; 6 Taunt. 202.

An acknowledgment of title by a tenant, in one who claims as heir-at-law of the person under whom the tenant had previously held, will not preclude the latter from calling in question the title of the claimant, under a plea of non tenuit, if it appears that the acknowledgment proceeded from a misrepresentation or misapprehension of the nature of the title set up. *Gregory v. Doidge*, 11 Moore, 394; 3 Bing. 474.

Payment of rent to, or even an express agreement with, one who claims to be landlord, does not preclude the tenant from afterwards showing that the party claiming had no title, and that the payment or other acknowledgement was induced by misrepresentation or made under mistake, the tenant not having been originally let into possession by the claimant. *Uaridge v. M'Kenzie*, 4 Scott, N. R. 796; 4 M. & G. 143.

A. demised a house and lands to B., and afterwards, being embarrassed, assigned the premises and all his personal estate to C. A. told B. that he had assigned the premises, and requested him to give C. an acknowledgment, whereupon B. gave C. a shilling, and subsequently agreed with C. to give up possession to him of the house and lands respectively, at the usual times, reserving an allowance for his improvements. Afterwards, and while the premises were still in B.'s occupation, A. became bankrupt, and C. brought ejectment. The assignees under A.'s commission defended as landlords, and contended that the assignment to C. was invalid, A. having become bankrupt when he made it:—Held, that the acknowledgments above mentioned did not estop B., or the assignees, as representing him, from contesting C.'s title on the above ground, such acknowledg-

ments having been made in consequence of A.'s representations, in which he suppressed the facts rendering the assignment invalid. *Doe d. Plavin v. Brown*, 3 N. & P. 592; 7 A. & E. 447; W., W. & D. 677.

## 2. Who Estopped; and to what Extent.

**What parties are estopped; and in whose favor estoppel operates.]**—In ejectment, a person defending as landlord, is bound by the same estoppel as the tenant in possession. *Doe d. Munvers v. Mizen*, 3 M. & Rob. 56—Patteson.

Previously to 1812, a person built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to the tenant of the adjoining land, who held it under a lease granted in 1812. The latter let the premises to the defendant:—Held, in ejectment by the landlord of the adjoining land against the defendant, that the latter was estopped from denying the title of the tenant, and the tenant from disputing that of the landlord. *Doe d. Whelsh v. Fuller*, 1 Tyr. & G. 17.

An assignee of a lease by indenture is estopped by the deed which estops his assignor. *Taylor v. Needham*, 2 Taunt. 278.

Ejectment for two stamping mills on the demise of H. The mills had been let to a mining company by H. from year to year, and notice to quit had been given by him to the company. On the day of the demise in the declaration H. was a partner in the company, and the defendant, who was another partner, defended on behalf of the company. At the trial, it was ruled that the defendant was estopped from disputing the title of H., although H. had admitted, in an answer in Chancery which was in evidence, that he had no legal title:—Held, that the defendant was estopped from disputing H.'s title, notwithstanding H. was a partner with him in the company. *Francis v. Doe d. Harvey*, 4 M. & W. 831; 1 H. & H. 362.

A lessee, after executing a lease, cannot dispute the title of either of his lessors. *Wood v. Day*, 1 Moore, 389; 7 Taunt. 646.

But he may show that his landlord's title has expired. *Neave v. Moss*, 1 Bing. 360; 8 Moore, 389.

A tenant who attorns to a party from whom he did not receive the possession, is not estopped from showing want of title in such party. *Cornish v. Searell*, 1 M. & R. 793; 8 B. & C. 471.

Where the avowants proved an attornment made by the plaintiff after ejectment brought against him seven years before the commencement of the replevin suit, during which period it did not appear that the rent had been demanded; and the plaintiff offered to prove a feoffment to himself by the person under whom the avowants claimed; and certain letters written by such persons, containing expressions adverse to the avowant's claim, were rejected, on the ground that the plaintiff could not be permitted to dispute his

tenancy after an attornment;—a new trial was granted. *Gravenor v. Woodhouse*, 7 Moore, 289; 1 Bing. 88.

Where A. claimed to hold lands under B. as a security for a debt:—Held, that he could not defend an ejectment by the assignees of B., after his bankruptcy, on the ground that the grant under which B. derived his title from the crown was void. *Doe d. Bulld v. Abrahams*, 1 Stark. 305—Ellenborough.

If B., claiming under A., lets lands for a year to C., and dies, and A. afterwards brings an ejectment against C., C. cannot dispute the title of A. *Barwick d. Richmond Corp. v. Thompson*, 7 T. R. 488. And see *Bryan d. Child v. Winwood*, 1 Taunt. 208.

A. having, without title, entered upon land, and built a cottage, afterwards accepted a lease (by indenture) from B.: C., claiming the land as his own, paid to A. 20l. to give up the possession to him:—Held (in ejectment by B. against C.), that A. estopped himself from controverting the title of B., and that C. was bound by the estoppel, as having come in under and received the possession from B. *Doe d. Bullen v. Mills*, 1 N. & M. 25; 2 A. & E. 17; 1 M. & Rob. 385. See *Doe d. Rutzen v. Lewis*, 6 N. & M. 764; 5 A. & E. 277; 2 H. & W. 162.

An assignee of the reversion may establish his title against the lessee by way of estoppel. *Cuthbertson v. Irving*, 4 H. & N. 742; 5 Jur., N. S. 740; 23 L. J., Exch. 306; affirmed, 6 H. & N. 135; 6 Jur., N. S. 1121; 29 L. J., Exch. 485; 3 L. T., N. S. 385; 8 W. R. 704—Exch. Cham.

**Extent of estoppel where title of landlord is limited or defective.]**—A lessee for years, who covenants to deliver up possession of the premises, at the expiration of the term, to his lessor, his heirs and assigns, is not estopped by such covenant from showing, after the death of the lessor or the determination of the lease, that the lessor was only tenant for life of the premises demised. *Doe d. Strode v. Seaton*, 2 C., M. & R. 728; 1 Tyr. & G. 19; 1 Gale, 303.

The interest of a tenant for life and a reversioner are the same, and therefore a lessee who has paid rent to the first cannot set up title in another person as an answer to an action by the latter after the death of the former. *Doe d. Colemere v. Whitroe*, D. & R. N. P. C. 1—Abbott.

If a lessor who has only an equitable title grants a lease, he has, as against his lessee, a good title by estoppel. *Doe d. Marriott v. Edwards*, 6 C. & P. 208; 3 N. & M. 193; 5 B. & Ad. 1065.

A., having mortgaged to B., demised to C., reserving a power of re-entry, and afterwards mortgaged to D. all his interest. C. may set up the title of D. as an answer to an ejectment brought by A. under the clause for re-entry. *Id.*

A lease granted under a power contained in a settlement, recited the title of the lessor, and showed that he had only an equitable interest;

a right of re-entry for a breach of covenants in the lease was reserved to the lessor and his assigns:—Held, that the lessee was not estopped from disputing the title of the lessor so disclosed in the lease. *Greenaway v. Hart*, 14 C. B. 940; 18 Jur. 449; 23 L. J., C. P. 115.

By a will, a power was given to a tenant for life to demise for twenty one years, and to executors, to mortgage in fee or for years. In 1812, after the testator's death, the tenant for life made a grant for ninety-nine years, if he should so long live; in 1814, he demised, under his power, for twenty-one years; in 1828, the executors mortgaged for 1,000 years, under their power. To an action by the mortgagee for rent arising under the lease for twenty one years:—Held, that the lessee could not set up as a defense the interest of the grantee for ninety-nine years. *Bringloe v. Goodson*, 4 Bing. N. C. 726; 6 Scott, 502; 1 Arn. 322.

If A. is put into possession of a cottage by parish officers, and the lord of the manor prevails on A. to give up the possession of the cottage to him, and the lord of the manor puts B. into possession, and the parish officers bring an ejectment against B., B. cannot set up a title in the lord of the manor, as, under these circumstances, neither the lord of the manor nor B. can set up any title which A. could not set up; and if the cottage really belonged to the lord of the manor, he must bring an ejectment for it. *Doe d. Huden v. Burton*, 9 C. & P. 254—Gurney.

Where an occupier of a house paid rent to churchwardens, and the latter afterwards demised the house by lease for a term to A., with notice to the tenant that he must consider A. as his landlord:—Held, that the tenant might impeach the lease, and show that the lessee had no title derived from the churchwardens. *Phillips v. Pearce*, 8 D. & R. 43; 5 B. & C. 433.

In defense to an ejectment, it may be shown that the parties under whom the plaintiffs claim had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach. *Doe d. Oliver v. Powell*, 1 A. & E. 531; 3 N. & M. 616.

A lessee may plead to an action by his lessor that the lessor had an interest at the date of the lease, but that such interest had determined before the alleged cause of action arose. *Langford v. Selmes*, 3 Kay & J. 220; 2 Jur., N. S. 859.

Therefore, if a termor affects to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the person to whom he made such assignment; and, accordingly, it would be doubtful whether the assignor would have any remedies for recovering the rent. *Id.*

If any estate or interest passes from a lessor, or his real title is shown upon the face of the

lease, there can be no estoppel. *Cuthbertson v. Irving*, 4 H. & N. 742; 5 Jur., N. S. 740; 28 L. J., Exch. 806; affirmed, 6 H. & N. 135; 6 Jur., N. S. 1211; 29 L. J., Exch. 485; 8 W. R. 704; 3 L. T., N. S. 335—Exch. Cham.

If a lessor has no title, and the lessee is evicted by title paramount, he may plead that as a defense to an action by the lessor. *Id.*

**Effect of expiration or surrender of tenancy or term.]**—In ejectment by landlord against tenant, whose lease is expired, the latter is not barred from showing that his landlord's title has expired. *England d. Syburn v. Stale*, 4 T. R. 682. S. P., *Doe d. Jackson v. Ramsbottom*, 3 M. & S. 516.

Payment of rent by a tenant to his landlord, after the title of the latter has expired, and after the tenant has received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord, or to a virtual attornment; unless, at the time of such payment, the tenant heard the precise nature of the adverse claim, or how the landlord's title had expired. *Fenner v. Duplock*, 9 Moore, 32; 2 Bing. 10.

T. held premises under a lease from B., and paid rent to B., and to his personal representative after his death. On the expiration of the lease, T. surrendered the premises to the defendant:—Held, that the defendant could not dispute the title under which T. came in. *Doe d. Manton v. Austin*, 2 M. & Scott, 107.

A tenant may show that his landlord's title is at an end, in an ejectment against him by the latter; but where such action was brought by the reversioner, whose interest was the same as that of the tenant for life, and the tenant had paid rent to the reversioner:—Held, that he could not show that the reversionary interest was at an end; but that he might show some prior title in the person under whom he claimed to hold. *Doe d. Colemere v. Whitroe*, D. & R., N. P. C. 1—Abbott.

A defendant in ejectment, who has paid rent to the lessor of the plaintiff, may show that his landlord, pending the term, sold his interest in the premises. *Doe d. Loudon v. Watson*, 2 Stark. 230—Ellenborough.

The defendant, after being let into possession of premises by P., and paying rent to him, paid one quarter's rent to the plaintiff, to whom P. had agreed to demise the premises for a long term. In an action by the plaintiff for the succeeding quarter's rent:—Held, that the defendant might show that the agreement between P. and the plaintiff was put an end to, and that the rent had been paid to P. *Brook v. Briggs*, 2 Bing. N. C. 572; 2 Scott, 803.

In an action for rent, the tenant may show that the title of his landlord has expired during the tenancy, though he continues to occupy the premises, and has not been



evicted. *Mountney v. Collier*, 1 El. & Bl. 630; 17 Jur. 503; 22 L. J., Q. B. 124.

Where, in an action by a landlord against his tenant for use and occupation, the tenant offers in evidence a document showing that the landlord's title has ceased, the document is admissible, because the property has passed to another who has a right to sue him for the same use and occupation; but when it appears that, under the document in question, the property would have passed from the plaintiff before the time of the use and occupation for which he sued, the document is not admissible, on the usual legal maxim, that a tenant cannot deny his landlord's title. *Agar v. Young*, Car. & M. 78—Erskine.

A landlord of premises dying, the tenant, whose term had not expired, paid rent to the devisee, and signed an agreement for a further period of occupation, on being told that the premises were devised to him:—Held, that, in ejectment against the tenant by the devisee, he could not offer evidence that the devise was void by reason of incapacity in the testator, no ground being shown for imputing fraud to the devisee in the communication made by him to the tenant. *Doe d. Marlow v. Wiggins*, 4 Q. B. 307; 3 G. & D. 504; 7 Jur. 529; 12 L. J., Q. B. 177.

Where a person, having possession of land under a good title, became tenant, and paid rent to a stranger:—Held, that he was not estopped after his tenancy had determined, and before he had given up possession, from setting up his own prior title in an ejectment by his lessor. *Accidental Death Insurance Company v. Mackenzie*, 9 W. R. 713; 5 L. T., N. S. 20—C. P.

A. let land to B. on a tenancy from year to year, which he continued to hold for several years after A.'s title had determined, paying rent to A., and he at length gave up possession on a notice to quit from A. Subsequently to the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. continued to hold, but paid no rent to any one subsequently. In ejectment by A. against C., after B. had given up possession:—Held, that it might be presumed, as a matter of fact, that a new tenancy from year to year had been commenced by B. after A.'s title had ceased, and that C. therefore could not dispute A.'s title. *London and North Western Railway Company v. West*, 2 L. R., C. P. 553; 36 L. J., C. P. 245.

In what actions estoppel is available; and how pleaded.]—In replevin, the landlord's title, under which the tenant has gained possession of the premises, cannot be disputed, although the tenant is prepared with evidence to show that the premises have been fraudulently conveyed to the landlord, and that the actual title is vested in another person. *Parry v. House*, Holt, 489—Dallas.

The rule by which a tenant is estopped from denying the title of the landlord, who

let him into possession, is applicable in an action of trespass as well as in ejectment. *Delaney v. Fox*, 26 L. J., C. P. 248; 2 C. B., N. S. 708.

Payment by a tenant of rent to a person other than the person who let him into possession, under a threat of expulsion, does not amount to a constructive eviction so as to affect the estoppel. *Id.*

A declaration by the devisee of the reversion against the lessee, alleged that the reversion of and in the demised premises belonged to the lessor and his heirs:—Held, that a plea, that the reversion of and in the premises did not belong to the lessor and his heirs, was a good plea, as traversing a material allegation in the declaration. *Weld v. Baxter*, 11 Exch. 810; 25 L. J., Exch. 214; affirmed in error, 3 Jur., N. S. 91; 1 H. & N. 508; 26 L. J., Exch. 112—Exch. Cham.

A replication by way of estoppel, that the lease was an indenture executed by the lessee, and that he entered and enjoyed the premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seized in fee, or that he had any estate or interest other than a fee-simple, nor did the indenture contain anything to show that the reversion did not belong to the lessor and his heirs, is bad, since the lessor might have had a term of years, or an estate for life, or *pur autre vie*. *Id.*

As to when disclaimer by tenant works a forfeiture,—see this title, XIII., 1.

For decisions applicable to estoppels, generally,—see ESTOPPEL.

## XI. RENEWAL.

Covenants for renewal; what constitutes.]—A. demised to B., for the life of B., and also for the lives of C. and D., and covenanted that if B., his heirs, &c., should be minded at the decease of B., C. and D., or any of them, to surrender the demise, and take a new lease, and thereby add a new life to the then two in being in lieu of the life so dying, that then A., his heirs, &c., upon payment for every life so to be added, in lieu of the life of every of them so dying, would grant a lease for the lives of the two persons named in the former lease, and of such other person as B., his heirs, &c., should appoint in lieu of the person named in the preceding lease, as the same should respectively die, under the same rent and covenants, there had been successive renewals from the time of a former lease, granted by the ancestor of A., and in each a like covenant for renewal:—Held, that A. and his ancestors had, by their own acts, construed this to be a covenant for a perpetual renewal. *Cook v. Booth*, Cowp. 819.

A. granted a lease, and covenanted that he would always, at any time when requested by the lessee, demise the premises for a further term of thirty-one years, in which new leases were to be contained the same rents, covenants, articles, clauses, provisos and agreements:—

Held, that this amounted to a covenant for perpetual renewal. *Copper Mining Company v. Beach*, 13 Beav. 478.

The governors of a charity, in consideration of a covenant to lay out 2,000*l.* in building, demised land for the term of forty-one and a-half years, and the concurrent term of ninety-nine years, if three lives named in the lease should so long live; and they covenanted that during the first-mentioned term, when one of the lives should die, they would put in another life for the fine of 5*l.* The lease being void by 13 Eliz. c. 10, as to the excess beyond twenty-one years or three lives:—Held, that the covenant for renewal was not binding on the governors of the charity. *Moore v. Clench*, 45 L. J., Chanc. Div. 80; 1 L. R., Ch. Div. 447; 24 W. R. 169; 34 L. T., N. S. 13.

— their interpretation and effect.]—If a lease for ninety-nine years, determinable on three lives, is conveyed in trust for A. for life, and A. covenants to use his utmost endeavors as often as any of the persons on whose lives the premises are held shall die, to renew the same, by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant if, upon one of the lives failing, he procures a renewal upon his own life. *Scudamore v. Stratton*, 1 B. & P. 455.

A. and B. covenanted in a lease for sixty-one years, "that at any time within one year after the expiration of twenty years of the term of sixty-one years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the premises unto the lessee for and during the further term of twenty years, to commence from and after the expiration of the term of sixty-one years; and so in like manner, at the end and expiration of every twenty years, during the term of sixty-one years, for the like consideration, and upon the like request, would execute another lease for the further term of twenty years, to commence at and from the expiration of the term then last before granted;" under this covenant the lessee cannot claim a further term of twenty years at the expiration of the last term of twenty years in the lease, if he has omitted to claim a further term at the end of the first and second twenty years in the lease. *Rubery v. Jerrold*, 1 T. R. 229.

A., being possessed of premises held under B. by lease, renewable from time to time on payment of certain fines and fees, demised them for a term to C., who covenanted "that he would from time to time, and at all times during the term, pay to A. or B. such part of the fines and fees, which on every renewal by A. of the lease under which he held the premises demised, should be paid by him in respect of the premises demised to C." A. afterwards renewed his lease under B. for a term of five years, exceeding the term demised to C.:—Held, that C. was not liable on this covenant to pay the whole of the fines and fees incurred by A. on the renewal of his lease to the above extent, but only a part

thereof, commensurate with the interest which C. had acquired in the premises. *Charlton v. Driver*, 5 Moore, 59; 2 B. & B. 345.

A lease to two tenants contained a proviso for re-entry in case the tenants, or either of them, should become bankrupt, or assign the premises without the landlord's consent, or should not observe and perform all the covenants and agreements on their part to be observed and performed; also, joint and several covenants by the lessees to keep the interior of the premises in repair, and a covenant by the lessor that he would, at the expiration of the term, in case the covenants and agreements on the tenants' part should have been duly observed and performed, upon notice, grant to the tenants, their executors or administrators, a new lease for a further term. One of the tenants assigned his interest to the other without the consent of the landlord, and afterwards became bankrupt, and the landlord from that time accepted the rent from the other tenant alone. At the expiration of the lease the remaining tenant—the premises being slightly out of repair—gave notice to the landlord that he required a new lease to be granted to himself alone:—Held, first, that the keeping the premises in repair was a condition precedent which must be strictly performed before the renewal could be called for. *Finch v. Underwood*, 45 L. J., Chanc. Div. 522; 2 L. R., Ch. Div. 310; 24 W. R. 657; 34 L. T., N. S. 779; reversing the decision of Malins, V. C., 33 L. T., N. S. 634.

Held, secondly, that although the landlord had waived the forfeiture by acceptance of rent after the assignment, he could not be compelled to grant a renewal to one only of the lessees so long as the other was living. *Id.*

Trustees of a messuage and premises, partly freehold and partly leasehold, for a term, of which fourteen years were unexpired, but which lease was renewable by custom on paying a fine, granted a lease to W. of the whole for fourteen years, and covenanted to use their best endeavors to obtain a renewal of the lease, and thereupon to grant him a lease for a further term of seven years from the expiration of his tenancy, at a like rent. The trustees' power was to lease at a rack-rent for any term not exceeding twenty one years. Before the expiration of W.'s lease new trustees had been appointed, and the reversion in fee had become vested in other persons, who would not renew the lease on the old fine, the property having much increased in value:—Held, that the trustees had no power to enter into a covenant to grant a further term at a like rent on the renewal of the lease, and that the covenant did not bind the new trustees. *Salamon v. Smyth*, 35 L. T., N. S. 826—C. A.; reversing the decision of Malins, V. C., 35 L. T., N. S. 463.

— when specific performance may be compelled.]—A contract for perpetual renewal will be specifically executed if clearly appearing, but is not to be inferred from a general

provision for similar covenants. The construction of such a covenant is the same in equity as at law, and is not to be affected by the acts of the parties. *Iggulden v. May*, 9 Ves. 325; 7 East, 287; 8 Smith, 260; 2 N. R. 449.

A promise, by letter, to renew a lease in consideration of money already laid out by the tenant, is nudum pactum, and no specific performance will be decreed; nor is it varied by money having been laid out afterwards. *Robertson v. St. John*, 2 Bro. C. C. 140.

A lessee of a house granted a sub-lease to L., in which he covenanted that if he should at any time obtain an extension of the term or a renewal of the lease he would grant to L. an extension or a renewal of his sub-lease for the same period. A renewal of the lease was taken in the name of a trustee for the wife of the lessee for her separate use:—Held, that L. was under no obligation to endeavor to procure the renewal to himself. That the question was whether the trustee was in reality trustee for the lessee or for his wife; that in the former case the parties to the record would be bound by the lease's covenant, and L. would have been entitled to have the covenant performed against them, but that as the trustee was in point of fact trustee for the wife L.'s case failed. *Lumley v. Timms*, 21 W. R. 494; 28 L. T., N. S. 608—L. J.

**How lease may be renewed; and effect of renewal.**—[By 4 Geo. 2, c. 28, s. 6, *chief leases may be renewed without surrendering all the under-leases.*]

A sum falling short of three years' annual value of the premises, is not an unreasonable fine for the renewal of a lease by the duchy of Cornwall; and the rack-rent paid by actual occupiers is a fair criterion of the annual value. *Simpson v. Clayton*, 4 Bing. N. C. 758; 6 Scott, 469; 1 Arn. 299; 2 Jur. 892.

In order to prove a renewal of a lease for lives the defendant called a witness, who stated that a conversation took place about fifteen years before, between himself and the former owner of the property, through whom the plaintiff made title, in which such former owner had said, that the premises had been new-leased or new-lived, but without mentioning either terms, or lives, or rent, or any of the stipulations of the supposed lease:—Held, too loose to be available as evidence for the purpose for which it was offered. *Doe d. Lord v. Crago*, 6 C. B. 90; 17 L. J., C. P. 933.

A. was beneficially entitled to renewable leaseholds for three lives held on trust to renew, and subject to certain charges. All the cestuis que vie had died. It being disputed whether the right to renew was lost, the reversioners granted a lease to A. for three new lives, without prejudice to the disputed question. A. subsequently bought the reversion:—Held, that the fee became subject to the charges. *Trumper v. Trumper*, 41 L. J., Chanc. 673; 14 L. R., Eq. 295—V. C. B.

## XII. SURRENDER.

### 1. What constitutes.

**To whom surrender may be made.**—Where a tenant had taken a house from two joint tenants, who had both signed the lease, but one of them only had afterwards interfered in the management of the house:—Held, that a surrender to one was a surrender to both. *Dodd v. Acklom*, 6 M. & G. 673; 7 Scott, N. R. 415; 13 L. J., C. P. 11.

A surrender of a lease cannot be made to sequestrators from the Court of Chancery: it must be to the lessor, or to a party legally entitled under him. *Cornish v. Searell*, 1 M. & R. 703; 8 B. & C. 471.

**Surrender by instrument in writing or deed.**—[By 29 Car. 2, c. 3, The Statute of Frauds, s. 8, *no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time be assigned, granted or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agent, thereunto lawfully authorized by writing, or by act or operation of law.*]

By 8 & 9 Vict. c. 106, s. 3, *a surrender in writing of an interest in any tenements or hereditaments not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law, unless made by deed.*]

It is not necessary that a surrender should be in writing, but the jury may presume a surrender from the delivery up of the key to the landlord, coupled with other facts, showing reasons for the landlord accepting a surrender, and the tenant giving up the tenancy. *Dodd v. Acklom*, 6 M. & G. 673; 7 Scott, N. R. 415; 13 L. J., C. P. 11.

A surrender might be by writing, without a deed, or sealing, before 8 & 9 Vict. c. 106, s. 3. *Farmer d. Earl v. Rogers*, 2 Wils. 26.

Executrixes of tenant from year to year signed the following instrument:—"We do hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, uses, trust, and terms of years whatsoever; and possession of that messuage called B."—Held, a surrender, and not a disclaimer. *Doe d. Wyatt v. Stagg*, 5 Bing. N. C. 504; 7 Scott, 690.

—**by cancellation of lease.**—The mere cancelling in fact of a lease is not, under the statute, a sufficient surrender of the term thereby granted. *Roe d. Berkeley v. York*, 6 East, 86; 2 Smith, 166. S. P., *Doe d. Courtail v. Thomas*, 4 M. & R. 218; 9 B. & C. 288; and see *Ward v. Lumley*, 5 H. & N. 87; 29 L. J., Exch. 322; *S. C.*, 5 H. & N. 656; 8 W. R. 184.

— by operation of law, in general.]—A surrender by deed is unnecessary where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him, and such an acceptance operates as a surrender in law; but it is not enough that the lessee agrees to an act done by the reversioner. *Lyon v. Reel*, 18 M. & W. 285; 8 Jur. 762; 13 L. J., Exch. 377.

The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. *Ib.*

Thus, when a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not the power to make a new lease; and as the lessor could not grant the new lease until the prior one had been surrendered, the acceptance of such new lease is of itself a surrender of the former one. *Ib.*

Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties. *Ib.*

A new letting to an old tenant, commencing immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term if the original term had subsisted; and, for a like reason, a new letting to a third party, with the assent of the original tenant, has the same operation. *McDonnell v. Pope*, 9 Hare, 705; 10 Jur. 771.

When surrender may be implied from grant and acceptance of a new lease.]—Acceptance of a new good lease implies the surrender of a former. *Davison d. Bromley v. Stanley*, 4 Burr. 2210.

A recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, is not a surrender by deed or note in writing of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though, in some instances, the acceptance of a second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and this even though the second lease is voidable, if it is not merely void. *Ros d. Berkeley v. York*, 6 East, 86; 2 Smith, 166.

A. demised premises to B., which B. demised to C., reserving rent; the interest of B. was afterwards sold to D., upon which D. obtained from A. a new lease, the lease to B. having been canceled: B. and D. afterwards distrained for rent in the name of D., upon which occasion D. declared that the premises belonged to him:—Held, in an action against B., D. and their servants, that the cancellation and new lease did not operate as a surrender of the interest of B., and that rent being due to B. by effluxion of time, B., D. and their servants were justified in making the distress, though in the name of D. *Woolley v. Gregory*, 2 Y. & J. 536.

Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law. *Davison v. Gent*, 1 H. & N. 744; 3 Jur., N. S. 342; 26 L. J., Exch. 123.

A lease of lands was granted conformably to a power to lease. A later lease was expressed to be granted "for the consideration of the surrender of the present lease, and which is hereby surrendered accordingly," and of a sum of money. The earlier lease was actually given up on the execution of the second. The second lease was not valid as an execution of the power; but rent was received according to its terms, by successive tenants for life and in remainder under the settlement:—Held, that the surrender of the first lease was good. *Doe d. Egremont v. Forwood*, 3 Q. B. 627.

The defendant, who had occupied under a lease which expired at Lady-day, 1829, paid a quarter's rent on Midsummer-day, 1829, deducting something for repairs; he was not afterwards seen on the premises, but the rest was paid at irregular intervals by L., who was in occupation for the ensuing two years;—Held, that it was correctly left to a jury to find whether the lessor had accepted L. as a tenant, and the jury having found for the defendant, the court refused to set aside the verdict. *Woodcock v. Nuth*, 8 Bing. 170; 1 M. & Scott, 817.

W. & H., by agreement in March, 1827, became tenants to the plaintiff, for three years, of premises occupied by them as partners, with the power to them to extend the term for seven years, by giving the plaintiff a notice to that effect. In January, 1829, W. and H. gave notice accordingly. At Midsummer, 1828, W. retired from the partnership, and in January, 1829, H. entered into partnership with S., and H. and S. carried on the business under the firm of H. and S., until 1831. The plaintiff gave receipts for the rent as received from H. after W. retired, and as received from H. and S. after S. became partner with H. In February, 1829, the plaintiff gave to H. a letter from the plaintiff's attorney, signifying that a lease might be made to H. and S., but this letter was kept by H., and not acted upon, and no lease was prepared:—Held, that the original tenancy of H. and W. was not surrendered by act or operation of law, and consequently that W. remained liable for rent. *Graham v. Wichelo*, 3 Tyr. 201; 1 C. & M. 188.

In 1743, a farm was demised by the Broderers' Company to F. for 100 years, with a covenant for perpetual renewal. In 1827, the residue of this term had become vested in B., who in that year assigned it, by way of mortgage, with a proviso for redemption. On the 23d May, 1828, H. demised the farm for twenty-one years to the plaintiff. On the 12th January, 1836, the mortgagees and H. surrendered the premises to the Broderers' Company. On the 13th January, 1836, the company demised them to H. for 100 years,

and shortly afterwards the unexpired residue of that term, and all the estate and interest of H. in the premises, were assigned to the defendant. In an action by the plaintiff against the defendant, on a covenant in the lease from H. to the plaintiff, to keep down the rabbits on the farm, the defendant pleaded that H. did not demise to the plaintiff; that the reversion on that lease did not vest in the defendant:—Held, that both these issues ought to be entered for the plaintiff, for that the lease being by deed was a demise by way of estoppel, and a reversion in H. by estoppel was thereby created, which *prima facie* was a reversion in fee, and therefore was not surrendered to the Broderers' Company, but passed from H. to the defendant. *Sturgeon v. Wingfield*, 15 M. & W. 224; 15 L. J., Exch. 212.

Lands which were devised for life, remainder over, with a power of leasing to the tenant for life, were held under two leases, of 1760 and 1784, for ninety-nine years, determinable on lives. In 1788, S., the lessee, agreed to sell a parcel to A.; and G., tenant for life under the will, in consideration of the surrendering into his hands of the two indentures, of 1760 and 1784, and in order to effectuate the agreement between S. and A. with respect to that parcel which was intended to be demised by an indenture bearing even date therewith, demised the residue of the lands to S., with an apportionment of the rents and heriots, the parcel being severed. The lease of 1788 was not a due execution of the power. In ejectment by the remainderman after the death of the tenant for life:—Held, that the acceptance by S. of the lease of 1788 did not, as to the lands thereby demised, operate as an absolute surrender in law of the lease of 1784, which was then subsisting, but as a conditional surrender only during the life of the tenant for life. *Doe d. Bidulph v. Poole*, 11 Q. B. 718; 12 Jur. 450; 17 L. J., Q. B. 143.

Lands were devised for life, remainder over, with a power of leasing to the tenant for life. In 1755 the testator made a lease for ninety-nine years, if certain lives should so long live. In 1812 the tenant for life under the will made a lease, "in consideration of the surrendering up into the hands of the lessor by the lessee" the lease of 1775, "which surrender was thereby made and accepted accordingly:" this lease was invalid, being not made conformably to the power:—Held, that, as the new lease did not pass an interest according to the contract, the acceptance of it did not operate as a surrender of the former lease. *Doe d. Egremont v. Courtenay*, 9 Q. B. 932; 12 Jur. 454; 17 L. J., Q. B. 151.

—from delivery and taking possession of premises.]—A tenant remains liable for rent unless he delivers up complete possession of the premises, or the landlord accepts of another in his room. *Harding v. Crethorn*, 1 Esp. 57—Kenyon.

If a landlord in the middle of a quarter accepts from his tenant the key of the house demised, under a parol agreement, that, upon

her then giving up the possession, the rent shall cease, and she never afterwards occupies the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key. *Whitehead v. Clifford*, 5 Trunt. 518.

A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under-tenants, and the stable and yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of the quarter. B. took possession of the yard and stable only. The occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold:—Held, that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 C., M. & R. 81; 4 Tyr. 612.

A lessee, who had paid his rent occasionally to a trustee, and occasionally to a cestui que trust, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having legal title:—Held, that, as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term. *Aikland v. Lutley*, 1 P. & D. 636; 9 A. & E. 809.

A. and B. demised a house, by lease in writing to C., at a rent payable quarterly. The key was delivered to C.'s wife. C. entered into possession; but before the first quarter's rent became due (there having been some dispute as to arrears of rent and taxes), C.'s wife delivered the key back to A., who accepted it. B., after signing the lease, had never interfered:—Held, that the delivering back of the key by the tenant, *animo sursum reddendi*, and the acceptance thereof by the landlord, amounted to a surrender of the term by act and operation of law. *Dodd v. Acklom*, 6 M. & G. 673; 7 Scott, N. R. 415; 18 L. J., C. P. 11.

Held, also, that the jury was, upon the facts, warranted in finding that C.'s wife acted as his agent in surrendering the term, and that A. acted as agent for B. in accepting such surrender, and that B. was bound by such surrender and acceptance. *Id.*

A. was tenant to B. of rooms for a term of years. Upon the bankruptcy of B., A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied. A. immediately quitted possession, and no further communication took place:—Held, not to amount to a surrender by act or operation of law. *Cannan v. Hartley*, 9 C. B. 694; 14 Jur. 577; 19 L. J., C. P. 323.

But when a tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front:—Held, sufficient evidence of a surrender by operation of law. *Phen v. Popplewell*, 12 C. B., N. S. 634; 8 Jur., N. S. 1104; 31 L. J., C. P. 235; 10 W. R. 523; 6 L. T., N. S. 247.

To an action by a landlord against his tenant for breach of promise to use the premises in a tenant-like manner, he pleaded, that during the tenancy, and before any breach, the premises, and his estate and interest therein, were duly surrendered to the landlord by act and operation of law, that is to say, by the tenant's quitting the premises, and every part thereof, with the license and consent of the landlord, and relinquishing the possession thereof to him with the intention of putting an end to the tenancy, and by his accepting such possession, with the intention of putting an end to the tenancy:—Held, that if the tenancy continued up to the time of the arrangement stated, such arrangement would not inure as a surrender by act and operation of law. *Morrison v. Chadwick*, 7 C. B. 266; 6 D. & L. 567; 13 L. J., C. P. 189.

In an action upon a parol demise, a plea that, during the term, it was agreed that the defendant should relinquish the possession to the plaintiff for a month, after which the possession should be resumed by the defendant; and that the defendant did relinquish the possession, but the plaintiff would not restore the possession, is bad, as not showing a surrender or an eviction. *Dunn v. Di Nuovo*, 3 M. & G. 105; 8 Scott, N. R. 487.

When a tenant on lease has quitted the demised premises before the expiration of the term, and has sent the key to the landlord, with the intention of giving up possession, the mere fact that the landlord has received the key, and attempted unsuccessfully to re-let the premises, does not estop him from alleging that the tenancy still subsists. And if afterwards, before the expiration of the term, the landlord re-lets the premises, the surrender by operation of law takes effect from such re-letting, and does not relate back to the original receipt of the key by him. *Oastler v. Henderson*, 46 L. J., Q. B. Div. 607; 2 L. R., Q. B. Div. 575; 37 L. T., N. S. 22—C. A.

—from particular agreements and transactions between landlord and tenant.]—An agreement between a landlord and tenant for the latter to give up possession, and the former to take the stock at a valuation, and to make compensation for fallows, to pay all taxes, and permit the tenant to keep possession of part of the messuage and some of the out-houses up to a certain day, without paying rent or taxes, was held to operate as a surrender of the term, and not being on a deed stamp was void. *Williams v. Sawyer*, 6 Moore, 226; 3 B. & B. 70.

Where a lease came into the hands of the

original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent, annually, towards the good-will, already paid by such assignee;" such agreement operates as a surrender of the whole term. *Smith v. Mapleback*, 1 T. R. 441.

A. demised a farm to B. under an agreement to hold from Michaelmas, 1709. to Michaelmas, 1816, at a yearly rent. A. died, and devised the premises to C., who in 1813 put them up to sale by auction; D. became the purchaser, and also agreed to buy B.'s outstanding term, without C.'s knowledge or assent. D., having let E. into possession, became bankrupt. In 1814, C., by letter to B., admitted that E. occupied the premises, and afterwards demanded rent from him. C. and D.'s assignees afterwards executed mutual deeds of release, and D.'s assignees released E.:—Held, that C. was entitled to recover the rent from 1813 to 1816 from B., as there had been no surrender in writing of his interest to D., and as C. had not assented to E.'s being let into possession. *Matthews v. Savell*, 2 Moore, 262.

By an agreement dated in May, to which A., B., and C. were parties, A. and B. agreed to sell by auction an estate to which they were entitled as tenants in common, or in default of such sale, that such parts of it as should not be sold after the 1st August and before the 1st September following should be divided into two equal lots between A. and B.; and that 100*l.* should be paid by A. to C., the principal tenant, as a remuneration for his giving up possession of his farm at Michaelmas following; and C. agreed to give up possession of his farm accordingly. No part of the estate was sold by the 1st September, but some portions were sold subsequently, and the remainder was divided between A. and B., but such division was not completed till the following March. C. continued in possession, by the desire of A. and B., until that time, and then quitted:—Held, that the agreement was not a surrender of A.'s term. *Weddall or Weddle v. Capes*, 1 M. & W. 50; 1 Galc, 432.

A., being seized in fee of premises, by indenture of the 5th July, 1814, demised them for twenty-one years to B., who entered and was possessed accordingly. B., by indenture of the 8d November, demised the premises to C. for the residue of his term therein, excepting the last twenty-one days; and, on the 12th February, 1816, B., by deed poll, indorsed on the counterpart of the lease to C., granted all his (B.'s) estate and interest in the premises to A., to hold to him for all such time or term in the counterpart of the lease mentioned, namely, the next immediate reversion, expectant on the determination of B.'s lease. A., by deeds of lease and release, of the 15th and 16th July, 1822, granted, sold, and assigned all his estate and interest in the premises to the

plaintiff by way of mortgage. On the 10th October, 1816, C. assigned all his interest in the premises to the defendant, who never entered, and C. remained in possession. In an action against the defendant for non-payment of rent:—Held, that the deed-poll did not operate as a surrender of B.'s reversion of twenty-one days to A., but only of his interest for the term co-extensive with C.'s lease; and that the plaintiff might sue the defendant on the covenants contained in such lease. *Burton v. Barclay*, 5 M. & P. 785; 7 Bing. 745.

As to surrender of tenancies for year to year,—see this title, XVI., 2.

## 2. Effect, and how pleaded and proved.

**Operation and effect, in general.**—A quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, without the trustees joining, and taking a new lease to himself, bar the remainders over; notwithstanding there were prior existing trusts at the time of making such surrender. *Blake v. Lupton*, Cooper C. C. 178; 3 P. Wms. 10; 6 T. R. 290, n.

A tenant who has become bankrupt, and delivers to his landlord the possession of the premises during a current half year, is not liable for a proportionate part of the rent to the time when he so delivered them up to his landlord. *Slack v. Sharp*, 3 N. & P. 390; 8 A. & E. 360; 1 W., W. & H. 496; 2 Jur. 830.

Where a lease by a bishop, which had been granted in consideration of the surrender of a prior lease by deed-poll, had been avoided by the successor, the first lease was not revived by such avoidance. *Doe d. Rochester (Bishop) v. Bridges*, 1 B. & Ad. 847.

Although a surrender of a life estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet it may have continuance to uphold a prior interest derived under it. *Doe d. Beadon v. Pyke*, 5 M. & S. 146.

**Where there is an under-tenant.**—[By 4 Geo. 2, c. 28, s. 6, if any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the underleases, be as good and valid to all intents and purposes as if all the underleases derived thereout had been likewise surrendered at or before the taking of such new lease;

And all and every person and persons in whom any estate for life or lives, or for years shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord and landlords shall have and be entitled to such and the

same remedy by distress or entry in or upon the messuages, lands, tenements and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had still been continued, or as they would have had in case such former leases had been renewed under such new principal lease, any law, custom or usage to the contrary hereof notwithstanding.]

Premises being demised and underlet, the first tenant surrendered his lease, and took a new one with similar covenants. The under-tenant continued in possession, and never surrendered. *Quære*, whether special covenants in the new lease co-extensive with those in the old (as not to erect new buildings without leave), could be enforced by the head landlord against such under-tenant, as "duties reserved" by the second lease, within the above provision? *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715.

The effect of the above statute, while it gives a lessee the right to surrender notwithstanding his contracts with his under-lessee, leaves untouched the sub-interest, though it is merely an agreement for an under-lease; and the effect of a new demise after the surrender for the residue of the original term is to make the new lessee the assignee of the reversion of the terms created by the surrenderor. *Cousins v. Phillips*, 3 H. & C. 892; 35 L. J., Exch. 84.

If a landlord attests a notice given by a lessee to his under-tenant to pay rent to the landlord, and has a knowledge of its contents, it is a termination of the tenancy of the lessee, and a discharge to him to that time. *Harding v. Crethorn*, 1 Esp. 57—Kenyon.

Otherwise, if the landlord has no knowledge of the contents of the notice. *Id.*

A voluntary surrender by a tenant to his landlord does not affect the rights of a person holding on a sub-tenancy created by the tenant, nor is the sub-tenant's knowledge of the surrender equivalent to notice to him to quit. *Mellor v. Watkins*, 23 W. R. 55; 9 L. R., Q. B. 400.

**Pleading.**—To an action for rent due under a demise, the defendant pleaded, that, before the rent became due, it was agreed between the plaintiff and the defendant, that, in consideration of his giving up possession, he should be discharged from any further rent, and that he had given up possession accordingly, concluding with an allegation, that the tenancy was thereby surrendered:—Held, that the plea was not to be taken as setting up a surrender so as to require a memorandum in writing; but that it afforded a valid excuse for the non-payment of the rent, by showing the agreement and the giving up of possession. *Gore v. Wright*, 3 N. & P. 243; 8 A. & E. 118; 2 Jur. 840; 1 W., W. & H. 266.

To an action upon an indenture of lease for non-payment of rent and for non-repair, the defendant proposed to plead, that it was agreed between the plaintiff and the defendant that the latter should surrender the tenancy to the plaintiff, by yielding up possession of such portion of the premises as was in his occupation, and by permitting the plaintiff to receive all future rents of such part as was occupied by the defendant's tenants, and by permitting the tenants to attorn to the plaintiff, the defendant to pay a certain sum of money, and give up certain machinery, all of which was to be done by the defendant, and accepted by the plaintiff, in satisfaction of the covenants of the lease, and that the lease and counterpart should be given up to be canceled. The plea alleged that the defendant paid to the plaintiff the money, and gave up the machinery, and delivered the lease to him, and that the plaintiff excused himself from delivering up the counterpart; that the defendant accordingly withdrew from the possession of the premises which he occupied, and had never since been in the occupation or in the receipt of the rents, and that he had always permitted the plaintiff to receive the same, and the tenants to attorn. Upon an application to plead several matters, the court refused to allow the plea to be pleaded, as not disclosing an equitable defense, on the ground that a court of equity would require the execution by the defendant of a valid surrender of the term as a condition precedent to staying the action, and that a court of common law has no power to enforce such condition. *Mines Royal Societies v. Magnay*, 10 Exch. 489; 2 C. L. R. 171; 18 Jur. 1028; 24 L. J., Exch. 7.

**Presumption of surrender, generally.]—**Where an alleged outstanding term appears to have done the duty for which it was created, the jury is at liberty to presume a surrender of it. *Bartlett v. Downes*, 5 D. & R. 526; 3 B. & C. 616; 1 C. & P. 522.

A. having granted a lease to B. for twenty-one years, before the expiration of the term, granted another lease of the same premises to C. No surrender in writing of B.'s interest was shown, but the lease granted to him was produced from A.'s custody, with the seals torn off; and it was proved to be the custom to send in the old leases to A.'s office, before a renewal was made, and which old leases were thereupon canceled by A.'s officer:—Held, that this was evidence from which the jury might presume that B. had assented to the grant of the lease to C., so as to determine his interest by act and operation of law within the 29 Car. 2. c. 3, s. 3. *Walker v. Richardson*, 2 M. & W. 882; M. & H. 251.

Under certain circumstances the jury may presume a satisfied term to have been surrendered to the cestui que use; but if no such presumption is made, and it appears in a special verdict in ejectment that such a term is still outstanding in a trustee who is not joined in bringing the ejectment, the cestui que use

cannot recover. *Goodtitle d. Jones v. Jones*, 7 T. R. 47. S. P., *Godfrey v. Hudson*, 2 Esp. 499, n.

A satisfied term may be presumed to be surrendered; but an unsatisfied term, raised for the purpose of securing an annuity, during the life of the annuitant, cannot; and may be set up as a bar to the heir at law, even though he claims only subject to the charge. *Doe d. Holsten v. Staple*, 2 T. R. 684.

In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining twenty-one, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than twenty years. *England d. Sybourn v. Slade*, 4 T. R. 682.

The jury may presume an old satisfied term surrendered to the cestui que use in order to substantiate a lease executed by him. *Doe d. Bowerman v. Sybourn*, 7 T. R. 2; 2 Esp. 426.

An acceptance of a surrender of a lease is not to be presumed from the circumstances of the rent having been paid by a third person, and not by the original tenant. *Copeland v. Watts*, 1 Stark. 96—Gibbs.

**— of surrender of mortgage terms.]—**[By 3 & 4 Will. 4, c. 27, s. 28, a mortgagor is to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.]

Where an old mortgage term of 1,000 years, created in 1727, was recognized in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was had of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage:—Held, that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe d. Graham v. Scott*, 11 East, 478.

A testator, in a codicil to his will, stated that certain premises mentioned in the will were charged with a mortgage for 500*l.*, which he directed his executors to pay off:—Held, that after the lapse of nearly forty years, during all which time the testator's representatives had been in the perception of the rent, the mortgagee might be presumed to have been satisfied, and the term surrendered. *Doe d. Martin v. Austin*, 3 M. & Scott, 107.

In 1772, a term of 1,000 years was created by deed, for the purpose of securing 5,000*l.*; and, in 1787, the principal and interest having been paid, the residue of the term was assigned in trust for the devisees of the person who created the term. In 1789, the premises were conveyed to a purchaser by deed, and the residue of the term was assigned in trust for the purchaser, her heirs and assigns, or as she should appoint, and in the meantime to attend the inheritance. The purchaser entered into possession of the premises, and



continued so possessed till her death. In 1803, she executed a marriage settlement, reserving to herself a power of appointment by deed or will; and, after the marriage, she, in December, 1818, devised all her real estate. Neither in the marriage settlement nor in the will was any mention made of the term of 1,000 years. She and her husband having both died:—Held, on ejectment brought by her heir-at-law, that there were no premises from which a surrender of the term could be presumed. *Doe d. Blacknell v. Plowman*, 2 B. & Ad. 573.

**Presumption and proof in other cases.]—**A. devised an estate to trustees for years with remainder to B., which B., eighteen years after the death of A., treated as his freehold, and leased for lives. In an action by the lessee of B., as reversioner, the jury was told that they could not presume a surrender of the term by the trustees to B.; and, upon motion for a new trial, the direction was held right. *Day v. Williams*, 2 C. & J. 460.

A tenant in tail conveyed by feoffment in 1779; but the feoffee never entered, and the tenant in tail and those claiming under him remained in possession until 1829; they were also in possession of the deed of feoffment and suffered a recovery:—Held, that a reconveyance from the feoffee might be presumed. *Jenny v. Jones*, 10 Bing. 75.

An estate was settled on A. for life, with power to charge it with an annuity for her husband, and portions for their younger children, and to grant leases. A. granted the estate to trustees for 500 years, on trust, if she should so direct, to raise portions by mortgages or sale:—Held, that the term, till called into operation, was subservient to the leasing power, and was no answer to an ejectment by a lessee holding under a lease granted subsequently to the settlement. *Doe d. Courtail v. Thomas*, 4 M. & R. 218; 9 B. & C. 288.

By a marriage settlement, the settlor limited his estate to A. and B., as trustees, "to the only proper use and behoof of them, their heirs and assigns forever," in trust for the settlor until his marriage, in trust for husband and wife for life and the longest liver; then in trust for a term to other trustees to raise portions for younger children; then in trust for the first son and heirs male of the body; then to the second son in like manner, and then to the daughters; and, for default of such issue, then over to the right heirs of the settlor:—Held, that the first set of trustees took the legal estate by common law, and not by the Statute of Uses; and the second use could not be executed by the statute. The purposes of the settlement, however, being at an end, in ejectment by the devisee of the person last seized, after the lapse of forty years:—Held, that it might be left to the jury to presume a reconveyance of the legal estate from the trustees. *Doe d. Lloyd v. Presham*, 9 D. & R. 410; 6 B. & C. 805.

Where the defendant's ancestor came into possession of certain lands seventy years ago,

as a creditor under a judgment obtained against the then owner, and the defendant's family had continued in possession ever since:—Held, that the original possession not having been taken under any conveyance, the length of possession was only *prima facie* evidence from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants; but that it might be rebutted by other evidence; and that the jury was not to presume such conveyance from length of possession, unless satisfied that such conveyance had actually been executed. *Doe d. Fenwick v. Reed*, 5 B. & A. 232.

A term of years was created in 1703, and assigned over to a trustee in 1770, to attend the inheritance. In 1814, the owner of the inheritance executed a marriage settlement; and, in 1816, he conveyed his life interest in the estate to a purchaser, as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819, an actual assignment of the term was made by the administrator of the trustee in 1770, to a new trustee for the purchaser in 1816:—Held, that, under these circumstances, on an ejectment brought by a prior incumbrancer against the purchaser, the jury was warranted in presuming that the term had, previously to 1819, been surrendered. *Doe d. Putland v. Hilder*, 2 B. & A. 782.

The plaintiff was tenant to A., of one close; K. was tenant to B., of another close; the plaintiff and K. verbally agreed to exchange their holdings; "the plaintiff to have B.'s land and pay K.'s rent, K. to have A.'s land and pay the plaintiff's rent." On the same day each took possession of the other's land. K. undertook to communicate their bargain to C., who was the agent of both A. and B.; he did accordingly, some days afterwards, communicate it to him, and C. expressed his concurrence:—Held, that this was evidence to go to the jury of a surrender by K. to B. of his interest in B.'s close. *Bees v. Williams*, 2 C. M. & R. 581; 1 Tyr. & G. 23; 1 Gale, 392.

A. demised to B., who underlet to C. In the middle of both terms it was agreed between A. and B., that B.'s tenancy should cease, and between A. and C., that C. should hold under A. for a longer term:—Held, that this arrangement amounted to a surrender from B. to A., and a new demise from A. to C. *Rees v. Buxbury*, 3 N. & M. 292; 1 A. & E. 130.

A term of 1,000 years was created by deed in 1717, and, in 1735, was assigned for the purpose of securing an annuity to A., and after that to attend the inheritance. A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the meantime taken of the term, except that, in 1801, the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for:—Held, that under these circum-

stances the jury was warranted, in an ejectment brought for the premises by the heir-at-law, to presume a surrender of the term. *Doe d. Burdett v. Wrights*, 2 B. & A. 710.

Receipts for rent received by a landlord from a third party, are evidence of a surrender by operation of law, putting an end to the liability of a former tenant. *Lawrence v. Fauz*, 2 F. & F. 435—Blackburn.

### XIII. FORFEITURE.

#### 1. Construction and Effect of Provisos; Disclaimer by tenant.

**Provisos for re-entry by landlord, on breach of covenant by tenant; their construction and operation generally.**—Provisos for re-entry in leases are to be construed like other contracts; not with the strictness of conditions at common law. *Doe d. Davis v. Elsam*, M. & M. 189—Tenterden.

Where a lease contained two clauses for re-entry; the one, in case the yearly rent was in arrear thirty days after it became payable, and the other in case the yearly rent was in arrear, which was stated to be payable half-yearly, at Lady-day and Michaelmas:—Held, that the landlord had a right to re-enter on non-payment of each half-year's rent; as the former clause contained the description of the amount to be annually paid, and the latter the times for payment. *Doe d. Rudd v. Golding*, 6 Moore, 231.

Where a lessee covenanted to pay the rent, and not to assign without the leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants thereafter contained on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that upon the lessee paying the rent, and performing all and every the covenants thereinbefore contained on his part to be performed, he should quietly enjoy:—Held, that the lessor could not re-enter for breach of the covenant not to assign, for that the proviso was restrained by the word "hereinafter" to subsequent covenants, and though there were none such, yet the court could not reject the word. *Doe d. Spencer v. Godwin*, 4 M. & S. 365.

A lease contained a covenant that the tenant should not carry any hay, &c. off the premises, under a penalty of 5*l.* per ton, and a clause followed which enumerated all the covenants except the above, and provided, that upon breach of any of the covenants, the lessor might re-enter:—Held, that the penalty of 5*l.* did not prevent the clause of re-entry from applying to the above covenant, the words of the proviso being large enough to comprehend it. *Doe d. Antrobus v. Jepson*, 3 B. & Ad. 402.

A proviso for re-entry was contained in a lease granted in pursuance of and referring to a private act of parliament. The proviso for re-entry in the act was subsequently altered

by another act:—Held, that the lessor could not afterwards enter by virtue of the proviso in the lease, on account of the subsequent act. *Doe d. Bywater v. Brandling*, 7 B. & C. 648; 1 M. & R. 600.

A proviso in a lease, giving power of re-entry if the lessee "shall do or cause to be done any act, matter, or thing contrary to and in breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being an act done within the meaning of the proviso. *Doe d. Abdy v. Stevens*, 8 B. & Ad. 299.

A proviso in a lease, giving power of re-entry if the tenant makes default in performance of any of the clauses by the space of thirty days after notice, does not apply to the breach of a covenant not to allow alterations in the premises, or permit new buildings to be made upon them without permission; and an under-tenant having erected a portico contrary to the covenant, and notice having been given to him to replace the premises in their former state, which he neglected to do for thirty days:—Held, that no forfeiture was incurred. *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715.

A proviso in a lease for re-entry on a condition broken can only operate during the term, and vanishes when that ends. *Johns v. Whitley*, 3 Wils. 127.

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10*s.*, and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10*s.* value, and substituted others of a different description:—Held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10*s.* had been committed. *Doe d. Darlington v. Bond*, 5 B. & C. 855; 8 D. & R. 738.

A lease, for a term of years, if R. should so long live, contained a covenant that the lessee should, within three months after notice from the lessor, produce R., or otherwise make it appear to the lessor, within the time aforesaid, or within a reasonable time if R. should be in foreign parts, by a good and sufficient certificate, that he was living. Proviso for re-entry on default. R. went to Brazil. The lessee, being called on under the covenant, produced an affidavit, sworn in October, 1834, stating that the deponent had seen R. in Brazil in 1832, and had often heard of him from that time till January, 1834, as residing at a place in Brazil thirty miles from that in which the deponent lived during the same period, and that the deponent was convinced that R. was alive and well in January, 1834, when deponent left Brazil:—Held, that the fact subsequent to 1831 could not be properly certified by hearsay evidence; and that the statement of occurrences in 1831, from which R. might be presumed alive in 1834, was not equivalent to such certificate as the covenant

required, that R. was then alive; and, therefore, that the affidavit was not a sufficient certificate, and a forfeiture was incurred. *Randle v. Lory*, 6 A. & E. 218.

Land was demised for 1,000 years by indenture, in 1793, to A. and B., the latter described as visitor and guardian of the poor of the parish of C., their successors and assigns, under 22 Geo. 3, c. 83 (Gilbert's Act), for the purpose of erecting a poor house thereon, and occupying and cultivating the same for the use and benefit of such poor-house and of the poor of C., and such other parishes as should be united therewith for the purposes of the act. Proviso for re-entry, if C. and all the other parishes which should or might at any time be so united, should of themselves discontinue to adopt the provisions of the statute. Further proviso, that if, during this demise, the legislature should repeal Gilbert's Act, so that the poor of the several parishes should no longer be permitted to remain under the care of the visitor and guardians of such parishes, it should be lawful for the visitor and guardians, their successors and assigns, yielding up the land, to pull down the poor-house, and carry away the materials. The house was built, and C. and other parishes adopted the provisions of the act, and C. continued to follow them till the making of the after mentioned order; but the other parishes seceded from the union. In 1830 the poor-law commissioners incorporated parish C. in a union, and ordered all the paupers to be removed to the union workhouse, after which no paupers were received into the poor-house of C. but persons requiring only out-door relief, and the parish officers issued a notice proposing to let part of the house and the land:—Held, no forfeiture, under the first proviso. *Doe d. Grantley v. Butcher*, 6 Q. B. 115.

A lessee was to incur a forfeiture if he did not do certain repairs "to the satisfaction of the surveyor" of the lessor; he did the repairs, but the lessor's surveyor was not satisfied:—Held, that if the jury thought the surveyor ought to have been satisfied, that would be sufficient, and there would be no forfeiture incurred. *Doe d. Baker v. Jones*, 2 C. & K. 743—Pollock.

E., a tenant of leasehold premises, underlet a portion of them to B. for a term of years, reserving a few months' reversion. B. covenanted to complete some cottages on the premises by the 25th of June. By an indenture made on the 30th of July following, which recited that E. had entered into agreements and under-leases affecting the premises, the particulars of which were known to I., it was witnessed that "E. did bargain, sell, assign, transfer, and set over the premises, with their appurtenances, and all estate, right, title, and interest of E. into or out of the premises, and every part thereof, to I., to have and to hold the premises and every part thereof for the residue of the term of years granted by the indenture of lease under which E. held, and all other the estate and interest of E. therein or thereout, subject

nevertheless to the agreements and under-leases hereinbefore referred to." B. did not build the cottages by the 25th of June. It did not appear whether E. knew of the fact or elected to treat the default as a breach of covenant and a forfeiture of the lease:—Held, that assuming the non-completion of the cottages was a breach of covenant, and gave E. a right of re-entry before the assignment to I., and that the 8 & 9 Vict. c. 106, s. 5, enabled E. to assign the right of entry for condition broken, yet that the language of the indenture was not sufficient to transfer that right to I., so as to enable him to take advantage of the forfeiture. *Hunt v. Remnant (in error)*, 9 Exch. 635; 18 Jur. 335; 23 L. J., Exch. 135—Exch. Cham.

Premises consisting of a wharf and dock, dwelling-house, wash-house, and court-yard, were demised under a lease, containing a covenant that the lessee, his executors, administrators or assigns, should not erect or build any edifice or structure whatsoever on the wharf and dock, or place goods thereon above a certain height, "nor do any other matter or thing of any nature or kind which might obstruct the view of the river, from the White Hart public-house, or that should grow or be a nuisance or annoyance to the occupier; nor carry on a certain trade thereon, nor make any external alteration whatsoever in the premises, nor any internal alterations in the dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose," with a proviso for re-entry for a breach:—Held, that this covenant absolutely prohibited all external alterations in any part of the demised premises, and that the qualification as to lessening "the value thereof," applied only to internal alterations in the dwelling-house. *Perry v. Davis*, 3 C. B., N. S. 769.

A lease contained a covenant by the lessee not to build on the demised premises, without the consent of the lessor, any dwelling-house, edifice, cabin, farm or other building, which should in the whole or in part be occupied as a dwelling-house, with a clause of re-entry on breach. At the date of the lease, there was a dwelling-house on the premises, to which the lessee, during the continuance of the demise, and without the lessor's consent, added a building containing several apartments, communicating with the original dwelling-house, and used together with it by the occupier as one entire dwelling-house:—Held, that the erection of the additional structure, without consent, was a breach of the covenant, and occasioned a forfeiture of the lease. *Domville v. Colville*, 7 Ir. R., C. L. 68—Exch.

A proviso for re-entry, "or if the lessee shall make default in the performance of any other covenants, which on his part are or ought to be observed, performed or kept," would apply to and forbid the breach of a negative as well as a positive covenant. *Croft v. Lumley*, 4 Jur., N. S. 903; 27 L. J., Q. B. 321; 6 H. L. Cas. 672

As to construction of covenants, generally, and what amounts to a breach,—see COVENANT; and as to construction of stipulations in leases and agreements for letting,—see this title, I.—IX.

**Provisos making right of re-entry optional or elective.**—A proviso in a lease, which, after stating that in certain events the term should cease, determine, and be utterly void, continues, “and it shall be lawful to and for (the landlord) to re-enter,” gives the landlord a right to enter or not, at his election. *Arnaby v. Woodward*, 6 B. & C. 519; 9 D. & R. 536.

A proviso in an agreement of demise that the tenant should within a certain time erect a shop-front, and that, if he did not do so, it should be lawful for the landlord or his agents to retake possession of the premises, and the agreement should be null and void, makes it a lease voidable only at the election of the lessor. *Doe d. Nash v. Birch*, 1 M. & W. 402.

Where there is a proviso in a lease, that, on non-payment of rent, the term shall cease, the lessor, and not the lessee, has the option of determining the lease upon a breach made. *Reid v. Parsons*, 2 Chit. 247. And see *Doe d. Green v. Baker*, 2 Moore, 189; 8 Taunt. 241.

When in a lease it was provided, that, in case of non-performance of the covenants, the lessor may re-enter and have the premises again, “as if the lease had never been made.”—Held, the effect of the proviso was not to render the lease void ab initio upon re-entry, but only to avoid it from the period of re-entry. *Hartshorne v. Watson*, 4 Bing. N. C. 178; 5 Scott, 506; 6 D. P. C. 404; 1 Arn. 15; 2 Jur. 155.

Where a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether if the tenant should cease working at any time within two years, but after the working had ceased more than two years the lessor received rent:—Held, that a tenancy from year to year was not thereby created, as the lease was not absolutely void by the lessee's ceasing to work, but voidable only at the option of the lessor, and that he might avoid the lease upon any cessation to work, commencing two years before the day of the demise in the ejectment. *Doe d. Bryan v. Bracks*, 4 B. & A. 401; Gow, 220. And see *Doe d. Boncawen v. Bliss*, 4 Taunt. 735.

A proviso in a lease for years (whereby the rent is payable on a day certain at the mansion-house of the lessor), that if the rent shall be unpaid for 40 days after the day whereon it is reserved (although not demanded) the lease shall be void, does not make the lease voidable by the lessee, by reason of his having over-stayed the 40 days allowed for payment. *Rede v. Farr*, 6 M. & S. 121.

**Provisos for re-entry in the event of execution, bankruptcy or insolvency.**—A proviso for re-entry in case the tenant shall commit

an act of bankruptcy whereon a commission shall issue, is good in law. *Roe d. Hunter v. Galliers*, 2 T. R. 133. S. P., *Church v. Browne*, 15 Ves. 268.

A lease contained a clause of re-entry in case the term of years thereby granted should be extended or taken in execution; and before the end of the term the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interests into the king's hands:—Held, that this proceeding was a taking in execution within the latter clause of the condition, and that the term was determined and forfeited to the lessor. *Rees v. Tipping*, M'Clel. & Y. 514. And see *Davis v. Eytton*, 4 M. & P. 820; 7 Bing. 154.

Lease for twenty-one years to A., his executors, administrators, and assigns. Proviso, that if A., his executors, administrators, and assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have power to re-enter. A. died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor having become bankrupt:—Held, that the lessor's right of re-entering thereupon accrued. *Doe d. Brigman v. David*, 1 C. M. & R. 405; 5 Tyr. 125; S. C., nom. *Doe d. Williams v. Davis*, 6 C. & P. 614.

The following proviso for re-entry, “that if the lessee, his executors, administrators or assigns shall, either by their or his own act or acts, or by bankruptcy, insolvency, writ of extent or of execution, by fieri facias or other act of law or by any other means, whereby, either voluntarily or without his or their consent, whereunder the premises demise, or any part thereof, would, in case that proviso did not exist, be liable to be seized by the sheriff or any other person, or in case the lessee, his executors, administrators or assigns shall at any time make breach or default in performance of the covenants or any of them, on his or their parts contained,” then the lease was to be void, and the lessor to re-enter, is insensible and void. *Doe d. Wyndham v. Carew*, 2 Q. B. 317; 1 G. & D. 640; 6 Jur. 457.

A lease for years contained a proviso for re-entry in case the lessee should, at any time during the term, commit any act of bankruptcy, whereupon a commission or fiat in bankruptcy should issue against him, and under which he should be duly found and declared a bankrupt. The lessee being a trader, committed an act of bankruptcy, on which a fiat issued against him, and he was found and declared a bankrupt; but the petitioning creditor's debt, on which the fiat was founded, was due to A. and B. as partners, whereas it was due to A., B. and C. as partners:—Held,

that the lessee was not duly found and declared a bankrupt within the meaning of the proviso. *Doe d. Lloyd v. Ingleby*, 15 M. & W. 465.

A lessee, who covenanted not to assign the demised premises without the consent in writing of the lessor, executed a deed, under section 193 of the 24 & 25 Vict. c. 134, whereby he assigned all his property to trustees for the benefit of his creditors:—Held, that the assignment was a forfeiture of the lease. *Holland v. Cole*, 1 H. & C. 67; 8 Jur., N. S. 1066; 31 L. J., Exch. 481; 10 W. R. 563; 6 L. T., N. S. 503.

As to what constitutes a breach of covenants in lease,—see COVENANT; other contracts and stipulations between landlord and tenant,—see this title, III.—VII.

**When disclaimer by tenant works forfeiture.**—A denial by parol of a landlord's title does not incur a forfeiture of a lease for years. *Doe d. Graves v. Wells*, 2 P. & D. 396; 10 A. & E. 427; 3 Jur. 820.

A termor after deserting the demised premises, delivered up the possession of them, with the lease, to a party who claimed by a title adverse to that of the landlord, with intent to assist him in setting up that title, and not that he should hold *bonâ fide* under the lease:—Held, that the term was forfeited by the act of betraying possession. *Doe d. Ellerbrock v. Flynn*, 1 C., M. & R. 137; 4 Tyr. 619.

A lessee who had paid his rent occasionally to a trustee and occasionally to a cestui que trust, gave up possession on the last day of his term, but before his term was over, to the person who had been trustee, and not to the party then having the legal title:—Held, that, as the act was equivocal, it did not amount to a forfeiture of the term. *Ackland v. Lutley*, 9 A. & E. 87; 1 P. & D. 636.

The mere payment by the tenant to a third person of the rent reserved by his lease does not amount to a disclaimer of the title of the landlord, so as to operate as a forfeiture of the lease. *Doe d. Dillon v. Parker*, Gow, 180—Richardson.

Lands were held by G. as tenant from year to year to D., who died in 1837, having devised the same to trustees for a term of 140 years, to permit his wife E. to take the rents and profits during her life. G. paid the rent to E., the widow, after D.'s death, from 1837 to 1840, and, on receiving a notice to quit from her in 1840, stated that he did not think she would turn him out of possession, as she had promised he should continue on as tenant from year to year:—Held, in ejectment by the trustees for the recovery of the premises, that this was sufficient evidence of a disclaimer by G. of the title of the trustees to warrant the jury in finding a verdict for the trustees. *Doe d. Davies v. Evans*, 9 M. & W. 48.

Parish lands had been let to the laboring inhabitants at a forehand rent of 4s. per acre; the lands having been afterwards inclosed, the churchwardens and overseers, for the time

being, increased the rent to 12s. per acre, for the purpose of raising a fund to pay the expenses of the inclosure. The tenants having paid this increased rent for many years, conceiving that the inclosure expenses had been paid off, insisted that they were entitled to hold the land at the original rent of 4s. an acre, and refused to pay the 12s.:—Held, that this did not amount to a disclaimer of the landlords' title, so as to enable them to eject the tenants without notice. *Hunt v. Allgood*, 10 C. B., N. S. 253; 30 L. J., C. P. 313.

As to necessity of notice to quit, after disclaimer by tenant,—see this title, XIV., 1.

## 2. Licenses; Waiver.

**Operation and effect of licenses.**—[By 23 & 23 Vict. c. 35, s. 1, where any license to do any act which without such license would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act (13th August, 1859) be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license);

And all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made punishable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done. (See *Dumport's Case*, 4 Coke's Rep. 119; 1 Sm. L. Cas. 28.)

By s. 2, where, in any lease heretofore granted or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or underletting, or doing any other specified act without license, and a license at any time after the passing of this act (13th August, 1859) shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be), over or in

respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license. (See *Knight's Case*, 5 Coke's Rep. 55.)]

After twenty years' user of demised premises, converted into a shop without license, contrary to the covenants contained in the lease, an assignee of the reversion cannot take advantage of a condition of re-entry for such user subsequently to the assignment. *Gilman v. Doeg* or *Doeg*, 27 L. J., Exch. 37; 2 H. & N. 615.

A lease contained a covenant on the part of the lessee, that he would not, without the consent of the lessor, use, exercise or carry on in the demised premises any trade or business whatsoever, nor convert the dwelling-houses into a shop, nor suffer the same to be used for any other purpose than dwelling-houses. One of the dwelling-houses was converted into a public-house and a grocery shop, and the lessor, with full knowledge of it, for more than twenty years received the rent. The plaintiff, having purchased the reversion of the lessor, brought an action of ejectment for the breach of the covenant:—Held, that the user of the premises in their altered state for more than twenty years, with the knowledge of the lessor, was evidence from which a jury might presume a license. *Ib.*

The plaintiff demised premises for a term to lessees, by a lease containing a covenant not to assign without license, and a clause for re-entry on breach of the covenant. The plaintiff agreed to an assignment to W., and received rent from him, but no formal assignment was ever executed. W. also, with the consent of the plaintiff, assigned to trustees for the benefit of his creditors, and the trustees, without license, sold the term to the defendant. In an action of ejectment against the defendant for a forfeiture by the assignment without license:—Held, that there never was an assignment of the whole term, and therefore there could be no forfeiture, except for breach of covenant by the original lessees. *West v. Dobb*, 17 W. R. 879; 20 L. T., N. S. 787; 38 L. J., Q. B. 289; 9 B. & S. 755; 4 L. R., Q. B. 634.

Held, also, that the parting with the possession by the original lessees without executing a transfer of the lease was no ground of forfeiture, there being nothing in the license to assign to forbid the lessees from parting with the possession until a complete transfer of the legal interest had been executed. *Ib.*

The predecessor in title of the plaintiff let about thirty-three acres of land to B., who covenanted that he, his executors, administrators, or assigns, or any of them, should not during the term demise, let, assign, make over, or part with the possession of the lands (except to the extent of three acres, therein described), without the license and consent in writing of the lessor, his heir or assigns. There was a proviso in the lease for re-entry

upon breach of a covenant. After the passing of the 22 & 23 Vict. c. 35, the lessor gave B. a license in writing to assign, transfer, and set over the premises, to the defendant, his executors, administrators, and assigns, upon condition that he would not at any time assign or transfer the premises without the consent of the lessor, his heirs or assigns. B. assigned the three excepted acres to Edge, for the remainder of the term, and let the rest of the premises by the year to another defendant, Jones; and Jones let the thirty acres to Edge by the year. There was no other license by the lessor but that mentioned:—Held, that the words of the license did not justify the letting of the thirty acres without a further license; and that this breach of covenant created a forfeiture of the whole of the premises let under the original lease. *Eyton v. Jones*, 21 L. T., N. S. 739—C. P.

#### Waiver of forfeiture by acceptance of rent.]

—Where in a lease a power of re-entry for a breach of covenant is reserved to the lessor, a forfeiture may be waived, as the lease is thereby rendered voidable only. *Doe d. Bryan v. Banks*, 4 B. & A. 401; Gow, 220.

But it is otherwise where the lease is declared absolutely void. *Ib.*

Acceptance of rent after a forfeiture is a waiver of the forfeiture. *Arnaby v. Woodward*, 6 B. & C. 519; 9 D. & R. 536.

If the fact of forfeiture was known to the lessor at the time. *Rosd. Grogan v. Harrison*, 2 T. R. 425. S. P., *Goodright d. Walter v. Davids*, Cowp. 803; *Doe d. Cheney v. Batten*, Cowp. 243; 9 East, 314, n.

If ejectment is brought on a forfeiture of a lease and after the bringing of such ejectment the landlord accepts rent, it is no waiver of the forfeiture. *Doe d. Morecraft v. Meux*, 1 C. & P. 346; 7 D. & R. 98; 4 B. & C. 606.

And upon a clause of re-entry on breach of covenant, ejectment may be supported in respect of a continuing breach, as by user of rooms in a manner prohibited by the lease, though rent has been accepted with knowledge of the original breach. *Doe d. Woodbridge*, 4 M. & R. 303; *S. C.*, nom. *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376.

A forfeiture of a lease accruing on the lessee's insolvency, is waived by acceptance of rent from him after his discharge under the Insolvent Debtors Act; and the non-payment of a debt specified in the schedule to be due to the lessor, is not a continuing insolvency, to constitute a new forfeiture after such acceptance of rent. *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384; 6 Scott, 161; 1 Arn. 159.

The receipt of rent is no waiver of a continuing breach of covenant. *Doe d. Baker v. Jones*, 5 Exch. 498; 19 L. J., Exch. 405.

And the receipt of rent is not a waiver of a forfeiture, unless it is rent due on a day after the forfeiture is incurred. *Price v. Worwood*, 4 H. & N. 512; 5 Jur., N. S. 472; 28 L. J., Exch. 329.

Ejectment upon a forfeiture of a lease for not insuring, and continuing to insure, a house

in the name of the lessor and lessee, according to the covenant. On the 24th of January, 1836, a policy of insurance had been effected in the sole name of the lessee, which had been shown to A., the then lessor, and approved of by him, and the premiums had been paid upon it up to Christmas, 1842. On the 14th of January, 1843, A. conveyed his interest in the reversion to the plaintiff, and on the same day received from the defendant the rent due up to the 25th December, 1842:—Held, that, though A. by his conduct might have waived the forfeiture up to the 25th December, 1842, yet that, there being a continuing covenant, a subsequent breach would entitle the plaintiff to enter. *Doe d. Muston v. Gladwin*, 6 Q. B. 953; 9 Jur. 508; 14 L. J., Q. B. 189.

The plaintiff leased premises to A. for a term of years, and A. died intestate pending the term, and the plaintiff, considering that no one would administer to A.'s estate, agreed with A.'s son that he should occupy the premises as yearly tenant, at the same rent as that reserved under the lease to his father, and the son did so, and paid rent. The plaintiff repaired the premises at or about Michaelmas, 1861, and having afterwards discovered that the defendant, a daughter of A., had taken out letters of administration to his estate, and as such claimed to hold the premises for the remainder of the term, the plaintiff sued her on the covenant to repair, and in ejectment, as for a forfeiture for non-repair. In the action of covenant, however, the defendant paid money into court, which the plaintiff took out in satisfaction. There was no want of repair in the premises after the plaintiff had repaired them, and the rent due up to Michaelmas, 1861, was paid by A.'s son, and received by the plaintiff, before either action was commenced:—Held, that either the rent so paid was to be taken as a satisfaction of the rent due under the lease, and so the acceptance of it to operate as a waiver of the forfeiture, or that there had been an eviction of the defendant by the plaintiff, which prevented his taking advantage of a forfeiture for non-repair during the eviction. *Pellatt v. Boosey*, 8 Jur., N. S. 1107; 31 L. J., C. P. 281.

In a crown lease, a lessee covenanted not to convert the premises into a shop or a place of sale of any kind, without consent of the commissioners of woods and forests. The trade of an engraver had been carried on in it, without consent or objection, but rent had afterwards been received:—Held, that the forfeiture had been waived. *Bridges v. Longman*, 24 Beav. 27.

After forfeiture of a lease had been incurred, the time having come when the rent would become due, the lessee tendered the rent to the lessor. He refused to take it, except on the terms that it should be taken not as rent, but as compensation for use and occupation subsequent to the forfeiture. The lessee refused to agree to any such condition. The lessor then took the money, declaring he

would not take it as rent, or as waiving the forfeiture:—Held, that in legal effect money must be taken according to the intent of the party paying it, in this case as rent; and that the receipt of rent, as a matter of law, operated to waive all forfeitures then known to the lessor, and that no protest on his part could prevent this legal effect. *Croft v. Lumley*, 5 El. & Bl. 648; 2 Jur., N. S. 275; 25 L. J., Q. B. 223.

At the time of the receipt of the money, the lessor knew of most of the judgments by virtue of which a forfeiture had been incurred, but did not know of every instance:—Held, that he must be taken to waive all forfeitures by that breach of which he had notice, though it was more extensive than he was aware of. *Ib.*

Where a lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry, it is, by force of the rule, "solutio accipitur in modum solventis," a waiver of the forfeiture in respect of such breaches as were known to the lessor.—By a majority of the judges. *S. C.*, 4 Jur., N. S. 903; 27 L. J., Q. B. 321; 6 H. L. Cas. 672. See *Toleman v. Portbury*, 6 L. R., Q. B. 245, 248; 40 L. J., Q. B. 125; 24 L. T., N. S. 24; 19 W. R. 623.

When a lease contains a proviso for re-entry for non performance of covenants, and a covenant is broken for want of the previous consent of the lessors to alterations, the receipt of rent is a waiver of the forfeiture. *Miles v. Tobin*, 17 L. T., N. S. 432; 16 W. R. 465—Chelmsford, C.

The acceptance of rent with knowledge of a written underletting for a time certain is a waiver pro tanto of the breach of covenant not to underlet. *Wakron v. Hawkins*, 32 L. T., N. S. 119; 44 L. J., C. P. 116; 23 W. R. 390; 10 L. R., C. P. 342.

A lessor let houses and lands upon a lease for twenty-one years, containing a covenant that the lessee would not assign, underlet, or permit any person to occupy any part of the premises without the consent of the lessor. The lessee underlet part of the premises by written agreement to T., for a year, and the lessor having accepted, and also distrained for rent accrued due after the making of the agreement, and with notice thereof, brought ejectment as for a forfeiture upon breach of the covenant not to underlet or permit to occupy:—Held, that the breach was not a continuing breach. *Ib.*

— by proceeding for rent.]—A distress and continuance in possession may be a waiver of an existing forfeiture, but not so as to any right which accrues subsequently. *Doe d. Taylor v. Johnson*, 1 Stark. 411—Ellenborough. And see *Zouch d. Ward v. Willingale*, 1 H. Bl. 311.

Taking an insufficient distress after the forfeiture, for rent accruing before, is not a waiver of the right to re-enter. *Brewer d. Onslow v. Eaton*, 3 Dougl. 230.

Where circumstances occur which entitle a party to take advantage of a clause of forfeiture, and he does acts which show that he waives that forfeiture (though the acts were such as he was not entitled to do), he cannot afterwards take advantage of the forfeiture. *Writ v. Day*, 33 L. J., Q. B. 254; 5 B. & S. 359; 13 W. R. 829; 10 L. T., N. S. 578—Exch. Cham.

By a deed for twenty-one years from the 24th June, at a rent payable half-yearly, the lessor granted the lessee leave and license to pick all the copperas stone over certain land, with a proviso that if any part of the rent should be in arrear for twenty-one days, it should be lawful for the lessor, without any demand, to determine the grant by notice in writing. In March, 1858, he distrained the goods of the lessee for five and a half years' rent, due the preceding Christmas, whereupon an action was commenced for an illegal distress. In May and June of the same year, negotiations took place between the parties for a settlement of the action, and for granting a new lease, commencing on the 24th of June, 1864, when the former grant would expire; but the terms arranged were not carried out by the lessee, who on the 3d of July, 1858, gave the lessor a written notice that he determined the grant, on the ground that half a year's rent, due at Christmas, 1857, was in arrear:—Held, that the conduct of the lessor in making the distress (though it was an illegal act), together with the negotiations, was satisfactory evidence that he treated the license as still subsisting, and was therefore a waiver of the forfeiture. *Ib.*

A lessee covenanted that his executors or assigns would insure the demised premises, and keep them insured during the term, and deposit the policy with the lessor. The lease contained a proviso for re-entry on breach of any of the covenants. The lessee assigned, and the premises were never insured either by him or his assignee. The lessor distrained on the 30th September for rent then due, and afterwards brought an ejectment on a demise laid on the 24th October:—Held, that though the distress was an acknowledgment of a tenancy to the 30th September, and a waiver of any forfeiture to that time, yet the lessor was entitled to recover in ejectment for the forfeiture incurred by the breach of covenant between the 30th September and the 24th October. *Doe d. Flower v. Peck*, 1 B. & Ad. 438.

A right of re-entry for breach of a covenant in a lease is waived by the lessor's bringing an action for rent accruing subsequently to the breach, with knowledge of its existence. *Drady v. Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220.

— by bringing ejectment for different breach.]—The service by a lessor upon the lessee of a declaration in ejectment for the demised premises for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although

there has not been any judgment in the ejectment) sue for rent due or for covenants broken after the service of the declaration (or by 15 & 16 Vict. c. 76, s. 168, after the service of the writ). *Jones v. Carter*, 15 M. & W. 718.

A lease of a farm contained a condition of re-entry for breaches of covenants. Breaches of covenants took place before the 24th June, 1871. The lessors brought ejectment against the tenant on the 21st of July, 1871; but the writ did not claim possession as from any antecedent date. After the commencement of the action, but before the trial, the lessors distrained for rent due up to the 24th of June, 1871:—Held, that by such distress they had not precluded themselves from relying at the trial on any breach of covenant before the 24th of June, 1871, on the ground that by bringing the ejectment they had unequivocally declared their election to determine the lease on any ground of forfeiture which had not been waived before the commencement of the action; and that the subsequent distress, if not justifiable under the 8 Anne, c. 14, s. 7, which enables the landlord, under certain circumstances to distrain after the determination of the tenancy, was a trespass. *Grimwood v. Moss*, 7 L. R., C. P. 360; 41 L. J., C. P. 259; 20 W. R. 972; 27 L. T., N. S. 268.

The plaintiff demised a house to C., who covenanted not to permit or suffer any sale by auction to take place on the premises. C. subsequently granted a bill of sale under seal, assigning his goods in the house as security for a loan, and empowering the grantees to sell them by auction on the premises in default of repayment. He next mortgaged the house by an under lease to the defendant, and finally executed a deed of assignment conveying all his estate to trustees for his creditors; he nevertheless remained in possession. The grantees of the bill of sale sold the goods by auction on the premises. The plaintiff brought an ejectment, and, in compliance with a judge's order, delivered particulars of the following breaches of covenant, upon which she relied as causing a forfeiture of the lease, namely: first, non-payment of rent accrued since the day of the sale; and, secondly, the permitting and suffering a sale by auction to take place on the premises. The arrears of rent were tendered to the plaintiff, and being refused, were paid into court, whereupon the proceedings on the first breach were stayed, but the action went to trial on the second. The jury found that C. permitted the sale:—Held, that he had power to do so, notwithstanding the conveyance of his estate, and having done so, had committed an act of forfeiture which was not waived by the plaintiff stating in the particulars of breaches the non-payment of subsequent rent. *Toleman v. Portbury*, 41 L. J., Q. B. 98; 7 L. R., Q. B. 344; 26 L. T., N. S. 292; 20 W. R. 441—Exch. Cham.; affirming *S. C.*, 6 L. R., Q. B. 245; 40 L. J., Q. B. 125; 24 L. T., N. S. 24; 19 W. R. 623. And see *Toleman v. Portbury*, 39 L. J., Q. B.



36; 5 L. R., Q. B. 288; 18 W. R. 570; 22 L. T., N. S. 83—Exch. Cham.

— by giving notice to repair.]—A forfeiture incurred by the breach of a general covenant to keep the premises in repair, is not waived by a notice given under a covenant to repair within three months. *Roe d. Goatly v. Paine*, 3 Camp. 523—Ellenborough.

A lease of lands and houses by A. to B. contained a general covenant by B. to repair, and a further covenant that A. might give notice to B. of all defects and want of repairs, and if B. did not repair the said defects within two months, A. might enter and do the repairs himself, the expense of which B. was to repay at the time of paying his next rent; and if he did not so, A. might distrain on him for the expense, as in case of rent in arrear. There was also a power to A. to re-enter, upon breach of any covenant. The premises being out of repair, A. gave B. notice to repair within six months, and that, if B. did not repair within that time, he would perform the repairs, and charge B. with the expense. The premises were not repaired within the six months; during that time a negotiation was entered into by A. and B., and, after the expiration of the six months, A. gave notice to B., that if he did not agree to certain terms in three days, A. would hold him to the covenants in his lease. B. did not agree:—Held, that A. could not recover in ejectment for a forfeiture, he having elected to perform the repairs, and distrain on B. for the expense, and the general power to re-enter not being revived by the three days' notice. *Doe d. De Rutzen v. Lewis*, 5 A. & E. 277; 6 N. & M. 764; 2 H. & W. 162.

Where a landlord, finding the premises out of repair, gave the tenant three months' notice to repair, pursuant to his covenant:—Held, first, that he could not maintain ejectment for a forfeiture until the three months had elapsed; and secondly, that the notice was a waiver of the breach of the general covenant to repair. *Doe d. Morecraft v. Meuz*, 7 D. & R. 98; 4 B. & C. 606; 1 C. & P. 340.

A right of re-entry, acquired by an omission to repair three months after notice, is suspended, but not waived, by an agreement to allow the tenant further time to repair. *Doe d. Rankin v. Brindley*, 1 N. & M. 1; 4 B. & Ad. 84.

Where a lease contains a covenant by the lessee to repair and keep in repair, and also to repair within three months after notice, with a clause of re-entry for non-performance of covenants, the landlord may re-enter, as for a forfeiture, on finding the premises out of repair. *Baylis v. Le Gros*, 4 Jur., N. S. 513; 4 C. B., N. S. 537.

A lessee under a covenant to repair on three months' notice, with a penalty of re-entry, received notice on the 16th September to repair according to a specification, and out of the twenty-two items specified only

two were not commenced, and eight not completely finished, on the 18th December, the latter having been delayed by the state of the weather. There was no entry by the lessors to inspect, and no notice from them to expedite the works during the interval, and the whole of the works was completely finished in the second week in January:—Held, that the lessee was entitled to be relieved against an ejectment for the breach of covenant. *Bargent v. Thomson*, 9 Jur., N. S. 1193; 9 L. T., N. S. 865; 4 Giff. 473.

When a notice to repair has been given, and the lessee makes an offer to sell his interest in the premises, and a negotiation takes place on that offer, the effect of that offer and the negotiation is to suspend the notice till the negotiation has been terminated, from which event alone the date of the notice can properly be calculated. Equity will relieve against an ejectment founded on the original notice. *Hughes v. Metropolitan Railway Company*, 2 L. R., App. Cas. 439; 40 L. J., C. P. Div. 583; 23 W. R. 680; 36 L. T., N. S. 932—H. L.; affirming the judgment of the Court of Appeal, which reversed the judgment of the Common Pleas Division, 45 L. J., C. P. Div. 578; 35 L. T., N. S. 87; 1 L. R., C. P. Div. 120; 24 W. R. 652.

A notice to repair, within six months, houses held on lease by the Metropolitan Railway Company, was given on the 22d of October, 1874, to expire on the 22d of April, 1875. It was answered by a letter of the 28th of November, suggesting that the lessors might like to purchase the premises. The lessors' solicitors, by letter of the 1st of December, asked the price demanded, and were told, by letter, on the 30th of December, that it was 3,000*l*. The lessors' solicitors, on the 31st of December, 1874, wrote to say that, considering the condition of the premises, "the price is out of all reason. We must therefore request you to reconsider the question of price, having regard to the previous observations, and to the fact that the company has already been served with notice to put the premises in repair, and we shall be glad to receive in due course a modified proposal from you." No farther communication on this subject took place till the 10th of April, 1875, when the agent for the company wrote to say that as "the negotiations had not resulted in a sale" the company would take in hand the repairs. On the 20th of April the solicitors for the lessors wrote, declaring that "the negotiations" had been broken off in December last, and that there had been ample time since then to complete the repairs. On the 22d of April the notice expired, and on the 28th the ejectment was served:—Held, that the company was entitled in equity to be relieved against the forfeiture, for that the letters at the end of November and at the beginning of December had the effect of suspending the notice, and that the suspension did not come to an end till the 31st of December, till which time the operation of the notice was waived, so that no part of that

time could be counted against the tenant in a six months' notice to repair. *Id.*

— by giving notice to quit.]—A tenant is not absolved from the performance of the covenants of his lease by a notice to quit; such notice ought rather to be regarded as a notice to be more vigilant in the performance of the covenants. *Gregory v. Wilson*, 9 Hare, 683; 16 Jur. 304.

— by permitting or recognizing breach.]—If a lessee exercises a trade on the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture. *Doe d. Sheppard v. Allen*, 3 Taunt. 78.

Some positive act of waiver, as the receipt of rent, is necessary. *Id.*

If, on the trial of an ejectment against the assignee of a tenant on a forfeiture of a lease by breach of covenant, it appears that the landlord so acted as to induce the tenant's assignee to believe that the latter was doing all that he ought, the landlord cannot recover, although the covenants are actually broken, and there is neither a release nor a dispensation on the part of the landlord. *Doe d. Knight v. Rowe*, 2 C. & P. 246; R. & M. 843—Abbott. See *West v. Blakeway*, 3 Scott, N. R. 199; 9 D. P. C. 846; 5 Jur. 630; 2 M. & G. 720.

On an action of ejectment for the breach of a condition that the lessee should not underlet, in an agreement amounting to a lease, it appeared that the lessor of the plaintiff asked the defendant what he would take for his land; and on the defendant naming a price, said, "Then let it, and I shall know what I will produce next year."—Held, that this was a waiver of the forfeiture on a breach of such condition. *Doe d. Henniker v. Watt*, 1 M. & R. 694; 8 B. & C. 308.

If a lessor, after a forfeiture, advises a person to purchase the term of his lessee, he cannot maintain an ejectment for such forfeiture against such purchaser; but he may do so if the party has an interest, viz., an annuity secured on the premises, and the advice is merely "to take to them." *Doe d. Sora v. Eykins*, 1 C. & P. 154; R. & M. 29—Abbott.

Land was demised to the lessee, who covenanted in the lease to build and complete certain houses thereon within a year, and that if he did not the lease should be void; the houses not being completed within the specified period.—Held, that the forfeiture was not waived by the steward of the lessor having permitted the lessee to employ workmen in completing the houses for a short period after such forfeiture. *Doe d. Kensington v. Brindley*, 12 Moore, 37.

An owner of an estate covered it with houses, and sold some of them, subject to a covenant not to carry on any trade, business or calling therein, or to otherwise use or suffer the same to be used, to the annoyance, nuisance or injury of any of the houses on the

estate.—Held, that the carrying on of a girl's school in one of the houses was a breach of the covenant, and that the covenantee had not waived the benefit of the covenant, though he had permitted other houses, held under the like covenant, to be used as schools. *Kemp v. Sober*, 1 Sim., N. S. 517; 15 Jur. 458; 20 L. J., Chanc. 602.

Mere standing by and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry v. Davis*, 3 C. B., N. S. 769.

Where, during the existence of a lease containing a proviso for re-entry in case of assignment or underletting without license in writing, the lessor, who had purchased the remainder of the interest in it, engaged to grant a new lease to the defendant, to take effect on the expiration of the old lease.—Held, that the lessor could not maintain ejectment against the defendant on the fact of his possession, though no license in writing had been granted, as there was a waiver of the forfeiture if any had taken place, or else there was no forfeiture at all, for the defendant came in with the lessor's consent. *Doe d. Weatherhead v. Curwood*, 1 H. & W. 140.

By a lease empowering the lessee to build, he covenanted to cultivate part of the land, on which no buildings should be erected, in a husbandlike manner, and there was a clause of forfeiture for breach of covenant. The lessee built a vitriol factory on the land, with the knowledge of the lessor, but being obliged to discontinue the manufacture by an indictment he pulled down the manufactory, and paid part of the proceeds of the building materials to the lessor in pursuance of an agreement between them.—Held, that the lessor had not in equity precluded himself from entering for the non-cultivation of the land after the manufactory was pulled down. *Hills v. Rowland*, 4 De G., M. & G. 430.

Restriction of operation of waiver to a particular breach.]—[By 23 & 24 Vict. c. 38, s. 6, where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of the act (23d July, 1860) in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance, or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.]

A lessor, who has a right of re-entry reserved on breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. Nor, by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subsequent want of repairs. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

## XIV. NOTICE TO QUIT.

## 1. Under Leases and Agreements, generally.

## (a) When Necessary or Proper.

**In general.]**—Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit previously to bringing an action. *Cobb v. Stokes*, 8 East, 358. 8. P., *Messenger v. Armstrong*, 1 T. R. 54; and *Right d. Flower v. Darby*, 1 T. R. 162.

A tenant holding under an agreement for a lease for seven years, which was never executed, is not entitled to a notice to quit at the end of the seven years. *Doe d. Tilt v. Stratton*, 4 Bing. 440; 1 M. & P. 183; 3 C. & P. 164.

Where a party occupies under an agreement for a lease during the whole term for which the lease was to be granted, a notice to quit is not necessary at the end of such term, as the agreement is evidence of the expiration of the tenancy, as well as of the other terms of the holding. *Ib.*

Under an agreement to let for a longer term than three years, though void as a lease for three years, under 8 & 9 Vict. c. 106, s. 8, the tenant holds from year to year, subject to the terms of the agreement, and is bound to leave at the expiration of the three years, without any notice to quit. *Tress v. Savage*, 4 El. & Bl. 36; 18 Jur. 680; 23 L. J., Q. B. 330.

A., being owner of a farm, let it for seven years to B., and by a written agreement of the same date it was agreed, that A. should manage the farm for B., B. allowing A. 12s. per week; "and allowing him and his family to reside and have the use of the dwelling-house and furniture therein, free of rent;" and this agreement was to be put an end to by three months' notice, or three months' wages:—Held, that no notice to quit was necessary, if the service was put an end to. *Doe d. Hughes v. Derry*, 9 C. & P. 494—Parke.

So, if, by the terms of a deed of copartnership, a house is to be used and occupied by the copartner during the copartnership, it is not necessary, after a dissolution of partnership, to give a notice to quit previously to bringing an ejectment against the copartner. *Doe d. Waithman v. Miles*, 1 Stark. 181; 4 Camp. 378—Ellenborough.

Where a tenant came into possession of premises in 1816:—Held, that the lessor of the plaintiff in ejectment, who claimed under an elegit and inquisition issued in 1818, but founded on a judgment recovered prior to 1816, need not give a notice previous to bringing the ejectment. *Doe d. Putland v. Hilder*, 2 B. & A. 782.

If A. lets part of a house to a firm consisting of himself and B., for the carrying on of the business of the firm, and the partnership of A. and B. is dissolved, A. may bring an ejectment against B., and recover possession of the part of the house thus let, without giving B. a notice to quit. *Doe d. Colnaghi v. Bluck*, 8 C. & P. 404—Tindal.

A person who held glebe lands as tenant to one incumbent, and continues in possession under his successor without disturbance, must be presumed to hold as tenant to the latter, and cannot be dispossessed without a notice to quit. *Doe d. Coates v. Somerville*, 9 D. & R. 100; 6 B. & C. 126.

If a tenant holds under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he comes of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be ejected upon a half-year's notice to quit, served after such a delay. *Doe d. Bromfield v. Smith*, 2 T. R. 436. And see *S. C.*, 6 East, 530; 2 Smith, 570.

Premises were demised under a written agreement, dated 4th August, 1845, "the tenancy to be from year to year from Michaelmas next," at the rent of 55*l.*, payable half-yearly, "except the last half-year, which portion of rent shall be paid on or before the 1st August in that year, and to be deemed then due for all legal remedies for recovering rent in arrear." The tenant "to allow the landlord or incoming tenant, in the last year, to enter on 1st May to make fallows and carry out the manure," for which compensation was to be paid. The tenant to have "the use of the barns for stacking and threshing the crops of the last year till the first day of May after the tenancy."—Held, that these stipulations did not necessarily import that the tenancy was to be extended beyond the first year; consequently, that the tenancy was determined by a notice, dated 24th March, 1846, to quit at Michaelmas that year. *Doe d. Plumer v. Nainby*, 10 Q. B. 473; 11 Jur. 308; 16 L. J., Q. B. 303.

**On disclaimer of title.]**—A notice is not necessary, where the tenant does an act which amounts to a disavowal of the title of the lessor. *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Doe d. Williams v. Pasquelli*, Peake, 106; *Doe d. Jefferies v. Whittick*, Gow, 195; *Doe d. Clun v. Clark*, Peake's Add. Cas. 239.

But refusal to pay rent to the devisee under a will, which is contested, is not such a disavowal. *Ib.*

Nor where the possession of the tenant is adverse. *Doe d. Foster v. Williams*, Cowp. 622. 8. P.; *Doe d. Chesser v. Creed*, 2 M. & P. 648; *S. C.*, nom. *Doe d. Davis v. Creed*, 5 Bing. 327.

"I have no rent for you, because A. has ordered me to pay none," is evidence of a disclaimer of tenancy. *Doe d. Whitehead v. Pittman*, 2 N. & M. 672.

The defendant held premises under a tenant for life, on whose death possession was claimed, and rent demanded by the heir at law of the deviser; whereupon the defendant wrote to the attorney of the heir at law, stating that he held as tenant to S. (the

husband of the tenant for life), in right of his wife; that he had never considered the claimant as the landlord of the house; that he should be ready to pay the arrears to any person who should be proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on him, without more satisfactory proof in a legal manner:—Held, that this letter amounted to a disclaimer of the title of the heir at law, and that he might maintain ejectment against the tenant without giving him a previous notice to quit. *Doe d. Calvert v. Froud*, 1 M. & P. 480; 4 Bing. 557.

So, where the tenant has attorned to some other person, or answered an application for rent, by saying that his connection as tenant with the party applying has ceased. *Doe d. Grubb v. Grubb*, 10 B. & C. 816.

Executrixes of a tenant from year to year signed the following instrument:—"We do hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, use, trust, term and terms of years whatsoever, and possession of that messuage called B.:—Held, a surrender, and not a disclaimer. *Doe d. Wyatt v. Stagg*, 5 Bing. N. C. 564; 7 Scott, 690.

In an ejectment by a landlord against his tenant, the landlord relied on a disclaimer. It was proved that the tenant disclaimed, in March, 1833; in November, 1833, the landlord put in a distress for rent:—Held, a waiver of the disclaimer. *Doe d. David v. Williams*, 7 C. & P. 822—Patteson.

B. had concurred, with other members of his family, in letting land to C., as tenant from year to year, and it was agreed that the rent should be paid to D., as agent for the family. B., to whom alone the land really belonged, demanded rent of C., who said, "You are not my landlord." B. then demanded possession, which C. refused to give up:—Held, that if the jury was satisfied that the fair meaning of this was, that C. asserted that B. and himself were not in the relation of landlord and tenant, this was a disclaimer, and that C. was not entitled to notice to quit. *Doe d. Burnett v. Long*, 9 C. & P. 773—Coide-ridge.

The defendant held premises as tenant to H., with an agreement for a lease for seven years, or for the lease for lives under which H. held the property. The attorney for the lessors of the plaintiff, who was assignee of H.'s interest in the premises, under an impression that the seven years had expired, went to demand possession; when the defendant said, "I hold on a lease for lives, and as long as they live, I will not give up possession; you know I have an agreement." The attorney then demanded a quarter's rent, which was due, but which the defendant refused to pay, saying, "I hold under H., and I was directed by him to pay to K. (the superior landlord), and I'll do so; how do I know he may not come and make a demand on me?"—Held, that this did not amount to a disclaimer of the title of the lessors of the

plaintiff. *Doe d. Williams v. Cooper*, 1 Scott, N. R. 36; 1 M. & G. 135. See *Doe d. Lewis v. Cadnor*, 1 C., M. & R. 398; 4 Tyr. 852.

Where upon a question as to the right of possession on a particular day, one party entitles himself to such possession by a tenancy for years under the other, an acknowledgment made after action brought, of an attornment to a stranger, taking place before such day, is sufficient evidence of a disclaimer to rebut his title as tenant. *Doe d. Mos v. Litherland*, 6 N. & M. 313; 4 A. & E. 784.

A lease for a term of years by deed is not forfeited by a parol disclaimer of the lessor's title by the lessee. *Doe d. Graves v. Wells*, 10 A. & E. 427; 2 P. & D. 806; 3 Jur. 820.

A notice to quit is unnecessary when, on demand of possession, the party refuses to give up possession, claiming the property as his own. *Landell v. Giner*, 17 Q. B. 589; 16 Jur. 100; 21 L. J., Q. B. 57.

As to when disclaimer by tenant works a forfeiture,—see this title, XIII, 1.

**By infants.**—Notice to quit must be given by an infant, who becomes entitled to the reversion of an estate leased from year to year, before he can eject the tenant. *Maddon d. Baker v. White*, 2 T. R. 150.

Where an ejectment has been brought on the demise of an infant, which has been compromised, and the tenant in possession has attorned to the infant; though the lessor of the plaintiff, on his coming of age, does not accept rent, or do any act to confirm the tenancy, yet, as the former ejectment was brought at his suit and for his benefit, he will not be allowed to consider the tenant as a trespasser, and bring a new ejectment without giving notice to quit. *Doe d. Miller v. Noden*, 2 Esp. 530—Kenyon.

**By mortgagees.**—It is not necessary for a mortgagee to give a notice, previously to bringing an ejectment, to a tenant who claims under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee. *Keech d. Warne v. Hull*, 1 Dougl. 21.

Nor where the tenant was let into possession after the original mortgage was made, but before an assignment of it for the purpose of bringing ejectment. *Thunder d. Weaver v. Belcher*, 3 East, 449. But see *Birch v. Wright*, 1 T. R. 378.

A mortgage deed contained a covenant, that if the principal remained unpaid on a given day, the mortgagee might enter; and that if not paid within a certain number of days from the day fixed for payment he might sell without the concurrence of the mortgagor:—Held, that the mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit or demanding possession. *Doe d. Fisher v. Gibbs*, 2 M. & P. 749; 5 Bing. 431.

A notice to quit was signed by the mortgagee after the mortgage of the reversion. A clause in the mortgage deed provided that if the interest was duly paid by the mortgagor,

the principal was not to be called in by the mortgagee until a period after the date of the notice. There was also a covenant for quiet enjoyment:—Held, that notwithstanding this clause the signature of the mortgagee to the notice was sufficient. *Burton v. Dickenson*, 17 L. T., N. S. 246—Blackburn.

As to when notice to quit is necessary, in cases of tenancies from year to year,—see this title, XVI, 2; weekly tenancies,—see this title, XVII; tenancies at will and by sufferance,—see this title, XVIII.

(b) Requisites, Sufficiency and Effect.

**Length of notice required.]**—Where rent is reserved quarterly, it does not dispense with the necessity of six months' notice to quit. *Shirley v. Newman*, 1 Esp. 266—Kenyon.

But if a quarter's notice is given to the lessor, and the rent paid up to the time when the tenant should quit, and the lessor neither assents nor dissents, it will be taken as a waiver of the regular notice, and an acquiescence on his part. *Ib.*

A month's notice is not sufficient. *Gulliver d. Tasker v. Burr*, 1 W. Bl. 596. But see *Doe d. Parry v. Hayell*, 1 Esp. 94.

A tenant held under a demise from the 26th day of March, for one year then next ensuing, and fully to be completed and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice:—Held, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing or by operation of law, within the Statute of Frauds. *Johnstone v. Huddleston*, 7 D. & R. 411; 4 B. & C. 922.

A lease for one year, and so on from year to year until the tenancy thereby created shall be determined as thereafter mentioned, with a provision that it shall be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. *Doe d. Chaitborn v. Green*, 1 P. & D. 454; 9 A. & E. 658; 2 W., W. & H. 122.

A notice on the 28th of September, to quit on the ensuing 25th of March, is a sufficient half-year's notice. *Roe d. Durant v. Doe*, 6 Bing. 574; 4 M. & P. 391. S. P., *Doe d. Harrop v. Green*, 4 Esp. 198.

A notice given on the 26th of September to quit at the end of six calendar months is good to determine a holding commencing on the 25th of March. *Howard v. Wensley*, 6 Esp. 58—Ellenborough.

So, though the word "calendar" had been omitted, or the notice had expressed half a year. *Ib.*

If notice to quit at midsummer is given to a tenant holding from Michaelmas, he may insist on the insufficiency of the notice at the trial, though he did not make any objection at the time when it was served. *Oakapple d. Green v. Copous*, 4 T. R. 361.

A tenancy from year to year, so long as both parties please, is determinable at the end of the first year, unless, in the creation of the tenancy, the parties introduce provisions showing that they contemplated a tenancy for two years at least. *Doe d. Clarke v. Smarridge*, 7 Q. B. 957; 9 Jur. 781; 14 L. J., Q. B. 327.

A tenancy commenced on the 12th of May, 1840, by a lease for one year only, at a certain rent; the tenant remained in possession till 1842, without any fresh agreement. An increased rent was to commence on the 12th of May, 1842:—Held, that the tenancy was determined in 1843 by a notice to quit, given after the payment of the increased rent existing on the 12th of May, 1843. *Doe d. Monck v. Geekie*, 5 Q. B. 841; 1 C. & K. 307; 8 Jur. 360; 13 L. J., Q. B. 239.

B. being possessed of a term, made an under-lease for fourteen years and a half from the 25th December, 1831, which was assigned to the defendant, and expired on the 24th June, 1846. The defendant continued in possession, and paid rent to the plaintiff, who had become assignee of the original term:—Held, that a notice given on the 24th December, 1846, to quit on the 24th June next was valid. *Doe d. Buddle v. Lines*, 11 Q. B. 402; 12 Jur. 80; 17 L. J., Q. B. 108.

A demise for "a term of three years, determinable on a six months' previous notice to quit, otherwise to continue from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice, and if not determined, a subsisting tenancy from year to year. *Jones v. Nixon*, 1 H. & C. 48; 8 Jur., N. S. 648; 31 L. J., Exch. 505.

A written agreement for the letting of premises expressed the tenancy to be "for a year certain, and so on from year to year until a half-year's notice should be given by or to either party, at a yearly rent of 50*l.*, payable quarterly, the first payment to be on the 25th of March next." The agreement was dated the 20th of December, 1872, and specified no date for the commencement of the term:—Held, that a notice to quit given by the landlord on the 24th of June, 1874, was a good notice. *Sandill v. Franklin*, 10 L. R., C. P. 377; 44 L. J., C. P. 216; 23 W. R. 478; 32 L. T., N. S. 390.

**Expiration of notice; in ordinary cases.]**—If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit, expiring at the end of the first year. *Thompson v. Maberly*, 2 Camp. 573—Ellenborough.

Where premises are let from year to year, upon an agreement that either party may

determine the tenancy by a quarter's notice, the notice must expire at the period of the year when the tenancy commenced. *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; 2 Camp. 78.

So, where premises are taken under an agreement, by which the tenant is always to quit at three months' notice, the notice must expire either at the same time of the year the tenancy commenced, or at any other corresponding quarter-day. *Kemp v. Derrett*, 8 Camp. 510—Ellenborough.

If a landlord leases for seven years by parol, and agrees that the tenant shall enter at Lady-day and quit at Candlemas, though the lease is void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas. *Doe d. Rigge v. Bell*, 5 T. R. 471.

Where a remainderman creates a new tenancy with a tenant in possession, under a void lease granted by a tenant for life, and receives rent on the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original demise. *Roe d. Jordan v. Ward*, 1 H. Bl. 97. S. P., *Doe d. Collins v. Walker*, 7 T. R. 478.

A party took possession of premises on the 1st August, and at the Michaelmas following paid the half-quarter's rent, and continued afterward to pay quarterly on the usual feast days:—Held, that a notice to quit at Michaelmas was sufficient, and that, although the landlord had at first given a notice, expiring within the half-quarter, it was not necessarily presumable thence that the tenancy was from year to year, commencing with the half-quarter. *Savage v. Stapleton*, 8 C. & P. 275—Park.

A notice to quit at Old Michaelmas, though given half a year before New Michaelmas, at which time the tenancy expired, is bad. *Doe d. Spicer v. Lea*, 11 East, 312.

A tenant held premises under a void agreement for a term of five years and a half from Michaelmas, 1823; before the expiration of the five years and a half, the parties entered into a negotiation for a future lease for seven, fourteen or twenty-one years, at an increased rent, in consideration of the landlord laying out money in improvements: no lease was ever executed, but the tenant continued in the occupation of the premises, paying the increased rent from Michaelmas, 1828, down to 1835:—Held, that a notice given at Lady-day to quit at Michaelmas, the period at which the tenancy originally commenced, was valid. *Berry v. Lindley*, 4 Scott, N. R. 61; 3 M. & G. 498; 5 Jur. 1061.

By a written agreement the tenancy was to be "from year to year to Michaelmas next, at the yearly sum of 85*l.*, payable half-yearly, at Lady-day and Michaelmas, except the last half-year, which portion of the rent shall be paid on or before the 1st of August in that year, the tenant to dress the lands in the due

course of husbandry, and to allow the landlord or incoming tenant in the last year to enter on the 1st of May to make fallows, the tenant to be allowed the use of barns for stacking and threshing the crops of the last year, until the 1st of May after the tenancy:—Held, that the agreement did not create a tenancy for more than a year, and that notice to quit might be given, expiring at the end of the first year. *Doe d. Plumber v. Nainby*, 10 Q. B. 478; 11 Jur. 808; 16 L. J., Q. B. 803.

Demise for one year and six months certain from August 18th, at a rent payable at the usual quarter days; three calendar months' notice to be given on either side before determination of the tenancy. The tenant continued to occupy beyond the year and six months:—Held, that a three months' notice to quit, expiring on 18th August, was proper; and not a notice expiring at the end of a year from the termination of the year and six months. *Doe d. Robinson v. Dobell*, 1 Q. B. 806.

Premises were let from 19th April, 1841, at the yearly rent of 42*l.*, payable quarterly, the first payment of 7*l.* 18*s.* 6*d.*, to be made on 24th June, 1841, being the proportion down to that date; the tenant to hold and enjoy at that rent, until one of the parties should give the other six calendar months' notice to quit; the tenant to leave the premises in as good condition as at the date of the agreement:—Held, that notice might be given to quit at the expiration of any six months after 24th June, and that a notice on 24th June for 25th December, 1841, was good. *Doe d. King v. Grafton*, 18 Q. B. 496; 16 Jur. 833; 21 L. J., Q. B. 276.

A person entered as tenant under a written agreement, on the 7th of May, 1850, but paid no rent:—Held, that a six months' notice to quit, expiring on the 7th of May, 1851, was a good notice. *Doe d. Cornwall v. Matthews*, 11 C. B. 675.

An agreement to give six months' notice to quit means, *prima facie*, six lunar months, and cannot be explained to mean calendar months, by evidence of the usage of a particular estate. *Rogers v. Hull Dock Company*, 12 W. R. 1101; 11 L. T., N. S. 43; 34 L. J., Chanc. 165—V. C. W.

An agreement for a mining lease contained the following clause: The lessees to be at liberty at any time hereafter to determine this agreement, or the lease agreed to be granted, and to abandon the ironworks on giving to the lessor six months' notice in writing of their intention so to do. The lessees entered and paid rent under the agreement, but no lease was executed:—Held, that this being a mining lease, and looking at the whole contract and the surrounding circumstances, the lessees were entitled to determine the tenancy at any time by six months' notice, expiring six months after the delivery of the notice, without regard to the time of the commencement of the tenancy. *Bridges v. Potts*, 17 C. B., N. S. 814; 10 Jur.,

N. S. 1049; 33 L. J., C. P. 338; 11 L. T., N. S. 873.

A. held premises of B. as tenant for a year, and so on from year to year so long as C. should live, the tenancy commencing at Christmas, after the death of A. (C. being also dead). A.'s widow, by agreement with the landlord, continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy:—Held, that there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., and therefore properly determined by a notice to expire at Christmas. *Humphreys v. Franks*, 18 C. B. 323.

— in cases of different times of entry.]—

Where a house and land are let together to be entered upon at different times, and it does not appear, from the terms of the demise, from what time the whole is to be taken as let together; it is a question of fact for the jury, which is the principal and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole was given in time. *Doe d. Heapy v. Howard*, 11 East, 498.

Under an agreement of demise, dated in January, of a dwelling-house, and other buildings, for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, water-courses, &c., for a term of twenty-five years, to commence as to the meadow ground from the 25th of December last; as to the pasture, from the 25th of March next; and as to the housing mills, and all the rest of the premises, from the 1st of May; reserving the first year's rent on the day of Pentecost, and the other half-year's rent at Martinmas:—Held, that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of May, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the incoming tenant had liberty of entering on the meadow, which was merely accessory to the other and principal subject of the demise; and consequently that a notice to quit served on the 28th of September (which would have been sufficient with reference even to the 25th of March, the day of entry on the pasture ground; the 29th of September being the correspondent half-yearly day of holding to the 25th of March), to quit at the expiration of the current year of holding, was sufficient. *Doe d. Bradford v. Watkins*, 7 East, 551; 8 Smith, 517.

Land and buildings were held by a yearly tenant, the land from 2d February to 2d February, the buildings from 1st May to 1st May. The landlord, on the 22d October, 1833, served the tenant with a notice to quit the land and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your present year's holding of or in the said premises, or

any part or parts thereof respectively, shall expire, after the expiration of half a year from the delivery of this notice:"—Held, that, as to the lands, the notice was to be considered a notice to quit on 2d February, 1835, and that the landlord might recover both land and buildings after that day in ejectment. *Doe d. Williams v. Smith*, 5 A. & E. 350; 6 N. & M. 829; 2 H. & W. 176.

A tenant held a house and land from year to year, the land from 2d of February, the house, &c., from the 1st of May. On the 16th of February, 1838, a notice to quit was served on him, requiring him to quit and deliver up the farm at the end of his present year's holding:—Held, that this was a good notice to determine the tenancy of 1839; it not being shown on the part of the tenant, that the land was not the principal subject of the holding. *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

Where a tenant held a farm, as to the arable lands, from Candlemas, and as to the buildings and pastures, from May-day, and the rent was payable at Michaelmas and Lady-day, a notice to quit given six months from Lady-day, but not six months before Candlemas, was insufficient. *Doe d. Grey De Wilton v. —*, 2 East, 384.

But where, under an agreement by a tenant of a farm "to enter on the tillage land at Candlemas, and on the house and all other the premises at Lady-day following, and that when he left the farm he should quit the farm according to the times of entry as aforesaid," the rent was reserved half-yearly at Michaelmas and Lady-day:—Held, that a notice to quit, delivered half a year before Lady-day, but less than half a year before Candlemas, was good; the taking being in substance from Lady-day, with a privilege for the incoming tenant to enter on the arable land at Candlemas for the sake of plowing, &c. *Doe d. Strickland v. Spence*, 6 East, 120; 2 Smith, 255.

So, an agreement to take a farm, the arable land from Old Candlemas, the pasture from Old Lady-day, and the meadow from Old May-day, paying rent half yearly at Old Michaelmas and Lady-day, is substantially a taking of the whole from Old Lady-day, and a notice to quit delivered before Old Michaelmas is sufficient to determine the tenancy. *Doe d. Daggett v. Snowden*, 2 W. Bl. 1224.

**Form of notice; writing or parol.]—**A parol notice to quit by a tenant under a parol lease is sufficient. *Timmins v. Rawlinson*, 3 Burr. 1603; 1 W. Bl. 533. S. P., *Doe d. Macartney v. Crick*, 5 Esp. 196.

Though given by a person acting as steward of a corporation. *Doe d. Rochester v. Pierce*, 2 Camp. 96. See *Smith v. Birmingham Gas Company*, 1 A. & E. 520; 8 N. & M. 771.

**What certainty is requisite; and construction of contents of notice, generally.]** A notice dated 27th and served on the 28th September, requiring a tenant to quit "at Lady-day next, or at the end of his current year," must be understood to mean a six

months' and not a two days' notice to quit. *Doe d. Huntingtower v. Culliford*, 4 D. & R. 249.

For the court will look to the intention of the parties, and where general language is used, which is open to doubt, they will intend if possible that the notice has a sensible meaning, and construe it accordingly; and in this case a two days' notice could not have been intended, because that would be no notice whatever. *Id.*

Notice to quit at the end and expiration of "the current year of your tenancy, which shall expire next after the end of one half-year from the date hereof," was held sufficient. *Doe d. Phillips v. Butler*, 2 Esp. 589—Kenyon.

A notice to quit on one of two days, as on Old or New Lady-day, is good, if served six months before the day on which the tenancy commenced. *Doe d. Matthewson v. Wrightman*, 4 Esp. 5—Kenyon.

A notice delivered to a tenant at Michaelmas, 1795, to quit "at Lady-day, which will be in the year 1795," was a good notice to quit on Lady-day, 1796. *Doe d. Bedford v. Knightley*, 7 T. R. 63; 1 Chit. 11.

A notice to quit on Lady-day is a good termination of a holding either from Lady-day old or Lady-day new style. *Denn d. Willan v. Walker*, Peake's Add. Cas. 104—Heath.

If a tenant from year to year holds from Old Michaelmas, a notice to quit at Michaelmas generally is good. *Doe d. Hinde v. Vince*, 2 Camp. 256—Macdonald. S. P., *Doe v. Brookes*, 2 Camp. 257, n.—Ellenborough. But see *Doe d. Spicer v. Lea*, 11 East, 312.

A notice to quit on St. Michaelmas-day is, *prima facie*, a notice to quit at New Michaelmas; but, if the holding is from Michaelmas, it will be a sufficient notice to quit at that time. *Doe d. Willis v. Perrin*, 9 C. & P. 467—Parke.

But a notice to quit at Michaelmas generally will be held to mean Old Michaelmas, if the custom of the country is to hold from that time. *Furley d. Canterbury v. Wood*, 1 Esp. 198—Kenyon.

An indenture of lease contained a clause, that if the lessee should be desirous to put an end to the term at the end of the first fourteen years, and should leave, or give six calendar months' notice in writing, immediately preceding the end of the first fourteen years, then the demise should cease and determine. The lease commenced at Michaelmas, and in November of the fourteenth year of the term the lessee gave notice, in writing, that he should deliver up the premises on the 24th June next, agreeably to the covenants of the lease. The jury found that the lessor understood the notice to be to give up at the end of the fourteen years:—Held, that it was bad, as it varied from the proviso in the lease. *Caddy v. Martinez*, 3 P. & D. 386; 11 A. & E. 720.

Where, on a written agreement to demise from the following "Lady-day," a notice to

quit "on the 6th April" is good, *parol* evidence being adduced to show that by "Lady-day" the parties meant "Old Lady-day." *Denn d. Peters v. Hopkinson*, 3 D. & R. 507.

A notice to quit, "or I shall insist upon double rent," is sufficiently certain to support an ejectment. *Doe d. Matthews v. Jackson*, 1 Dougl. 175.

A notice to quit at the end of the current year of tenancy, "on failure whereof, I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, and does not give the tenant an option. *Doe d. Lyster v. Goldwin*, 1 G. & D. 463; 2 Q. B. 143.

Notice was given to a tenant from year to year, holding from Martinmas to Martinmas, to quit "on the 18th day of May next, or upon such other day or time as the current year for which you now hold will expire." The notice was dated and served on 21st October:—Held, *bad*. *Doe d. Richmond (Mayor, &c.) v. Morphet*, 7 Q. B. 577; 9 Jur. 776; 14 L. J., Q. B. 345.

Where a tenant is entitled to six months' notice, a notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting. *Doe d. Gorst v. Timothy*, 2 C. & K. 351—Rolfe.

Where a tenancy began on the 11th October, a notice served in June, 1840, requiring the tenant to quit "on the 11th of October now next ensuing, or such other day or time as your tenancy may expire," is a three months' notice to quit in October, 1840, and not a six months' notice to quit in October, 1841. *Mills v. Goff*, 14 M. & W. 72; 14 L. J., Exch. 249.

A notice to quit, served on the 26th of October, 1870, to determine a tenancy from year to year, which commenced on the 1st of May, 1869, required the tenant to give up possession on the 1st of May, 1871, "provided the tenancy originally commenced on the 1st of May, or, otherwise, at the end of the year of the tenancy which should expire next after the end of half a year from the date of the notice;" and, in January, 1872, the plaintiff brought an ejectment for the lands, claiming title from the 2d of May, 1871:—Held, that the notice was effectual to determine the tenancy on the 1st of November, 1871. *Ash-town v. Larks*, 6 Ir. R., C. L. 270—C. P.

**Description of premises.**—A misdescription of the premises is not fatal, if they are otherwise sufficiently designated, so that the party to whom the notice has been given has not been misled. *Doe d. Cox*, 4 Esp. 185—Ellenborough.

But a notice to quit a part only of premises leased together is bad. *Doe d. Ridd v. Archer*, 14 East, 245.

Where a farm was leased for twenty-one years at a rent of 180*l.* per annum, consisting, as described in the lease, of the Town Barton,



and its several parcels described by name, at the rent of 83*l.*; other closes named, at other rents of 5*l.*, 5*l.*, and 1*l.*; the Shippen Barton, and its several parcels, described by name, at 86*l.*; with a power reserved to either party to determine the lease at the end of fourteen years, on giving two years' previous notice:—Held, that a notice by the landlord to his tenant to quit "Town Barton, &c., agreeably to the terms of the covenant between us, on the expiration of the fourteenth year of your term," given in due time, was sufficient. *Ib.*

Where a house, lands, and tithes, are held under a parol demise at a joint rent, a notice to quit "the houses, lands, and premises, with the appurtenances," includes the tithes, and is sufficient to put an end to the tenancy. *Doe d. Morgan v. Church*, 3 Camp. 71—*Lo Blanc*.

In ejectment to recover a farm at H., the notice to quit described the premises to be at D., which was a distinct parish; but as it did not appear that the tenant was misled by the notice:—Held, that it was sufficient. *Doe d. Armstrong v. Wilkinson*, 4 P. & D. 823; 12 A. & E. 748; 1 A. & H. 39.

**By whom notice should be given and signed; joint landlords and tenants.]—**Where joint lessors are partners in trade, a notice to quit in the names of all, signed by one only, is valid. *Doe d. Elliott v. Hulme*, 2 M. & R. 483.

A notice to quit signed by one of several joint tenants on behalf of the others, is sufficient to determine a tenancy from year to year as to all. *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135.

So a notice to quit, given by a person authorized by one of several lessors, joint tenants, determines the tenancy as to all. *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

A notice to quit by joint tenants to a tenant from year to year must be signed by all the joint tenants at the time it is served, if it is given by one of them; but if such notice is given by an agent on behalf of the joint tenants, it is sufficient, if his authority is subsequently recognized by all of them. *Goodtitle d. King v. Woodward*, 3 B. & A. 680. S. P., *Doe d. Jolliffe v. Sybourn*, 2 Esp. 877.

So, where there are three joint trustees of an estate, a notice to quit or discontinue the possession given by two is bad, even though given in the names of the three, and the third trustee afterwards adopts it, and joins in the ejectment. *Right d. Fisher v. Cuthell*, 5 East, 491; 2 Marsh. 83; 5 Esp. 149.

But if four joint tenants jointly demise from year to year, such of them as give notice to quit may recover their several shares in ejectment. *Doe d. Wayman v. Chaplin*, 3 Taunt. 120.

A., a brewer, demised a public-house to B., under an agreement that he should hold for one year certain, and that, after the expiration of that time, either party might put an end to the tenancy, by giving three months' notice to quit, the rent to be payable quarterly; the

agreement contained no clause of re-entry. B. took possession, and paid rent to A., who at first gave him a receipt in his own name, and afterwards in the joint names of himself and two partners, who were interested with him in the brewery. After B. had been in possession for three years, A. gave him a notice to quit in his own name alone:—Held, in ejectment, that A. might recover on his own demise, although the latter receipts for rent were given in the names of himself and partners, and that no clause of re-entry was necessary in the agreement. *Doe d. Green v. Baker*, 2 Moore, 189; 8 Taunt. 241.

Four trustees were joint landlords of a house under a deed of trust; and notice to quit was served upon the tenant, but signed by three of them only:—Held, that the notice was sufficient to put an end to the connection between all the parties as landlord and tenant. *Alford v. Vickery*, Car. & M. 280—*Coleridge*. See *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

Notice to quit to a tenant of lands originally devised to the rector and churchwardens of a parish, and their successors in trust, signed by the rector and churchwardens, requiring him to deliver up the premises to the rector and churchwardens for the time being, is not sufficient. *Doe d. Brooks v. Fairclough*, 6 M. & S. 40.

**—mortgagors and mortgagees.]—**A notice to a tenant to quit was signed by the mortgagee after the mortgage of the reversion. A clause in the mortgage deed provided that if the interest was duly paid by the mortgagor the principal was not to be called in by the mortgagee until a period after the date of the notice. There was also a covenant for quiet enjoyment:—Held, that notwithstanding this clause the signature of the mortgagee to the notice was sufficient. *Burton v. Dickenson*, 17 L. T., N. S. 246—*Blackburn*.

A notice to quit signed by the mortgagor is sufficient to determine a tenancy created before the mortgage, when the tenant knew, previously to the service of the notice, that the mortgagor had a general authority from the mortgagee to determine tenancies. *Stackpoole v. Parkinson*, 8 Ir. R., C. L. 561—*Exch.*

A notice to quit, signed by the mortgagor, who had a general authority from the mortgagee to determine tenancies, is sufficient to determine a tenancy created before the mortgage, although the notice does not purport on the face of it to be on behalf of the mortgagee. *Ib.*

**—agents, receivers, and collectors of rent, &c.]—**A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it. *Doe d. Lyster v. Goldwin*, 1 G. & D. 463; 2 Q. B. 143. S. P., *Doe d. Mann v. Warlters*, 10 B. & C. 626; 5 M. & R. 357.

A notice to quit, given by an agent in the names of A. and B., and also several other parties, is valid as a notice from A. and B. only. *Doe d. Bailey v. Foster*, 3 C. B. 215; 15 L. J., C. P. 203.

A notice to quit, given by an agent of the landlord to receive rents, is not sufficient, without a recognition by the landlord; the bringing of an action founded on the notice is not of itself a recognition. *Doe d. Rhodes v. Robinson*, 3 Bing. N. C. 677; 4 Scott, 396; 3 Hodges, 84; 1 Jur. 356.

In ejectment by a corporation against a tenant from year to year, a notice to quit given by the steward of the corporation is sufficient, without evidence that he had an authority under seal from the corporation for the purpose. *Doe d. Rochester v. Pierce*, 2 Camp. 96—Macdonald. And see *Doe d. Plymouth (Mayor, &c.) v. Phillis*, 2 Chit. 170.

A notice to quit given to a mere collector of rents is not good. *Pearse v. Boulter*, 2 F. & F. 133—Martin.

A receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *Doe d. Marsack v. Read*, 12 East, 57.

A lease, dated October, 1825, to which the king was a party, was granted by the commissioners of his Majesty's woods and forests, containing a clause, that, if the commissioners for the time being should, at any time during the term, be minded or desirous to determine the demise, and of such their mind and desire should cause "one calendar month's notice in writing under their hands" to be given to the lessee, the lease, at the expiration of such notice, should cease, determine, and be absolutely void:—Held, that the lease was determined by a notice signed by two only out of three commissioners, by virtue of 10 Geo. 4, c. 50, s. 92. *Coombes v. Dutton*, 5 M. & W. 469.

In October, 1863, the trustees of G.'s marriage settlement purchased a farm, G. furnishing a portion of the purchase-money. From the time of the purchase G. assumed the entire control over the farm, and had for twenty-six years been allowed by the trustees to have the entire management of all the other settled estates. At the time of the purchase the defendant was yearly tenant of the farm to the vendor. G. negotiated with him as to the terms and continuance of the holding, and he treated with and considered G. as the legal owner:—Held, that G. had authority from the trustees to give the defendant notice to quit, and that a notice given in his own name, not purporting to be given as agent of the trustees, was valid. *Jones v. Phipps*, 9 B. & S. 761; 3 L. R., Q. B. 303; 37 L. J., Q. B. 173; 16 W. R. 1018; 18 L. T., N. S. 655.

An agent, being authorized in writing to manage lands in the name and on behalf of their owner, to perform, in his name, certain specified duties relating to them, which would require the agent's personal attendance, and

also, in his name, to sign, serve and give notices and other documents necessary to be served upon or given to the tenants for the purpose of carrying into effect such management, served a notice to quit signed by him in his own name, but purporting to be served by him as such agent, and on behalf of the landlord:—Held, a sufficient notice to determine a yearly tenancy. *Erne v. Armstrong*, 6 Ir. R., C. L. 279; 20 W. R. 370—Exch.

**To whom to be given.**—Where two tenants hold premises in common, notice to quit to one of them is sufficient to determine the tenancy. *Doe d. Macartney v. Crick*, 5 Esp. 196—Ellenborough.

At least it is evidence that the notice reached the other tenant who lived elsewhere. *Doe d. Bradford v. Watkins*, 7 East, 531; 3 Smith, 517.

But if, upon notice to quit given to a tenant, he gives notice to his under-tenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his under-tenants refuse to quit, an ejectment may still be maintained against him for so much as his under-tenants have not given up. *Roe v. Wiggs*, 2 N. R. 330.

A tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that anything short of a regular notice to quit from the landlord to his immediate tenant would, after such sub-letting, have determined the tenancy in the whole):—Held, that the landlord could not entitle himself to recover against the sub-lessee (there being no privity of contract between them), upon giving half a year's notice to quit in his own name, and not in the name of his first lessee: for, as to the part so underlet, the original tenancy still continued undetermined. *Pleasant d. Hulton v. Benson*, 14 East, 234.

Where A. has been tenant of certain premises, and upon his leaving them B. took possession:—Held, that, in the absence of any evidence to the contrary, it might be presumed that he came in as assignee of A., although he never paid rent, and that notice to quit was rightly given to B. *Doe d. Morris v. Williams*, 6 B. & C. 41; 9 D. & R. 30.

**Direction and address.**—It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him at the proper time. *Doe d. Matthewson v. Wrightman*, 4 Esp. 5—Kenyon.

And if a notice to quit is directed to the tenant by a wrong Christian name, and he keeps it and does not send it back, it is a waiver of the misdirection, and the lessor may recover on it if there was no other tenant of the name. *Doe v. Spiller*, 6 Esp. 70—Ellenborough.

**Service.]**—A notice to quit is sufficiently served upon a tenant if it can be shown that it came to his hands before the six months previously to the expiration of his year of holding, though the notice had been served only by having been put under the door of the tenant's house. *Alford v. Vickery*, Car. & M. 280—Coleridge.

The regular service of a notice to quit held to have been properly inferred from the circumstance of the tenant's speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant. *Doe d. Simpson v. Hall*, 5 M. & G. 795.

If a notice to quit is served on the tenant's wife at the house, accompanied by a statement, that the paper delivered is "a notice of discharge," it is sufficient. *Smith v. Clark*, 9 D. P. C. 202; 1 W. P. C. 44. S. P., *Pulteny v. Shelton*, 5 Ves. 261, n.

The mere leaving of a notice to quit at the tenant's house with a servant, without further proof of its having been explained to the servant, or that it came to the tenant's hands, is not sufficient. *Doe d. Burose v. Lucas*, 5 Esp. 153—Ellenborough.

But where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house is strong presumptive evidence that the master received the notice. *Jones d. Griffiths v. Marsh*, 4 T. R. 404.

An ejectment against the bailiffs pro tempore of a corporation, cannot be maintained by proving payment of rent for the premises, by the annual predecessors of the defendants, in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But, at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers. *Doe d. Carlisle v. Woodman*, 8 East, 237.

Delivery of a notice to quit to the servant is sufficient, though the tenant might not have been informed of it till within the half-year after its expiration, especially as the servant might have been called, but was not. *Doe d. Neville v. Dunbar*, M. & M. 10—Abbott.

A notice to quit, served upon Thomas Mitchell, the servant of John Mitchell, instead of upon John Mitchell, although the latter afterwards acknowledged having seen the notice, and referred to the mistake, is not sufficient. *Doe v. Mitchell*, 1 Jur. 795.

A notice to quit is good, though given on a Sunday. *Sangster v. Noy*, 16 L. T., N. S. 157—Sir Eardley Wilmot, C. C. J.

The service of a notice to quit, made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant. *Tanham v. Nicholson*, 5 L. R., H. L.

Cas. 561; 6 Ir. R., C. L. 188; reversing *Nicholson v. Tanham*, 18 W. R. 533; 4 Ir. R., C. L. 185—Q. B.

The presumption in such a case is that it did reach the tenant himself. *Ib.*

In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master. *Ib.*

The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person whose agent had received and destroyed it. *Ib.*

When there has been service of notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger. *Ib.*

But even if only presumptive evidence of the service, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all. *Ib.*

T. lived in a house where his two sons and his daughter also resided. T. was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt it. One of the sons knew of its existence, but was not shown to have known its exact terms, though he was aware of its nature:—Held, that this was a service sufficient to entitle the landlord to maintain ejectment against the father. *Ib.*

A tenant from year to year died intestate, and, no administration being taken out, his widow continued in possession and paid the rent; the landlord served a notice to quit on her, and, on its expiration, he, with her assent, entered into an agreement with a new tenant for letting the premises, in pursuance of which the new tenant entered and paid rent; subsequently a son of the deceased tenant took out administration to him, and brought an ejectment as administrator to recover possession:—Held, that the service of the notice to quit on the widow, the person in possession, was sufficient, in the absence of a legal personal representative of the deceased tenant, to determine the tenancy which had been in him, and was effectual for such determination even as against the legal personal representative subsequently raised, and that therefore the plaintiff was not entitled to recover possession. *Sweeney v. Sweeney*, 10 Ir. R., C. L. 375—Exch.

**Proof of notice.]**—A notice to quit, in writing, signed by the party giving it, and attested by a witness, before 17 & 18 Vict. c. 125, s. 26, which renders it unnecessary to call the attesting witness in such a case, must have

been proved by calling that witness, or his absence must have been accounted for; proof that it was served on the tenant, that he read it, and did not object to it, was not sufficient. *Doe d. Sykes v. Durnford*, 2 M. & S. 62.

Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to indorse on duplicates of such notice the fact and time of such service; and, on one occasion, the attorney himself prepared a notice to quit to serve on the tenant, took it out with him, together with two others prepared at the same time, and returned to his office in the evening, having indorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant; and two of them were proved to have been delivered by him on that occasion:—Held, on the trial of an ejectment, after the attorney's death, that the indorsement so made by him was admissible to prove the service of the third notice. *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890.

In an ejectment against a weekly tenant, the notice proved was, to quit on Wednesday, the 4th August. The witness, who was called to prove that Wednesday was the expiration of the current week of the tenancy, said "that he guessed" the defendant came in "about Tuesday or Wednesday, but had no recollection which."—Held, insufficient. *Doe d. Finlayson v. Bayley*, 5 C. & P. 67—Tindal.

Notice to quit may be proved by a duplicate or an examined copy, without any notice having been given to produce the original. *Doe d. Fleming v. Somerton*, 7 Q. B. 58; 9 Jur. 775; 14 L. J., Q. B. 210.

A person who was employed to serve notices to quit, and whose duty it was to inform his employer of their service, was sent with a notice to serve on R. C., and on his return he signed a memorandum, "29th September, served R. C." It turned out, in fact, that he had served, not R. C., but W. C., his father. It was proposed to show that he stated this fact to his employer on his return, but the memorandum having been prepared beforehand, was not altered:—Held, that this evidence was not admissible after his death, as it was not made in the course of business or in discharge of a duty. *Stapylton v. Clough*, 2 El. & Bl. 938; 3 C. L. R. 266; 18 Jur. 60; 23 L. J., Q. B. 5.

The custom of the country is not admissible to prove that a notice to quit, served on the 5th of April, is a good notice to quit by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case. *Hogg v. Norris*, 2 F. & F. 246—Erle.

Between nine and ten o'clock on the 25th March, a tenant put into a post-office in London a letter, containing a notice to quit on the following Michaelmas, and addressed to the place of business of his landlord's agent. The agent was at his place until between six and seven o'clock in the evening, and did not receive the letter, but found it

on the following morning:—Held, a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th of March, after the agent had left his place of business. *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Exch. 265.

**Effect of notice in evidence, and upon rights of parties.]**—A notice by the owner of premises, requiring a tenant in possession "to leave the premises he then rented of the owner at Lady-day next," is not conclusive evidence of a demise from a testator to the party in possession. *Doe d. Wilcockson v. Lynch*, 2 Chit. 688. And see *Bishop v. Howard*, 3 D. & R. 298; 2 B. & C. 100.

A notice to quit is not *prima facie* evidence of the period of the year when the tenancy commenced. *Doe d. Ash v. Calvert*, 2 Camp. 387—Ellenborough.

A notice was given on the 22d March, by a landlord to his tenant, to quit at the expiration of the current year; a declaration in ejectment, laying the demise on the 1st November, was on the 16th January following served upon the tenant, who at the time made no objection to the notice to quit, but said he should go out as soon as he could fit himself:—Held, to be *prima facie* evidence that the tenancy commenced at Michaelmas, and was determined before the day of the demise. *Doe d. Baker v. Wombell*, 2 Camp. 559—Ellenborough.

So, if the notice to quit is served personally on the tenant in possession, and he makes no objection to it, it is *prima facie* evidence to be left to the jury, that the tenancy commenced at the season of the year when the notice to quit expires. *Doe d. Clarges v. Forster*, 13 East, 405. S. P., *Thomas d. Jones v. Thomas*, 2 Camp. 647.

A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession. *Doe d. Godsell v. Inglis*, 3 Taunt. 54.

If a tenant disputes the time when his tenancy commences, and that his notice to quit does not correspond with it, it is incumbent on him, and not on the lessor, to show the true time of the commencement of the tenancy. *Doe d. Matthewson v. Wrightman*, 4 Esp. 5—Kenyon.

Where a tenant, on being applied to respecting the commencement of his holding, informs the party that it begins on a certain day, and notice to quit on that day is given at a subsequent time, he will be bound by the information he so gave, and not be permitted to show, that in fact it began at a different time. *Doe d. Eyre v. Lambly*, 2 Esp. 635—Kenyon.

A remainder-man received rent from the lessee of a void lease, and having given notice to quit, conveyed the property by virtue of a power to A.:—Held, that in ejectment the purchaser might take advantage of the

notice given by the remainder-man. *Doe d. Egremont v. Hellings*, 6 Jur. 821—Q. B.

Notice to quit was given, and it expired at Lady-day, 1840; the tenant held on till Lady-day, 1841; but since the former period there had been no payment of rent, nor any other overt act to show that a new tenancy was created. The landlord distrained for rent due at Lady-day, 1841:—Held, that the distress was not justifiable. The landlord ought to have sued for use and occupation. *Alford v. Vickery*, Car. & M. 280—Coleridge.

Lands were settled with a power to lease. A., the tenant for life under the settlement, made, in May, 1807, a lease which was not a good execution of the power, and received rent in conformity with the terms of the lease, by which the rent was payable on Lady-day, Midsummer, Michaelmas, and Christmas days. B., a succeeding tenant for life, also received rent in conformity with the terms, and afterwards, in conjunction with C., remainder-man in tail expectant upon B.'s estate for life, settled the land to such uses as C. should appoint, and, in default of appointment, to C. for life, remainder to a trustee for C. for C.'s life, remainder to the right heirs of C. C. received rent before B.'s death, according to the terms of the lease; and, after B.'s death, gave notice to the lessee, on 21st March, 1838, to quit "on 20th of September-next, or at the expiration of the current year of your tenancy." On 19th of February, 1839, C. appointed to N. in fee:—Held, that, as between C. and the lessee, the notice was good, and determined the tenancy; and that N., at the expiration of the notice, might evict the lessee; for that, if N. held under the creator of the power of B., no notice to quit was necessary as against N., and if N. held under the appointer, C., he might take advantage of the notice at the expiration. *Doe d. Egremont v. Forwood*, 3 Q. B. 627.

A notice to quit was served during the pendency of an ejectment for non-payment of rent, in which judgment was subsequently entered and an habere executed; an order for restitution having been afterwards obtained by the tenant, an ejectment on the title was then brought, founded upon the notice to quit:—Held, that the notice to quit was not effectual to determine the tenancy. *Hall v. Flanagan*, 11 Ir. R., C. L. 470—Exch.

**What amounts to waiver of benefit of notice, and effect of waiver.**—If a landlord receives rent accrued due after the expiration of a notice to quit, it is a waiver of that notice. *Goodright d. Charter v. Cordwint*, 5 T. R. 219.

So, if he distrains for such rent. *Souch d. Ward v. Willingale*, 1 H. Bl. 311. See *Jenner v. Clegg*, 1 M. & Rob. 213.

But the mere acceptance of rent by a landlord, for occupation subsequently to the time when the tenant ought to have quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice, but matter of evidence

only, to be left to the jury under the circumstances of the case. *Doe d. Cheney v. Batten*, Cowp. 428; 0 East, 814, n.

The receipt by an authorized agent of rent due at Michaelmas, is *prima facie* a waiver of a notice to quit at Midsummer. *Doe d. Ash v. Calvert*, 2 Camp. 887—Ellenborough.

But where rent is usually paid to a banker, if the banker, without any special authority, receives rent accruing after the expiration of a notice to quit, the notice is not thereby waived. *Ib.*

A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice had expired, the landlord, fearing that the witness, by whom he was to prove the notice, would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment:—Held, the second notice was no waiver of the first. *Doe d. Williams v. Humphreys*, 2 East, 237.

And a second notice, delivered to a tenant after the expiration of a former notice, to quit on a subsequent day, or to pay double rent, is no waiver of such first notice, or of the double rent which has accrued under it. *Messenger v. Armstrong*, 1 T. R. 53.

If, after the expiration of a notice to quit, the landlord gives the tenant a fresh notice, that, unless he quits in fourteen days, he will be required to pay double value, the second notice is no waiver of the first. *Doe d. Digby v. Steel*, 3 Camp. 117—Ellenborough.

A landlord of premises, about to sell them, gave his tenant notice to quit on the 11th of October, 1806, but promised him not to turn him out unless they were sold; and not being sold till February, 1807, the tenant refused on demand to deliver up possession; and on ejectment brought:—Held, that the promise (which was performed) was no waiver of the notice, nor operated as a license to be on the premises otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. *Whiteacre d. Boulton v. Symonds*, 10 East, 13.

In an action for rent of coal, the issue being whether or not the defendants, having given notice to quit, had afterwards waived the notice, and continued the tenancy, it was proved that, after the time fixed by the notice had expired, they continued for two months, working out certain portions of the coal, which, however, as they contended, it was usual for a tenant to take away on abandoning such a work:—Held, that it was for the jury to decide, on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice, and continue the tenancy. *Jones v. Shears*, 4 A. & E. 832; 6 N. & M. 428; 2 H. & W. 43.

No continuance of the tenancy is neces-

sarily implied, from the mere fact of a tenant's continuing in possession after the expiration of a notice to quit given by such tenant. *Id.*

Where a tenant gave his landlord notice to quit at Michaelmas, 1835, and subsequently made an offer to remain another year, to which the agent of his landlord replied, that "H. (the landlord) has directed me to inform you that he could only consent to accept your offer of 420*l.* for the farm from Michaelmas next to Michaelmas, 1836, subject to the existing covenants, provided I could not find a tenant at the rent it appeared to be worth by the 1st of August;" the tenant then assented to these terms:—Held, that if the above amounted to a substantive agreement at all, it was an implied condition on the part of the tenant to allow any one wishing to take the farm to go over the land, and the tenant having refused to do so, the agreement fell to the ground, and the notice to quit at Michaelmas, 1835, remained good. *Doe d. Hertford v. Hunt*, 2 Gale, 102; 1 M. & W. 690.

Though payment and acceptance of rent accruing after the expiration of a notice to quit amount to a waiver of the notice, a demand of such rent does not necessarily operate as a waiver; and it is a question for the jury, and not for the court, whether, under the circumstances of the case, the notice has been waived. *Blyth v. Dennett*, 13 C. B. 178; 22 L. J., C. P. 79.

As to requisites, sufficiency and effect of notices to quit in cases of tenancies from year to year,—see this title, XVI., 2; of weekly tenancies,—see this title, XVII.; of tenancies at will or by sufferance,—see this title, XVIII.

As to effect of holding over after notice to quit,—see this title, XV., 2; XVI.

As to recovery of double rent or double value of premises after notice to quit,—see this title, XVI., 2.

## XV. RECOVERY OF POSSESSION.

### 1. *Contracts and Provisos for giving up or retaking Possession.*

**Implied terms.**—There is an implied contract, in a parol demise for a term, on the part of the tenant to give up possession to the landlord at the expiration of the term, and the tenant is liable for a breach of such contract, where his sub-tenant holds on and so prevents the landlord obtaining possession. *Henderson v. Squire*, 10 B. & S. 183; 4 L. R., Q. B. 170; 38 L. J., Q. B. 73; 19 L. T., N. S. 601; 17 W. R. 519.

A parol demise was terminated, but the sub-tenant refusing to quit, the landlord brought an ejectment and recovered possession of the premises:—Held, that he could recover from his tenant the amount of rent lost by such holding on, and the costs of the ejectment. *Id.*

**Covenants and provisos in leases, &c.**—Lense of land for term of years, with a covenant by the lessee that if the lessor should be desirous during the term to take all or any part of the land for building thereon, it should be lawful for her to come into and enter upon all or any part, to make such buildings as she should think proper, and to do all necessary acts without interruption by the lessee, provided the lessor gave six months' notice of such intention, with a proviso also that the lease should be void for non-performance of covenants:—Held, that the lessor having agreed with a third person to the terms of a building contract, might give six months' notice of her intention to take the whole of the land for building, and at the expiration of that time, and after refusal by the tenant to deliver up possession, might bring ejectment. *Doe d. Wilson v. Abel*, 2 M. & S. 541.

A clause in an agreement to let land, that the lessor might take any part for building, on making a proportionate abatement in the rent and making good the fences, operates as a covenant, and not a defeasance of the estate, if there are no words giving him a right of re-entry. *Doe d. Wilson v. Philips*, 2 Bing. 13; 9 Moore, 46.

A lease of land by deed contained this clause, "Covenants to repair, payment, &c. Provided, nevertheless, that in case M." (the lessor) "shall at any time be desirous of having any part of the piece of land delivered up to him, and of such his desire shall give three calendar months' notice to C." (the lessee); "then, at the expiration of the notice, C. covenants peaceably to surrender up, and that M. shall and may take peaceable possession of such part or parts of the land as shall be mentioned in the notice, M. paying to C. a reasonable compensation in respect of the moneys which may have been laid out by C. in improving the condition of so much of the land as shall be so given up, and then and from thenceforth the rent reserved shall be reduced," &c. (in proportion to the land given up.) "and the remainder of the land shall be held by C. at such reduced rent, and M. shall have the same powers and remedies in all respects as if this lease had originally been granted at such reduced rent, and all the covenants, clauses, &c., shall be as valid for so much of the demised land as shall not be included in such notice, as if the reduced rent had been the original rent, and the land originally demised had been the land not included in such notice."—Held, that under this proviso the lessor, giving notice, might resume all the demised land. *Doe d. Gardner v. Kennard*, 12 Q. B. 244; 12 Jur. 831.

The lessor served a notice requiring the lessee to give possession of the whole land at the end of three months, and adding, "I hereby offer and agree to allow you a reasonable compensation for any repairs which may have been done by you."—Held, a sufficient offer of compensation under the proviso. *Id.*

Where a plaintiff had entered into posses-

sion of premises under an agreement, one clause of which was, that, if the rent should be in arrear for ten days, it should be lawful for A. and her agents immediately to enter upon and take possession of the premises and expel the plaintiff, as effectually as a sheriff might do under a writ of habere facias possessionem; and in case of such entry, and of any action being brought for the same by any person whomsoever, the defendants might plead leave and license in bar, and the agreement used as conclusive evidence of the leave and license of the plaintiff for the entry, trespasses, or other matters to be complained of in such action; and arrears of rent having become due, the defendants, as agents of A., entered and expelled the plaintiff from the premises:—Held, that this agreement was a conclusive answer under a plea of leave and license to an action for such entry and expulsion. *Kavanagh v. Gudge*, 7 M. & G. 310; 7 Scott, N. R. 1025; 1 D. & L. 928; 8 Jur. 362; 13 L. J., C. P. 99.

A. became tenant to B. of a colliery, and also of some farm land, at distinct rents. The lease contained numerous covenants as to the payment of the rents, and as to the management of each property. The term created was forty-two years, but the tenant was to have liberty to put an end to the term on giving eighteen months' notice before the expiration of the first eight years, or any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed), this lease and every clause and thing therein contained shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine and be utterly void. . . . But nevertheless, without prejudice to any claim or remedy which any of the parties may then be entitled to for breach of any of the covenants or agreements." The Exchequer held, that this proviso did not make the performance of all the covenants a condition precedent to the tenant's power to put an end to the lease. But the Exchequer Chamber held, that the proviso did make the performance of the covenants a condition precedent. The lords were equally divided, and so the judgment of the Exchequer Chamber was affirmed. *Gray v. Friar*, 4 H. L. Cas. 565; 18 Jur. 1036; *S. C.*, in Exch. Cham., 5 Exch. 584; 15 Jur. 814.

A proviso in a lease, empowering the lessor to resume any portion of the demised land which might be required for the purpose of building, planting, accommodation or otherwise, will not enable the lessor to resume a portion of the land for the purpose of conveying it to a railway company discharged from the lease. *Johnson v. Edgware, Highgate and London Railway Company*, 35 L. J., Chanc. 822.

A lease contained a proviso empowering the

lessor "upon giving three months' notice of his intention to resume any portion of the premises . . . to enter into such possession." The lessor subsequently conveyed by deed his reversion to the use of himself and another as tenants in common. Shortly afterwards the tenants in common served upon the lessees a notice of resumption of the whole of the lands:—Held, that the fact that a sum per acre, which was by the lease covenanted to be allowed as rebate upon resumption, would in the case of resumption of the whole of the lands exceed the rent per acre originally reserved, would not constitute evidence of an intention to resume part only of the entirety of the demised premises. *Liddy v. Kennedy*, 5 L. R., H. L. Cas. 134; 20 W. R. 150.

Held also, that actual re-entry was not necessary under such notice; that the severance of the reversion did not determine the right to resumption in pursuance of the proviso; and that service of the notice upon a servant living at the house of one of the lessees, the servant "promising to give it to him on his return home in a few days," was good service upon that lessee. *Id.*

As to effect of provisos for forfeiture,—see this title, XIII., 1.

## 2. Holding-over; Damages, Double Rent or Double Value.

**Rights and liabilities of tenant holding over; and actions for damages.**—Where a lease expires, the tenant continues liable to the rent, unless he delivers up complete possession of the premises, or the landlord accepts another in his room. *Harding v. Grethorn*, 1 Esp. 57—Kenyon.

If a person has held under the terms of a lease, and holds over after the lease is at an end, he is bound by the terms of it, although no new bargain to that effect is entered into between the parties; but if he comes in as an under-tenant, before any lease was granted to the person of whom he took the premises, and that person afterwards takes a lease, if there is no evidence that he knew of the lease, it will be for the jury to say whether he is not an under-tenant, and not an assignee of the lease. *Torriano v. Young*, 6 C. & P. 8—Taunton.

If, after the expiration of a lease, containing a covenant by the tenant to keep the premises in repair, he verbally agrees to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, he is presumed to hold under the covenants of the former lease, as far as they are applicable to his new situation; and if the premises are afterwards burnt down by accidental fire, he is bound to rebuild them. *Digby v. Atkinson*, 4 Camp. 275—Ellenborough.

A tenant holding over after the expiration of a lease for years may be taken to hold upon any of the terms of such former lease which are consistent with a yearly tenancy; whether he does hold on any such terms or not, is a

question for the jury on the facts proved. *Lytt v. Griffiths*, 17 Q. B. 505.

Where several persons, directors of a trades' union bank, took certain premises for a year, with a proviso, that the landlord, on one month's notice before the expiration thereof, would grant a lease of the premises; and the directors, before the expiration of eleven months, abandoned the directorship and their possession; before the year had expired, negotiations were entered into for a lease for another year between the landlord and the new directors, but which terminated without any decisive arrangement being entered into, the new directors having continued to occupy after the expiration of the year:—Held, that the original directors remained liable for the rent. *Christie v. Tancred*, 7 M. & W. 127; 1 H. & W. 50; 4 Jur. 1064.

A. was tenant to the plaintiff of premises which the plaintiff gave him notice to quit on the 11th of October, 1843. After the notice was given, the defendant agreed to take a lease of the premises from that day. Before that day, the defendant was, with the consent of the plaintiff, substituted for A. as tenant during the remainder of A.'s term. The plaintiff and the defendant could not agree as to the terms of the lease to be granted to the defendant; but the defendant continued to occupy the premises for half a year after the 11th of October:—Held, that after the 11th October, the defendant did not impliedly occupy, subject to the rent of the determined tenancy. *Thetford (Mayer, &c.) v. Tyler*, 8 Q. B. 95; 10 Jur. 68; 15 L. J., Q. B. 33.

A. and B. were tenants to C. for a term of three years. B. never occupied the premises, but A., on the expiration of the term, held over. No assent of B. to the holding over was proved. An action for use and occupation having been brought by C. against A. and B., in which A. suffered judgment by default, C. tendered in evidence a letter written by his agent to B. after the expiration of the term, in which he demanded rent alleged to be due subsequently to the term. No answer was returned to the letter:—Held, that, as one tenant cannot bind his co-tenant by holding over without his assent, and, as there was no evidence of B.'s assent, B. was not liable for the rent, and therefore the letter to him, although admissible, was not entitled to much weight. *Draper v. Crofts*, 15 M. & W. 166; 15 L. J., Exch. 92.

A lessee of a term underlet, and his under-tenant held over for a portion of a year after the expiration of the term against the will of the lessee, so that he could not give up possession to his lessor. During such holding over, the lessee distrained upon the under-tenant for rent previously due:—Held, that the lessee was liable for the period of the under-tenant's holding over, but not for the whole year's rent. *Ibbs v. Richardson*, 1 P. & D. 618; 9 A. & E. 840.

The defendant was tenant to the plaintiff, who was owner of the equity of redemption, under a lease, whereby the defendant cove-

nanted to deliver up to the plaintiff, at the expiration of the term, the premises and all fixtures therein. The term expired on the 1st of April, 1855, and on the 10th the plaintiff demanded possession, which was not given. On the 13th, the mortgagee gave notice to the defendant to pay the rent and deliver up the premises to him. The plaintiff sued the defendant for a breach of his covenant in not delivering up the fixtures:—Held, that the defendant was not estopped from setting up the title of the mortgagee, and that the plaintiff could not recover the value of the fixtures, but only the actual damages sustained by him in consequence of their detention from the 10th to the 13th of April. *Watson v. Lane*, 11 Exch. 769; 25 L. J., Exch. 101.

If a landlord, after giving a yearly tenant notice to quit at the end of his year, afterward agrees to let the premises to A. from the end of the year, and informs the tenant that he has done so, but the tenant nevertheless holds the premises over for another quarter, and, after being ejected, pays the landlord a quarter's rent for the extra quarter, the landlord is not prevented by the receipt of the rent from bringing an action against the tenant for the damages occasioned by his holding over, and in that action the landlord may recover as damages the amount of the ordinary damages which he has had to pay in an action brought against him by A., for not giving him possession at the time agreed on, and also the costs of such action. *Bramley v. Chesterton*, 2 C. B., N. S. 592; 3 Jur., N. S. 1104; 27 L. J., C. P. 23.

In an action for breach of an agreement between a tenant of S. and the plaintiff, that the tenant should deliver to the plaintiff the farm occupied by the former, "upon the terms and conditions of the agreement under which the said tenant held of S.," it is not necessary to produce at the trial the lease by S. *Wallis v. Littlell*, 11 C. B., N. S. 369; 3 Jur., N. S. 745; 31 L. J., C. P. 100; 10 W. R. 192.

Where a lessee, after the expiration of his lease, remains in possession and pays rent, it is a question for the jury upon what terms his tenancy continues. *Oakley v. Monck*, 4 H. & C. 251; 1 L. R., Exch. 159; 35 L. J., Exch. 87; 14 W. R. 406; 14 L. T., N. S. 20—Exch. Cham.

A tenant for life granted a lease containing a covenant that he would, at the expiration of the term, pay and allow the lessee, a nurseryman, for all fruit trees and shrubs then on the premises which had been planted by him. At the expiration of the lease the lessee continued in possession, and paid rent, and upon the death of the tenant for life he paid the same rent to the remainder-man, who was not aware of the covenant in the lease:—Held, that there was no evidence for the jury that the tenancy continued upon the terms of the lease, so as to bind the remainder-man by the covenant. *Ib.*

A tenant under a parol agreement, without any stipulation that he shall deliver up possession of the premises at the end of the term.



is nevertheless bound at law to deliver up complete possession. Where, therefore, a tenant, under such an agreement, has underlet a part of the premises, and at the determination of both tenancies the under-tenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the whole premises for the time he is kept out of possession, and the costs of ejecting the under-tenant. *Henderson v. Squire*, 4 L. R., Q. B. 170; 38 L. J., Q. B. 73; 17 W. R. 519; 19 L. T., N. S. 601.

By an agreement in writing, but not under seal, A. agreed to let and B. to hire on lease for twenty-one years a house on the following terms: the rent to be 55l. per annum; the lease to commence from the 25th of March next, and to contain an extract of the covenants in the original lease which A. is bound under; that the proposed lease shall not be sold, parted with, or any portion of the property under-let without the consent in writing of A. In the original lease were six covenants by the lessee, with a proviso for re-entry on the breach of any of them; but there was no covenant not to under-let without the consent of the landlord. B. entered and paid rent, and under-let the premises without the consent of A., who thereupon brought ejectment, and was nonsuited:—Held, that the nonsuit was right. B. held as tenant from year to year on such of the terms of the agreement as were applicable to that tenancy. The agreement incorporated the six covenants in the original lease, and the proviso for re-entry on the breach of any one of those covenants; but the agreement could not be read as applying the proviso for re-entry to the new clause as to not under-letting; and on mere words of agreement a condition could not be created. *Crawley v. Price*, 10 L. R., Q. B. 302; 23 W. R. 874; 33 L. T., N. S. 203.

A tenant for life of an estate for 1,000 years demised from year to year, with six months' notice to quit, lessee covenanting to repair. After the death of the tenant for life the co-executor assigned the reversion of the estate for 1,000 years. The lessee continued to pay rent to the assignees of the reversion, and gave six months' notice to quit:—Held, that this furnished evidence that the lessee held over upon the terms of the original agreement, and was bound by the covenant to repair. *Wyatt v. Cole*, 36 L. T., N. S. 613—C. P. Div.

Held, also that the executor of the tenant for life was properly joined as a plaintiff. *Id.*

The assignee of a lease for lives continued in possession for several months after its expiration, and paid a half-yearly gale of the reserved rent which subsequently accrued due; but there being a controversy as to the terms upon which he was permitted to remain in possession:—Held, that it ought to have been left to the jury to find what was the precise character of the assignee's possession after the expiration of the lease—whether as tenant from year to year upon the terms of

the expired lease, or, subject to negotiations for the creation of a new tenancy at an increased rent. *Caulfield v. Farr*, 7 Ir. R., C. L. 469—C. P.

As to when a tenancy from year to year arises upon holding over by tenant,—see this title, XVI.

**Double rent.**—[By 11 Geo. 2, c. 19, s. 18, in case any tenant or tenants shall give notice of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her or their executors or administrators, shall thenceforward pay to the landlord or landlords or lessor or lessors double the rent or sum which he, she or they should otherwise have paid, to be levied, sued for, and recovered at the same time and in the same manner as the single rent or sum before the giving such notice could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid.]

In an action for double rent, for holding over after notice, the jury may find for so much as the tenant appears to have over-held, without reference to the sum demanded, so that it is not more than that sum. *Anon.*, Loft, 275.

Though a demise is for a certain time, a demand of possession and notice in writing are necessary to entitle the landlord to double rent or value; but such demand may be made above six weeks afterwards, if the landlord has done no act in the meantime to acknowledge the continuance of the tenancy; and if the tenant holds over, he will be entitled to double value from the time of such demand; but if the rent is reserved quarterly, and the demand is made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. *Cobb v. Stokes*, 8 East, 358. And see *Lake v. Smith*, 1 N. R. 174; and *Wilkinson v. Colley*, 5 Burr. 2694.

If a tenant from year to year gives his landlord notice that he will quit upon a contingency, and does not quit when the contingency happens, he is not liable for double rent. *Farrance v. Elkington*, 2 Camp. 591—Ellenborough.

The statute only applies to those cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given a valid notice sufficient to determine such tenancy. *Johnstone v. Huddleston*, 7 D. & R. 411; 4 B. & C. 922.

A tenant who, after having given notice to quit, holds over for a year, paying double rent, may quit at the end of such year without fresh notice. *Booth v. Macfarlane*, 1 B. & Ad. 904.

If a landlord give notices to his tenant to quit at the expiration of the lease, and the tenant holds over, he is liable to double rent. *Messenger v. Armstrong*, 1 T. R. 53.

When a tenant holds over after the expiration of a notice to quit, the landlord is entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession. *Bramley v. Chesterton*, 2 C. B., N. S. 592; 3 Jur., N. S. 1144; 27 L. J., C. P. 23.

**Double value.**—[By 4 Geo. 2, c. 28, s. 1, in case any tenant or tenants for any term of life, lives or years, or other person or persons who are or shall come into possession of any lands, tenements or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall willfully hold over any lands, tenements or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof by his or their landlords or lessors, or person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in such case such person or persons so holding over shall, for and during the time he, she and they shall so hold over, or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments, pay to the person or persons so kept out of possession, their executors, administrators or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long a time as the same are detained, to be recovered in any court of record by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, and against the recovery of which said penalty there shall be no relief in equity.]

The remedy for double value, conferred by this statute, against a tenant willfully holding over after the determination of the term, and after demand and notice in writing, is given only to the lessor or landlord, or to the person entitled to the reversion, and not to one to whom the landlord has granted a fresh lease, to commence from the expiration of the former term; such new lessee having no estate, but a mere interesse termini. *Blatchford v. Cola*, 5 C. B., N. S. 514; 5 Jur., N. S. 412; 28 L. J., C. P. 140.

One tenant in common may bring an action for the double value of his moiety. *Cutting v. Derby*, 2 W. Bl. 1077.

But tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. *Wilkinson v. Hall*, 1 Scott, 675; 1 Bing. N. C. 718; 1 Hodges, 170.

The administratrix of an executor cannot sue for the double value of lands held over, after notice to quit under a demise from the testator, without taking out administration de bonis non; even though the tenant has attorned to her. *Tingrey v. Brown*, 1 B. & P. 810.

In an action for double value the declaration stated, that the plaintiffs were seized in their

demesne as of freehold in right of the plaintiff, Caroline, during her life, of a messuage held by the defendant as tenant to the plaintiffs for a year, terminable on the 11th of October, 1844, the reversion thereof belonging to the plaintiffs, in right of Caroline. That the plaintiffs, on the first of September, gave notice in writing and demanded of the defendant to deliver up possession of the premises to the plaintiffs on the 11th of October, which he refused to do. The defendant became tenant to Mr. H., one of the plaintiffs, for one year, from the 11th of October, 1843, to the 11th of October, 1844, of a house, farm, &c., at a certain rent, and occupied the same as tenant to him for that year. The contract for this tenancy was by parol, and was made by the defendant expressly with Mr. H. alone in his own right, and Mrs. H. was no party thereto. A demand and notice in writing for delivering up of the possession by the defendant were made and given by the agent of the plaintiffs. The defendant retained possession of the premises:—Held, that the two plaintiffs were not entitled to recover in this joint form of action, the defendant not being the tenant of the two plaintiffs, and the reversion not being in the two plaintiffs, but in the husband alone, and that neither the averment of the tenancy nor the words, "to the plaintiffs," in the allegation of the tenancy, could be rejected. *Harcourt v. Wyman*, 3 Exch. 817; 18 L. J., Exch. 453.

Where there was a demise to a wife, and notice to quit given to her, after which, but before the time it expired, she married:—Held, that it was not necessary to give a notice to the husband subsequent to the marriage, in order to support an action for double value. *Lake v. Smith*, 1 N. R. 174. And see *Wilkinson v. Colley*, 5 Burr. 2694.

An action for double value does not lie against a weekly tenant. The statute being penal, is to be construed strictly. *Lloyd v. Roslee*, 2 Camp. 453—Ellenborough.

Quære, whether a quarterly tenant, who willfully holds over after his tenancy is expired, is liable to pay double value to his landlord? *Wilkinson v. Hall*, 4 Scott, 301; 3 Bing. N. C. 508; 3 Hodges, 56.

A tenant, holding over the premises after his term has expired, is not within the penalty imposed by the statute, unless he holds over willfully and contumaciously, and with a consciousness that he has no right to do so. *Swinfen v. Bacon*, 6 H. & N. 184; 30 L. J., Exch. 33; 6 Jur., N. S. 1257; 9 W. R. 105; 3 L. T., N. S. 440; affirmed on appeal, 6 H. & N. 846; 7 Jur., N. S. 897; 30 L. J., Exch. 368; 9 W. R. 740; 5 L. T., N. S. 83—Exch. Cham.

Where, on the receipt of a notice to quit to two joint-tenants, one of whom only actually occupied the land, the other said "that he had nothing to do with the land:"—Held, that this statement was not admissible to show that a holding over after the expiration of the notice was not willful on the part of the latter. *Hirst v. Horn*, 6 M. & W. 303.

A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is a sufficient demand of possession, to render the tenant liable for holding over after the determination of the notice. *Ib.*

In an action by a landlord against his tenant for double value, under 4 Geo. 2, c. 28, s. 1, he must show a willful holding over by the tenant; and it is not enough to show that the premises were held over by a sub-tenant, without his assent or authority. *Rands v. Clark*, 19 W. R. 48—C. P.

After a landlord has recovered in ejectment against his tenant, he may maintain an action for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit. *Soulaby v. Neving*, 9 East, 810.

Notice to quit under the statute may be previously to the expiration of the lease. *Cutting v. Derby*, 2 W. Bl. 1075.

A joint authority by mortgagor and mortgagee of premises to a person, to be the receiver, agent, and attorney of the mortgagors, to receive the rents until satisfaction of the mortgage, to bring actions in case of non-payment of rent, to give notices to quit, to bring ejectment in case of non-compliance, &c., as fully as the mortgagor might have done, is a sufficient authority to him to demand possession of the tenants, so as to make them liable in double value for holding over. *Pool v. Warren*, 8 N. & P. 693; 8 A. & E. 583; 3 Jur. 23.

An action for double value is not supported by a notice that the landlord requires the tenant to give up possession at twelve at noon, on, &c. (the day when the tenancy was determinable), at which time the landlord will attend to receive the keys and rent; and that in the event of the tenant not so surrendering, the landlord will demand 7s. daily rent (a rate more than double the original rate of rent), till he can obtain legal possession. For the requisition to deliver up the premises at noon is premature and insufficient, as a notice to determine the tenancy. *Page v. More*, 15 Q. B. 684.

Acceptance of single rent is a waiver of the double value. *Doe d. Cheney v. Batten*, Cowp. 243; 9 East, 814, n.

A landlord declared, first, for the double value, and secondly, for use and occupation. The tenant pleaded nil debet to the first, and a tender of the single rent before action to the second count, and paid the money into court, which the plaintiff took out before trial, and still proceeded: the court held, that this was no case for a nonsuit, upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury; and that the plaintiff's going on with the action, after taking the single rent out of court, was evidence to show that he did not mean to waive

his claim for the double value, but to make it pro tanto. *Ryal v. Rich*, 10 East, 48.

It is not necessary, in order that the tenant may avail himself of a waiver of the double value on the part of the landlord, that such waiver should be specially pleaded. *Rawlinson v. Marriott*, 16 L. T., N. S. 207—Mellor.

An action for double value may be brought in a county court. *Wickham v. Lee*, 12 Q. B. 521; 12 Jur., 628; 18 L. J., Q. B. 21.

An owner of a woolen mill and steam-engine let a room in the mill, together with a supply of power from the steam-engine, by means of a revolving shaft in the room:—Held, in an action against the tenant, for holding over after the expiration of a notice to quit, that, in estimating the double value, the value of the power supplied could not be included. *Robinson v. Learoyd*, 7 M. & W. 48.

### 8. Re-entry by Landlord.

**When landlord may re-enter, without action.**—If a tenant quits without any intention of returning, the landlord may enter without bringing ejectment. *Lacey v. Lear*, Peake's Add. Cas. 210—Alvanley. And see *Willbore v. Rainsforth*, 8 B. & C. 6; 2 M. & R. 185.

Where a tenant of a house, after a regular notice to quit had been given him, abandoned the premises, locked up the door, and left only a few articles of furniture therein; and the landlord afterwards, in his absence, and when no person was in the house, broke open the door and took possession:—Held, that he was justified in so doing, as he had a legal right of entry. *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158. And see *Taunton v. Cantor*, 7 T. R. 431.

If a tenancy of a house is determined, and the tenant has promised to leave on a particular day, but afterwards refused to do so, the landlord is not justified in putting the tenant's wife by force out of the house, and putting the tenant's furniture into the street; but if the tenancy is determined, and the tenant and his family are gone away, and the house locked up, no one being in possession, the landlord will be justified in breaking into the house and obtaining possession. *Hillary v. Gay*, 6 C. & P. 284—Lyndhurst.

If a landlord is lawfully on his tenant's premises for the purpose of making a distress, he may put up a bill in the window for the purpose of letting them, without thereby making himself liable as a trespasser. *Skidmore v. Booth*, 6 C. & P. 777—Tindal.

Where a tenant remains in apartments after the expiration of his term, the landlord is not justified in forcibly asserting his right to the possession by expelling him. *Newton v. Harland*, 1 Scott, N. R. 473; 1 M. & G. 644; 2 Jur. 350.

**Who may re-enter.**—[By 22 & 28 Vict. c. 35, s. 3, when the reversion upon a lease is recovered, and the rent or other reservation is legally apportioned, the assignee of each part of

*the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reservation in respect of the apportioned rent or other reservation allotted or belonging to him.]*

A lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he has no reversion. *Doe d. Freeman v. Bateman*, 2 B. & A. 168.

B. bequeathed leasehold premises to trustees, on trust to permit and suffer his wife to receive the rents during her life. Afterwards, the surviving trustee and the widow granted a lease of the premises, the rent to be paid to the widow, and the lessor to have a power of re-entry upon non-payment of rent; the lease disclosed the title of the widow, who, after the death of the trustee, entered on the premises:—Held, that being a stranger to the legal estate, the power of re-entry could not be reserved to her, and that the lease operated as a lease by the trustee, and a confirmation by the widow. *Doe d. Barker v. Goldsmith*, 2 C. & J. 674; 2 Tyr. 710.

A house was demised, habendum, for twenty-one years from March 25th, 1800, paying rent on certain days, of which March 25th was one. The estate, of which the house formed part, had been devised by the landlord to trustees, to receive the rents and apply them to certain purposes. After the landlord's death, and before the trusts were completely executed, and during the tenancy, the reversion was sold. For a year after this sale the purchasers received the rents, but, during the subsequent years, from Christmas, 1817, to Lady-day, 1830, they were received by the trustees. The trusts were completely executed in 1821. On March 25th, 1830, the lessee came to the house (no one being therein), gave the keys to the trustees, and departed. The trustees entered, and the purchasers, who had been present at the above proceedings, and had come to take possession, entered also, but were put back by the trustees, and the latter remained on the premises:—Held, that if the lessee's term had expired, the reversioners' entry would have been good, notwithstanding the entry of the trustees; but that the term, under the lease, did not expire till the end of March 25th, 1830. *Ackland v. Lutley*, 9 A. & E. 879; 1 P. & D. 636.

By a lease by a mortgagee and the executrix of the mortgagor, the mortgagee demised, and the executrix of the mortgagor demised and confirmed:—Held, that a re-entry under a power reserved for that purpose "to them or either of them," inured to re-vest the former estate, and to give the legal estate to the mortgagee. *Doe d. Barney v. Adams*, 2 Tyr. 289; 2 C. & J. 232.

In an agreement between A. and B., not

under seal, expressed to be made "in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted," it was provided that as soon as B. should have executed certain specified repairs, A. would lease certain premises to him for thirty-five years from a day passed, at a yearly rent, such lease to contain certain covenants on the part of B. as to rent and other matters, and also all other usual and proper covenants, and especially a proviso for re-entry for non-payment of rent or non-performance of covenants; and until the lease should be granted, A. should have the same powers and remedies for recovering and enforcing payment of the rent and performance of the covenants, as fully as if the lease had been actually granted, the repairs to be completed by a given day. Then followed this proviso: "Provided always, that if the rent should be in arrear, or if B. should make default in the observance and performance of the covenants and conditions, then, and in either of the cases, it shall be lawful for B. to enter the premises, and the same to have again and enjoy as in his former estate, and B. and all other occupiers thereof to remove, and thenceforth these presents and everything herein contained, shall cease and be void." B. was let into the premises, and paid rent. The repairs not having been done by the time agreed on:—Held, that A. was entitled to re-enter. *Hayne v. Cammings*, 16 C. B., N. S. 421; 10 Jur., N. S. 773; 10 L. T., N. S. 341.

**Necessity of demand of rent before re-entry for non-payment; and what demand is sufficient.**—Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demands the rent on the day when it becomes due; nor under 4 Geo. 2, c. 28, s. 2, if there is a sufficient distress on the premises. *Doe d. Forster v. Wandlass*, 7 T. R. 117.

A demand of rent due from the lessee to the lessor, though made of a stranger, if made upon the land, is a sufficient demand, and need not be general to sustain ejectment for a forfeiture for non-payment of rent, being lawfully demanded. *Doe d. Brook v. Brydges*, 2 D. & R. 29.

Where a lease contained a proviso that if the rent was in arrear for twenty-one days, the lessor might re-enter, although no legal or formal demand should be made:—Held, that the rent having been in arrear for twenty-one days, the lessor might maintain ejectment without actual re-entry or demanding the rent. *Doe d. Harris v. Masters*, 4 D. & R. 45; 2 B. & C. 490. And see *Rode v. Farr*, 6 M. & S. 121.

In ejectment to recover premises for non-payment of rent, under the usual proviso for re-entry on non-payment for twenty-one days, it appeared that the rent was payable quarterly, and that a demand of more than one quarter's rent was made on the twenty-first day at one o'clock:—Held, that only one

quarter's rent should have been demanded, and that at sunset. *Doe d. Wheeldon v. Paul*, 3 C. & P. 613—Tenterden.

Upon a lease reserving rent payable quarterly, with a proviso, that, if the rent is in arrear twenty-one days next after the day of payment, being lawfully demanded, the lessor may re-enter:—Held, that five quarters being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand. *Doe d. Scholefield v. Alexander*, 2 M. & S. 525; 8 Camp. 516.

A lease for years contained a covenant to pay rent, and a proviso for re-entry on non-payment of rent, the rent "being first lawfully demanded." The property being vacant, the landlord asked for payment of rent from the person liable to pay it, and not receiving it, re-entered:—Held, that there had been a sufficient demand, and that the lease was effectually determined. *Manser v. Dix*, 8 De G., M. & G. 703; 3 Jur., N. S. 252.

By a lease, rent was payable on the usual quarter days, provided that if the rent should be in arrear for twenty-eight days after any of the days appointed for payment after the same had been lawfully demanded, it should be lawful for the lessor to re-enter and take possession if necessary without bringing an ejectment. The rent being unpaid:—Held, that a demand made on the premises at half-past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action. *Acocks v. Phillips*, 5 H. & N. 183.

A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. *Doe d. Graves v. Wells*, 10 A. & E. 427; 2 P. & D. 396; 3 Jur. 820.

A lease contained the following clause: "And it shall be lawful for the lessor, her executors, &c., to call on tenant for quarterly payment of rent, or, if otherwise, as now accepted, at Michaelmas and Lady-day, as a matter of favor, with a quarter remaining in hand, and, if not paid in twenty days after, rent as stated, and 10% of increased rent for breaking up land by acre, then the tenant shall be liable to have the rent due recovered by sale and distress, or to enter on the premises for the same till it be fully satisfied:—"—Held, first, that the clause might be understood as reserving a right of entry, upon non-payment of rent, to hold the premises till the arrears were paid. *Doe d. Drake v. Bowditch*, 8 Q. B. 973; 10 Jur. 637; 15 L. J., Q. B. 266.

Held, secondly, that under the clause the lessor could not enter without the common-law formalities, the 4 Geo. 4, c. 28, s. 2, applying only where there is a right of re-entry by which the lease is avoided. *Ib.*

An agreement of tenancy contained the following clause: this agreement is entered into upon the express condition that, if the tenant shall make default in payment of the rent, or any part thereof, within twenty-one

days after the same shall become due, being demanded, it shall be lawful for the landlord, without giving any notice to quit, and without any other warrant, authority, or proceedings, to re-enter:—Held, that, to entitle the landlord to avail himself of the right of re-entry, the rent must be in arrear twenty-one days, and a demand (but without the formalities of a common-law demand of payment) be then made. *Phillips v. Bridge*, 9 L. R., C. P. 48; 43 L. J., C. P. 13.

A demand within the twenty-one days is insufficient. *Ib.*

**Operation and effect of re-entry; and how pleaded.**—C. rented a farm under the plaintiff, his term in which expired on the 1st February, 1838. On the 2d February, the plaintiff's agent demanded possession of the land; but C. refused to quit unless paid for certain improvements. The plaintiff thereupon brought an ejectment, and obtained actual possession on the 16th July:—Held, that the demand of possession on the 2d February gave the plaintiff such a constructive possession as to enable him to maintain trespass against a third person for coming on the land and carrying off the crops. *Hey v. Moorhouse*, 8 Scott, 156; 6 Bing. N. C. 52.

Where a right of entry accrues by forfeiture, and several forfeitures of the same kind have happened, though the landlord has not availed himself of them, if he pleads his right of entry in trespass brought against him by his tenant, he must set out the specific forfeiture on which he grounds such right. *Kavanagh v. Gudge*, 6 Scott, N. R. 508; 5 M. & G. 726; 7 Jur. 352; 12 L. J., C. P. 258.

To an action for rent, the defendant pleaded a plea to the further maintenance of the action, setting out an indenture, by which premises were demised by S. to the plaintiff, with a power of re-entry in favor of S., in case of non-performance by the plaintiff of the covenants contained therein; that, before the rent accrued due, the plaintiff broke one of such covenants; and that, by means of the premises, the estate and interest of the plaintiff in the premises became forfeited, and that, by reason and in consequence of the forfeiture, S. brought an ejectment. The plea set out the proceedings and judgment in ejectment given after the commencement of the action, and that the defendant afterwards, on being required to do so, attorned tenant to S., and paid him the rent:—Held, a good answer to the further maintenance. *Franklin v. Carter*, 3 D. & L. 213; 1 C. B. 750; 9 Jur. 874; 14 L. J., C. P. 241.

When a lessor re-enters on a forfeiture the rights of under-lessees are gone, but where a lessor accepts a surrender from a lessee the rights of the under-lessees remain, although the lessee was at the time liable to forfeiture. *Great Western Railway Company v. Smith*, 2 L. R., Ch. Div. 235—C. A.

As to ejectment by landlord against tenant,—see EJECTMENT.

## 4. Summary Proceedings.

To recover possession when premises vacant.]—[By 11 Geo. 2, c. 19, s. 16, after reciting that landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated, without any distress thereon, whereby their landlords or lessors might be satisfied for the rent-arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering in ejectment, it is enacted, that if any tenant holding any lands, tenements or hereditaments, at a rack-rent, or where the rent reserved shall be full three-fourths of the yearly value of the demised premises, who shall be in arrear for one year's rent, shall desert the premises, and leave the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it shall and may be lawful to and for two or more justices of the peace, of the county, riding, division, or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed, on the most notorious part of the premises, notice in writing, what day (at the distance of fourteen days at least) they will return to take a second view thereof;

And if, upon such second view, the tenant, or some person on his or her behalf, shall not appear and pay the rent in arrear, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, as to any demise therein contained only, shall from thenceforth become void.

By s. 17, it is provided, that such proceedings of the said justices shall be examinable in a summary way, by the next justice or justices of assize of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judges of the Court of King's Bench or Common Pleas; and if in the counties palatine of Chester, Lancaster, or Durham, then before the judges thereof, who are hereby respectively empowered to order restitution to be made to such tenant, together with his or her expenses and costs, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same: and in case they shall affirm the act of the said justices, to award costs not exceeding 5*l.* for the frivolous appeal.

The 57 Geo. 3, c. 52, reciting the expediency of extending this remedy, enacts, that the provision is to apply to those who shall hold lands and tenements or hereditaments, under any demise or agreement, either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of non-payment of rent, who shall be in arrear for one half-year's rent instead of one year.

By 3 & 4 Vict. c. 84, s. 13, none of the police magistrates within the metropolitan police dis-

trict shall be required to go upon any deserted lands, tenements or hereditaments, for the purpose of viewing the same or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof, under the provisions of 11 Geo. 2, c. 19, or 57 Geo. 3, c. 52, but in every case within the metropolitan police district, in which by the said acts or either of them two justices are authorized to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police magistrates, upon the request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant, directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said acts or either of them are required to be affixed by two justices of the peace; and upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned that it has been duly executed, and that neither the tenant nor any person on his or her behalf has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises, it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force, requiring him to put the landlord or lessor into possession of the premises; and every constable to whom any such warrant shall be directed shall duly execute and return the same, subject to the provisions of the 2 & 3 Vict. c. 47, as to the execution of warrants directed to constables of the metropolitan police force; and upon the execution of such second warrant the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void.]

The 11 Geo. 2, c. 19, s. 16, does not require the request or complaint to be made upon oath. *Basten v. Carew*, 5 D. & R. 558; 3 B. & C. 649.

When a tenant ceased to reside on the premises for several months, and left them without any furniture, or sufficient other property to answer the year's rent:—Held, that the landlord might properly proceed under 11 Geo. 2, c. 19, s. 16, to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same. *Pilton, Ex parte*, 1 B. & A. 869.

It is not necessary to state, in the record of the magistrates' proceedings, that the landlord has a right of re-entry; although such a right must exist in order to entitle the party to proceed under this statute. *Id.*

Where magistrates had given possession of a dwelling-house, as deserted and unoccupied, and the judges of assize had, on appeal, made an order for restitution with costs, and the tenant brought an action for the eviction against the magistrates, the constable, and the landlord:—Held, that the record of the

proceedings before the magistrates was an answer to the action on behalf of all the defendants. *Ashcroft v. Dourne*, 3 B. & Ad. 684.

The judges of assize, on appeal, under 11 Geo. 2, c. 19, s. 17, against an order of two magistrates giving possession to a landlord, made an order for restitution of the premises to the tenant. The order of the judges was not directed to any person:—Held, that a mandamus could not issue commanding the two justices to make restitution. *Reg. v. Trail*, 13 A. & E. 761; 4 P. & D. 925; 1 Arn. & H. 78.

Proceedings of magistrates for restitution of premises under 11 Geo. 2, c. 19, are, by s. 17, to be reviewed (in England) by the judges on the circuits, acting as individual justices. An allegation in an indictment, that an order was made by A. and B., the justices of assize for Surrey, is not supported by a certificate of such an order, being signed by the deputy clerk of assize in the same way as an order of court. *Reg. v. Sewell*, 8 Q. B. 161; 10 Jur., 48; 15 L. J., Q. B. 40.

An order for restitution, though not directed to any person, will justify the sheriff in acting under it. *Id.*

Where magistrates, from a doubt of their jurisdiction, decline giving possession of premises to a landlord, the court will not compel them, by mandamus, to do so. *Fulder, Ex parte*, 3 D. P. C. 535; 4 Jur. 507.—B. C.—Williams.

On an appeal to the judges of assize against the decision of justices giving possession of premises under the 11 Geo. 2, c. 19, ss. 16 and 17, requiring that the notice, after the first view by justices, should state what day, at the distance of fourteen clear days at the least, they should return to take a second view:—Held, that fourteen clear days must elapse between the first and second views, and as that period had not elapsed, the proceedings were set aside as irregular, and restitution ordered. *Creak v. Brighton (Justices)*, 1 F. & F. 110.—Erle and Williams.

The power to view and give possession to a landlord of deserted premises, created by 11 Geo. 2, c. 19, s. 16, extended by 57 Geo. 3, c. 52, and varied as to its mode of execution by 3 & 4 Vict. c. 84, s. 13, is not, by any of the provisions of the 3 & 4 Vict. c. 84, or by 11 & 12 Vict. c. 43, s. 34, vested in the lord mayor or one alderman sitting in the justice-room at the Mansion-house or Guildhall, so as to enable them to exercise the power in the same manner as a police magistrate sitting in one of the metropolitan police courts may, under 3 & 4 Vict. c. 84, s. 13, exercise it. *Edwards v. Hodges*, 15 C. B. 477; 1 Jur., N. S. 91; 3 C. L. R. 472; 24 L. J., M. C. 81.

**To recover possession of small tenements.]**—[The 1 & 2 Vict. c. 74, reciting the expediency of providing for the more speedy and effectual recovery of the possession of premises unjustly held over after the determination of the tenancy, enacts, that when and so soon as the

term or interest of the tenant of any house, land, or other corporeal hereditaments held by him at will or for any term not exceeding seven years, either without being liable to the payment of any rent or at a rent not exceeding the rate of 20l. a year, and upon which no fine shall have been reserved or made payable, shall have ended or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same or any part thereof shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises or of such part thereof respectively, it shall be lawful for the landlord of the said premises or his agent to cause the person so neglecting or refusing to quit and deliver up possession to be served as directed by s. 2, with a written notice, in the form set forth in the schedule to the act, signed by the landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in the act;

And if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of the act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof, and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession;

And upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division, or place within which the said premises or any part thereof shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district, division, or place within which the said premises or any part thereof shall be situate, commanding them, within a period to be therein named, not less than twenty-one nor more than thirty clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent:

Provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday, or Christmas-day, or at any time except between the hours of nine in the morning and four in the afternoon:

Provided also, that nothing in the act contained shall be deemed to protect any person on whose application and to whom any such warrant shall be granted from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not at the time of granting the same lawful right to the possession of the same premises:

Provided also, that nothing herein contained

*shall affect any rights to which any person may be entitled as outgoing tenant by the custom of the country or otherwise.*]

In an action for breaking and entering the plaintiff's dwelling house, F. and M. justified the trespasses; the former, as owner in fee, the latter, as his servant. Plea, also, by the latter, not guilty. Replication, *nolle prosequi* as to F., but alleging an estoppel as to M., for that M. demised the premises to the plaintiff, as a yearly tenant, at 16l. a year, which demise was in force and undetermined. Rejoinder by M., denying that the tenancy of the plaintiff was in full force and undetermined. At the trial, the demise from M. to the plaintiff was proved, and it was shown that a notice to quit, signed in the names of both F. and M., was given to the plaintiff; and that subsequently a complaint was made to the magistrates under the above statute, which was signed by F., "as for himself and M., either or both of them." Upon that complaint, a warrant was issued, which contained the name of only one complainant, under which the trespass was committed, and the plaintiff ejected; the key of the house was taken to M. by the officer; the jury having found for the plaintiff:—Held, that the authority of M., as servant of F., was sufficiently denied by the replication of estoppel, and that trespass was the proper remedy. *Darlington v. Pritchard*, 2 D., N. S. 604; 5 Scott, N. R. 10; 4 M. & G. 783; 7 Jur. 677; 12 L. J. 34. See also *Edmunds v. Pinniger*, 7 Q. B. 559; 14 L. J., Q. B. 273.

In an action against a landlord for irregularity in the mode of proceeding to obtain possession of premises under 1 & 2 Vict. c. 74, where the landlord, at the time of applying for the justices' warrant, was entitled to the possession of the premises, there must be special damage arising from the irregularity complained of. *Delaney v. Fox*, 2 Jur., N. S. 1253; 26 L. J., C. P. 5; 1 C. B., N. S. 166.

A declaration, setting out an informal notice of the landlord's intention to apply to the justices for a warrant to obtain possession under the act, and alleging the issuing and execution of such warrant, and that under the authority of such proceedings the plaintiff was forcibly expelled from the dwelling-house of which he was tenant, does not sufficiently show special damage arising from the informality of the notice. *Ib.*

A landlord is not liable in trespass for ejecting a tenant where the tenancy has expired, although he may have taken proceedings against him under 1 & 2 Vict. c. 74. *Ib.*

Upon an application under 1 & 2 Vict. c. 74, by a landlord, to justices of petty sessions, to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved to the satisfaction of the justices, and its legal determination, and the tenant's refusal to quit, the jurisdiction of the justices to give the landlord possession is not ousted by the tenant's setting up the title of a third person. *Rees v. Davies*, 4 C. B., N. S. 56.

## XVI. TENANCIES FROM YEAR TO YEAR.

### 1. How created.

**Intent of parties.**—In order to create a tenancy from year to year, there must be some circumstances to show an intention to do so, such as payment of rent quarterly, or some other aliquot part of a year. *Doe d. Hull v. Wood*, 14 M. & W. 682; 9 Jur. 1060, 15 L. J., Exch. 41.

**When created by agreement for letting, payment and receipt of rent, &c.**—Payment and receipt of rent are evidence against a corporation of a demise by them from year to year. *Doe d. Pennington v. Taniers*, 12 Q. B. 908; 13 Jur. 119; 18 L. J., Q. B. 49.

A reuting of a tenement for an indefinite period, and an occupation for a year, constitute a tenancy for a year. *Reg. v. St. Giles*, 33 L. J., M. C. 3; 12 W. R. 125; 9 L. T., N. S. 411; 4 B. & S. 509.

A. agreed to let, and B. agreed to hire, a piece of land, containing about fifteen acres, at an annual surface rent; B. to use the land for the purpose of making bricks, and to pay A. 8s. per 1,000 on the quantity made; the quantity made to be not less than 4,000,000 annually; the ground not to be excavated beyond the depth of eight feet without the permission of A. in writing. A portion of the land being required by a railway company, B.'s claim for compensation in respect of his estate and interest in the land so required, and for deterioration to the residue, was referred to arbitration. The umpire found that the interest of B. under this agreement was that of merely a tenant from year to year; and he assessed the compensation upon that basis:—Held, that the construction put by the umpire upon the agreement was correct; and that evidence tending to show that by the custom of the brick-making trade brick land is never hired from year to year was properly rejected. *Stroud, In re*, 8 C. B. 502; 16 L. J., C. P. 117.

An agreement dated the 10th April, 1841, by which part of a dwelling-house was let, stipulated for "the yearly rent of 42l., payable quarterly, the first payment of 7l. 13s. 6d., to be made on the 24th June next, being the proportion of rent from the 19th April, 1841, to that date." And, further, that the tenant should hold and enjoy the possession "until one of the parties should give to the other six calendar months' notice in writing to quit at the expiration of any such notice."—Held, that a yearly tenancy was not created, and that a six months' notice to quit expiring on the 5th December, was a sufficient notice to put an end to the tenancy. *Doe d. King v. Grafton*, 16 Jur. 833; 21 L. J., Q. B. 276.

H. and R., by indenture of February, 1805, granted and leased premises unto and to the use of J. H., his heirs, executors, administrators and assigns, forever, yielding and paying therefor a yearly rent. Proviso for re-entry on non-payment of rent. Covenant by J. H. for payment of the rent, for repairs and for



insurance:—Held, that in the absence of proof that the premises were, at the date of the instrument, in the occupation of tenants, and the expressed intention of the parties precluding the presumption of livery of seizin, the instrument could not operate as a conveyance of the fee subject to a rent-charge, but only to create a tenancy from year to year; *Doe d. Robertson v. Gardiner*, 12 C. B. 319; 21 L. J., C. P. 222.

A., under a mortgage deed, agreed to become tenant to B. of the premises demised, "henceforth, at the will and pleasure of B., at the yearly rent of 25*l.* 4*s.*, payable quarterly:—Held, that this was a tenancy at will; and that occupation for two years, and payment of rent under the agreement, did not make B. tenant from year to year. *Doe d. Bastow v. Coz*, 11 Q. B. 122; 17 L. J., Q. B. 3.

The plaintiff was in possession of land under a lease granted to him by B., who had previously mortgaged the premises. The transferees of the mortgage (being cognizant of the lease) gave the plaintiff notice of the mortgage, and required him to pay them all rent due, and to become due, in respect of the mortgaged premises:—Held, that this was evidence whence the jury might infer a contract of tenancy for a year, as between the mortgagees and the plaintiff. *Brown v. Storey*, 1 M. & G. 117; 1 Scott, N. R. 9; 4 Jur. 319.

A. agreed to let, and B. to take, a cottage for three months from 29th December, at a yearly rent of 18*l.*, the first monthly payment to be made 25th January, free from all taxes, which were to be paid by the tenant, and allowed out of the rent, three months' notice to quit from either party to be sufficient. B. occupied for eighteen months:—Held, a tenancy from year to year, so as to give the tenant a settlement under 6 Geo. 4, c. 57, s. 2. *Reg. v. Willenden*, 9 Jur., N. S. 874; 32 L. J. M. C. 109; 11 W. R. 425; 7 L. T., N. S. 784; 3 B. & S. 593.

A party hired apartments upon the terms contained in the following memorandum:—"I hereby agree (according to our conversation of last evening) to pay you for the occupation of your first floor, furnished, from Monday, March 4, 1839, to September the 4th, 1839, the sum of 52*l.* 10*s.* I also agree either to occupy the said rooms from the 4th September to the 4th December, furnished, on the same terms, viz., 26*l.* 5*s.*, for the three months, or take them unfurnished at the rate of 84*l.* per annum:—Held, that this did not create a tenancy from year to year, but was properly declared on as an agreement to take the apartments furnished for six months; and for a further period of three months, furnished or unfurnished, at the option of the tenant. *Atherstone v. Bostock*, 2 Scott, N. R. 637; 2 M. & G. 511; 1 Drink. 96.

Payment of rent is *prima facie* evidence of a tenancy from year to year. *Doe d. Pritchard v. Dodd*, 2 N. & M. 838; 5 B. & Ad. 689.

*Secus*, *semble*, where the existence of such

a tenancy would imply that devisees in trust had conveyed away their estate, while a duty still remained to be performed by them. *Ib.*

The presumption is completely rebutted by showing that the rent paid and reserved is of the same amount as the rent reserved in an unexpired lease, the premises being at the time of such payment of rent of much greater value than the rent so reserved and so paid. *Ib.*

A tenant at will, at a yearly rent, is a tenant from year to year. *Pope v. Garland*, 4 Y. & C. 394.

The defendant hired of the plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into possession at Michaelmas, 1822. At Lady-day, 1823, he paid one half-year's rent, and at the Midsummer following gave up possession without having given any notice to quit; but at Michaelmas, in the same year, he paid another half year's rent. At Lady-day, 1824, the plaintiff demanded a third half-year's rent, which the defendant refused to pay:—Held, that a tenancy from year to year could not be inferred from these facts. *Wilson v. Abbott*, 4 D. & R. 693; 3 B. & C. 88.

A. agreed by parol to sell an estate to B. on certain terms, provided B. would continue C. his tenant, not for one year only, but from year to year (C. having just before been let into possession, under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit); and A. thereupon agreed to take C.'s forfeited deposit as part of the purchase-money. A. and B. afterwards reduced their agreement respecting the purchase into writing, in which no notice was taken of the stipulation concerning C.'s tenancy:—yet held, that this stipulation being collateral to the written agreement, was binding upon B.; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at the end of the first year, by six months' previous notice to quit. *Denn v. Jackling v. Cartwright*, 4 East, 29.

By articles of agreement under seal, the plaintiff covenanted with E. that he would from time to time, when and so soon as he should have erected and covered in one or more of the messuages agreed to be built by him upon land therein described, and agreed to be demised by indenture, demise, and lease unto E., his executors, administrators or assigns, the whole or such part or parts whereon one or more of the messuages or tenements should have been built for ninety-eight years from the 29th of September then last (1852), at a certain yearly rent payable quarterly, the rents to be so apportioned that the yearly rent to be reserved on any such lease should not exceed one-sixth of the yearly value of the land and buildings demised, with a proviso, that if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only

of the land should amount to or make up the full yearly rent reserved, the remainder of the land, when built upon, should be demised at the yearly rent of a peppercorn only. The articles contained a covenant by E. with the plaintiff, to pay the rent agreed to be reserved, and to pay rates, to erect the messuages, and also a covenant that until the land and the buildings erected should be leased in execution of the covenant in that behalf, E., his executors, administrators or assigns would pay for the same the several yearly rents stipulated or agreed to be reserved in the leases to be granted to such persons, and in such manner and proportions and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff, in case the whole or any part of the yearly rent or rents thereby or by the leases to be granted should be behind or unpaid for twenty-one days. In 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to B.:—Held, that neither E. nor the defendant acquired any estate in the premises under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the land, and payment of the stipulated rents. *Camden v. Batterbury*, 5 C. B., N. S. 808; 5 Jur., N. S. 627; 28 L. J. C. P. 187; affirmed on appeal, 7 C. B., N. S. 804; 5 Jur., N. S. 1405; 28 L. J., C. P. 335—Exch. Cham.

In ejectment the plaintiff proved that S. was the tenant of the premises when he became the owner, and had paid rent to him for many years; that she quitted, and was succeeded by H.; that N. succeeded H. and paid rent. On the beginning of September, 1858, the defendant and N. severally called on the plaintiff and asked if he would accept the defendant as tenant. On each occasion the plaintiff said he would. On the 7th of September the defendant took possession, and in October of the same year paid the rent to Michaelmas, 1858, for which the plaintiff gave a receipt as for rent due from N. The plaintiff received the rent at Christmas, 1858, and gave a receipt for it to the defendant as for rent due from him. In March, 1859, the plaintiff gave to the defendant notice to quit at Michaelmas, or otherwise at the end of the year of the tenancy, which should expire after the end of one half-year from the time of his being served with that notice. On the 17th of December, 1859, the plaintiff's agent served a notice on the defendant to quit at Midsummer. The defendant said the plaintiff might have the house if he paid the valuation of the fixtures and good-will:—Held, that it was a question for the jury and not for the judge, to be determined by a consideration of all the facts, at which time the tenancy commenced; that there was evidence of a tenancy ending at Michaelmas, and that it was a misdirection to withdraw from the jury all the

facts, except the conduct of the defendant when the notice to quit at Midsummer was served on him. *Walker v. Godd*, 6 H. & N. 594.

In December, 1819, the testator's father was tenant of a farm belonging to the plaintiff until the following Lady-day. The plaintiff's steward, in the month of December, proposed to let the farm, and read from a printed paper the terms of letting. The testator was present, and assented to those terms, agreeing to succeed his father at Lady-day, but no writing was signed. He did then enter, and continued tenant till his death, since which his executors occupied and paid rent. At the foot of the printed paper of terms was written a memorandum, not signed by either party, but by the attorney of the plaintiff, who was present at the time of the letting. This memorandum commenced in the following terms:—"A. B., as agent of the plaintiff, agreed to let, and C. D. agreed to take," and went on to state the farm, rent, and when payable; that the term was for one year certain from Lady-day next, and so from year to year, until a due notice to quit was given:—Held, that this agreement, followed by entry and payment of rent, created a tenancy, upon the terms contained in the printed paper and memorandum, and that they might be referred to by the attorney, as showing what the terms of the demise were. *Bolton v. Tomlin*, N. & P. 247; 5 A. & E. 856; 2 H. & W. 368.

The defendant being in possession, under a lease for fourteen years, assigned it, by way of mortgage, to the plaintiff, and then committed a forfeiture, for which the lessor brought ejectment. It was then agreed, at a meeting of all the parties, that judgment should be signed in the ejectment, that the lessor should grant a new lease to the plaintiff, and that the plaintiff should grant an underlease to the defendant. The new lease was accordingly granted to the plaintiff, who then delivered the defendant the key, saying, "Go on as usual, pay the money" (due on mortgage), "and when you have done so you shall have an underlease;" no rent was ever paid:—Held, that this did not constitute the defendant a tenant from year to year. *Doe d. Rogers v. Pullen*, 3 Scott, 271; 2 Bing. N. C. 749; 2 Hodges, 39.

A. let land to B., on a tenancy from year to year, which B. continued to hold for several years after A's title had determined, paying rent to A., and he at length gave up possession on a notice to quit from A. Subsequently to the determination of A's title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. continued to hold, but paid no rent to any one subsequently. In an ejectment by A. against C., after B. had given up possession:—Held, that it might be presumed, as a matter of fact, that a new tenancy, from year to year, had been commenced by B. after A.'s title had ceased, and that C., therefore, could not dispute A.'s title. *London and North Western*

*Railway Company v. West*, 2 L. R., C. P. 553; 36 L. J., C. P. 245.

W. being entitled to a leasehold interest, the term of which expired on 25th December, 1881, agreed in writing to let the same to K. at the yearly rent of 36*l.*, and agreed not to give K. notice to quit so long as he continued to pay the rent. A railway company agreed to purchase at the price of 470*l.* this interest, described as the interest which K. held of W., for any term at tenant's option, but not beyond the term and interest of W. in the premises, which term will expire on the 25th December, 1881. The railway company subsequently objected that this was only a tenancy from year to year:—Held, that it was a tenancy for the remainder of the term, but that even if it was not, the company was bound by their agreement. *King, In re, East London Railway Company, Ex parte*, 21 W. R. 881; 20 L. T., N. S. 28*c*, 16 L. R., Eq. 521—V. C. M.

By an agreement under seal the premises in dispute were let for the term of one year, at a yearly rent, payable quarterly; and it was agreed that the lessee might determine the tenancy at the expiration of the term of one year by giving to the lessor three months' previous notice in writing, and that the lessee might continue tenant after the expiration of the term on punctual payment of the rent, free from disturbance or eviction by the lessor as long as the rent was punctually paid:—Held, that the estate created by the instrument and the payment of the rent was a tenancy from year to year, and that a clause declaring that such a tenancy was not to be determinable by a notice to quit was inconsistent with and repugnant to the nature of such estate; and that the lessor, who had served a notice to quit, was entitled to recover. *Holmes v. Day*, 8 Ir. R., C. L. 235—C. P.

An agreement in writing "to let from year to year, and for so long as the lessor has power to let," creates only a tenancy from year to year, which is terminable by a legal six months' notice to quit, though the power of the lessor to let the premises has not come to an end. *Wood v. Beard*, 46 L. J., Q. B. Div. 100; 2 L. R., Q. B. Div. 30; 35 L. T., N. S. 863—D. C. A.

As to what agreements create merely a tenancy at will,—see this title, XVII.

— by holding over after expiration of term.]

—If a tenant, whose lease is expired, is permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but so strictly a tenant at will, that he may be turned out of possession without notice; but it is otherwise if he has continued in possession for a year, or rent has been received. *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717—Kenyon.

Where a tenant holds over after the determination of a lease for years, and pays rent, he is tenant from year to year; but such tenancy is determinable at the end of the first

year by a six months' notice to quit, expiring at the end of the first year; and the same is true of every other mere tenancy from year to year. *Doe d. Clark v. Smarridge*, 7 Q. B. 957; 9 Jur. 781; 14 L. J., Q. B. 327.

B. holding land of A. for a term of years, underlets part to C. from year to year. At the expiration of the term, B. agrees with A. to hold on from month to month. In the absence of any new agreement between B. and C., the tenancy from year to year continues. *Peirse v. Shaw*, 2 M. & R. 418.

When a lease for a term of years expired at Midsummer, 1821, and the tenant refused to relinquish possession, and insisted that he was entitled to a notice to quit, and continued in possession until Christmas following, and paid rent to that time, when he tendered the keys of the premises to his landlord, which the latter refused to accept:—Held, that such continuing in possession by the tenant did not amount to a holding over by him, but was conclusive evidence on presumption of law of a tenancy from year to year, which entitled the landlord to maintain an action for the use and occupation of the premises to recover the amount of a quarter's rent, which became due from Christmas, 1821, to Lady-day in the following year. *Bishop v. Howard*, 3 D. & R. 238; 2 B. & C. 100.

Where A. agreed to let B. premises for three years from Michaelmas, 1845, with a power for B., six months previous to the end of the term of three years, by a notice to that effect, to renew the tenancy for a further term of three years, and B. entered and paid rent, and gave notice of his desire to renew, but no further lease was granted:—Held, that a tenancy from year to year was granted, determinable during the three years by a notice to quit, but expiring at the end of that period by effluxion of time, when A. might recover in ejectment without giving any notice to quit. *Doe d. Devenish v. Moffat*, 15 Q. B. 257; 14 Jur. 935; 19 L. J., Q. B. 438.

Wherever a tenancy for years comes to an end either by efflux of time, or by the death or end of the title of the lessor, so that either he or his representative, or any independent owner of the demised hereditament, can without notice eject the tenant, and the person entitled to eject leaves the tenant in possession, and receives rent from him without explanation or stipulation, the person receiving the rent is to be assumed to have created a tenancy upon the terms on which the tenant held in the demise originally made to him; and the holding to be presumed is as of a tenancy from year to year according to the former holding of the tenant, and therefore commencing at a time corresponding to that from which he originally held. *Kelly v. Patterson*, 43 L. J., C. P. 320; 9 L. R., C. P. 681; 30 L. T., N. S. 842.

Premises had been let by a tenant in fee on a lease expiring at Midsummer, 1806: at that date the defendant was in occupation as tenant from year to year to the intermediate lessee, on a demise commencing at Michael-

mas; the tenant in fee let the premises on a fresh lease to the plaintiff, commencing at Midsummer, 1866: the defendant continued in occupation and paid rent to the plaintiff. Notice to quit at Midsummer was given by the plaintiff to the defendant, who refused to leave the premises. The plaintiff having sued in ejectment:—Held, that the plaintiff having allowed the defendant to hold over, and having received rent as from year to year without explanation or stipulation, the inference was that there had been a tacit agreement that the defendant should hold from year to year according to the terms of his former tenancy, that is to say, from Michaelmas to Michaelmas; that the notice to quit at Midsummer was wrong; and that the plaintiff must be nonsuited. *Ib.*

An assignee of a lease for lives continued in possession for several months after its expiration, and paid a half-yearly gale of the reserved rent which subsequently accrued due; but there being a controversy as to the terms upon which he was permitted to remain in possession:—Held, that it ought to have been left to the jury to find what was the precise character of the assignee's possession after the expiration of the lease, whether as tenant from year to year upon the terms of the expired lease, or subject to negotiations for the creation of a new tenancy at an increased rent. *Caulfield v. Furr*, 7 Ir. R., C. L. 469—C. P.

As to effect of holding over by tenant, in general,—see this title, XV., 2.

—by occupying under change in terms of tenancy.]—A. granted an annuity to B. out of lands, with the usual powers of distress and entry, if the annuity should fall in arrear. A. afterwards granted a lease for years to the defendant. The annuity having fallen into arrear, B. distrained on the defendant, and informed him that he had a charge upon the premises under lease to him. The defendant thereupon signed an agreement “to attorn and become tenant to B.,” and paid him rent:—Held, that this created a new tenancy from year to year between B. and the defendant, determinable on the payment of the arrears of the annuity, upon which the defendant's lease for years would revive. *Doe d. Chawner v. Boulter*, 1 N. & P. 650; 6 A. & E. 675; W., W. & J. 333.

A tenant occupied land at the expiration of a lease, with the assent of the lessor, a parson; on the determination of this title, he continued to be tenant to his successor:—Held, that he was tenant under the terms of the original lease. *Hutton v. Warren*, 2 Gale, 71; 1 M. & W. 466.

If there is a written agreement between landlord and tenant, that for certain premises the tenant shall pay 170*l.* a year, and afterwards an arrangement is made by parol that 30*l.* a year shall be allowed out of it, because the landlord is to occupy a certain part for a time, such parol arrangement does not vary the agreement so as to reduce the rent payable

under it, and therefore an allegation is correct which states it to be 170*l.* *Hilton v. Goodhind*, 2 C. & P. 591—Best.

Where there is a demise from year to year, so long as the parties shall please, and a new tenant takes possession, whose occupation as tenant the then reversioner omits to determine by a notice to quit, the pleadings may allege a new relation of landlord and tenant, on the original terms between the reversioner and the occupier. *Buckworth v. Simpson*, 1 C., M. & R. 834; 5 Tyr. 344; 1 Gale, 38.

A. demised to B. certain lands and premises for one year certain, and then from year to year so long as the parties should think proper, with power to determine it on giving notice to quit; and the lease contained various terms and conditions as to the management of the lands and repairing the buildings. The lessee died, and his executors entered into the occupation of the premises, and continued to occupy, and paid rent:—Held, that they were chargeable in their personal character upon the terms contained in the original demise; their continuing to occupy, and the landlord abstaining from giving notice to quit, raising an implied promise on their part to abide by the terms of the original contract. *Ib.*

A declaration stated that the defendant held lands under a lease from E. on certain terms, which were set forth; that the reversion came to the plaintiff; and that the defendant, in consideration of an alteration of the rent, promised to hold of the plaintiff on the same terms in all other respects; but that the defendant broke the terms. The plaintiff not having proved an express contract to hold of the defendant on the old terms:—Held, that he could not rely upon an implied contract arising from the old lease without putting it in evidence, and that the old lease could not be used as such evidence unless properly stamped. *Wallis v. Broadbent*, 4 A. & E. 877; 2 H. & W. 41.

Where there was a letting by two tenants in common at an entire rent, and one of them afterwards gave notice to the tenant to pay a moiety of the rent to him:—Held, that it was a question for the jury, whether there was a new contract, or only an alteration in the mode of receiving the rent. *Powis v. Smith*, 1 D. & R. 490; 5 B. & A. 850. And see *Harrison v. Barnaby*, 5 T. R. 246.

A., B. and C. (C. being an unmarried woman), entered into an agreement, dated 25th December, 1834, to take a house of the plaintiff for seven years at an annual rent, payable quarterly, under which they entered. In September, 1835, C. married; in December, A. became a bankrupt. In an action by the plaintiff against A., B., C. and C.'s husband, for two years' rent, claimed to be due under the demise contained in the agreement, the defendants proved payment, by A.'s assignees, of the quarter's rent due at Michaelmas, 1835, and an admission by the plaintiff of the receipt of the two previous quarters' rent, but it was not shown when, or by whom, these latter payments were

**made:**—Held, that this was not evidence from which a new yearly tenancy, on the terms of the agreement, could be inferred, so as to charge all the defendants, inasmuch as it was not shown that the payments were made before C.'s marriage, or with her assent after her marriage. *Douglas v. Bowers*, 2 M. & W. 365; M. & H. 170.

By increasing the amount of rent payable by a tenant from year to year, a new tenancy is not necessarily created. *Doe d. Monck v. Geekie*, 5 Q. B. 841; 1 C. & K. 307; 8 Jur. 360; 13 L. J., Q. B. 239.

During a tenancy from year to year, at a given rent, the rent was raised at the termination of one of the years, by consent of the landlord and tenant:—Held, that, if this created a new contract, it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred in default of additional evidence, even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain. *Ib.*

—by occupying under an agreement for a lease.—Where A., having entered into an agreement for a lease, has been let into possession, and has paid the stipulated rent, a tenancy from year to year is created. *Doe d. Westminster v. Smith*, 1 M. & R. 137.

An occupation of premises, pending the execution of a lease, constitutes the relation of landlord and tenant, and will entitle the latter to sue the former upon a quantum valebat, although no distress for rent can be made. *Himerton v. Stuck*, 5 D. & R. 206; 2 B. & C. 473. And see *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717.

So, an occupation for eighteen years, under an unstamped agreement for a lease for twenty-one years, was held to constitute a tenancy, though no lease had ever been tendered by the lessor, or demanded by the lessee. *Weekly d. Yea v. Bucknell*, Cowp. 473.

No tenancy is created where one has got into possession of a house without the privity of the landlord, although they afterwards enter into a negotiation for a lease, but differ as to the terms. *Doe d. Knight v. Quigley*, 2 Camp. 505—Ellenborough.

Where the occupier, under an agreement for a lease at a certain rent, pays the rent, he becomes tenant from year to year, on the terms of the agreement, and the landlord may distrain. *Mann v. Loejoy*, R. & M. 355—Abbott.

A party took possession of premises under an agreement for a lease, to be granted to him for a term of ten years, at a yearly rent, payable half-yearly; no lease was executed, nor was the quantum of the rent to be paid ascertained; but he occupied under the agreement for three years, paying rent for two:—Held, that this created a tenancy from year to year. *Knight v. Bennett*, 11 Moore, 222; 3 Bing. 301.

A party entered into possession of premises

under an agreement for a lease at a certain rent, and occupied them more than a year, but paid no rent. An account was afterwards delivered to him by the landlord, charging him with half a year's rent, the amount of which he at first disputed, but admitted that a half a year's rent was due, and named the amount, and the account was altered accordingly:—Held, that a yearly tenancy might thereby be implied; and that the landlord had a right to distrain. *Cox v. Bent*, 2 M. & P. 281; 5 Bing. 185.

Where a person held premises under an agreement in writing, from quarter to quarter, and the agreement provided that the tenant should quit possession upon receiving six months' notice in writing, and, in the event of his losing his license to sell ale, through misconduct at any time during the term, should then forthwith quit possession on being requested so to do by his landlord:—Held, that he had neither a tenancy from year to year, nor a term certain in the premises, within 1 Geo. 4, c. 87, s. 1, so as to entitle the landlord in ejectment to compel him to give security for costs under that act. *Doe d. Carter v. Roe*, 10 M. & W. 670; 2 D., N. S. 449; 6 Jur. 1044; 12 L. J., Exch. 27.

Where there has been an agreement for a lease and an occupation without payment of rent, the occupier is a mere tenant at will. *Braythwaite v. Hitchcock*, 10 M. & W. 494; 6 Jur. 976. See *Riseley v. Ryle*, 11 M. & W. 16; 12 L. J., Exch. 38.

If he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. *Ib.*

But, in order to establish a tenancy from year to year in such case, the payment of rent means a payment of rent with reference to a yearly holding. *Ib.*

In an action for rent, stating a demise of a messuage, by the plaintiff to H. for one year, and so on from year to year, if they should respectively please, at the yearly rent of 140*l.*, payable quarterly, and an assignment by H. to the defendant, the plaintiff proved an agreement (signed by himself only) for a lease of the premises by him to H., for seven years, at 140*l.* a year; that no lease had been actually executed, but that H. had entered into possession shortly after the date of the agreement, and had paid two quarters' rent, at the rate of 140*l.* a year:—Held, that this was sufficient evidence of a tenancy from year to year, as stated in the declaration, and in which H. had an assignable interest. *Ib.*

The receipt of rent may be explained so as to rebut the implication arising out of payment of a yearly tenancy. *Doe d. Lord v. Crugo*, 6 C. B. 90; 12 Jur. 705; 17 L. J., C. P. 263.

By a memorandum, dated 23d June, 1842, made between A. as agent for and on behalf of the churchwardens of the parish of St. M. (not naming them), of the one part, and B. of the other part, it was agreed that the

churchwardens should grant a lease to B. for twenty-one years from Midsummer-day then next, under the clear yearly rent of 80*l.*, and B. agreed to accept such lease; and that, until such lease should be granted, the yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease had been executed:—Held, that the tenancy thereby created was a tenancy from year to year. *Doe d. Bailey v. Foster*, 3 C. B. 215; 15 L. J., C. P. 268.

—by occupying under a void lease.]—In 1786 a dean and chapter and P. granted a lease of premises for ninety-nine years, reserving a rent to the dean and chapter and another rent to P. This lease purported to be made in pursuance of leasing powers given by a private statute, but was in fact not in accordance with them. The rents reserved by the lease had been from time to time regularly paid to and received by the successive deans and chapters, and to and by P. and his representatives. *Quære*, whether the lease was void or only voidable? but held, that if voidable, it had been set up by acceptance of rent by each successive dean and chapter; and if void, the payment and receipt of rent were evidence from which a demise from year to year by the dean and chapter would be presumed. *Doe d. Pennington v. Tuniere*, 12 Q. B. 998; 13 Jur. 119; 18 L. J., Q. B. 49.

By an agreement in writing made on the 17th December, 1850, the plaintiff agreed to let to the defendant premises for a term of three years from the 25th December inst. The defendant occupied under this agreement during the three years, and paid the rent reserved. The plaintiff, without giving notice to quit, brought ejectment:—Held, that though the lease, not being by deed, was void by 8 & 9 Vict. c. 106, s. 3, the defendant became tenant from year to year, subject to the terms of the agreement, and that his interest expired at the end of the three years without a notice to quit. *Tress v. Savage*, 4 El. & Bl. 36; 23 L. J., Q. B. 339; 18 Jur. 680.

Where a party became tenant for a period exceeding three years, under a lease void at law, as not being made by deed under 8 & 9 Vict. c. 106, s. 3, and the receipts given to him for rent which he had paid for two years, stated the rent to be payable in advance:—Held, that he became a yearly tenant, on the terms of paying the rent in advance. *Lee v. Smith*, 9 Exch. 602; 23 L. J., Exch. 198.

By an agreement, expressed to be made by a corporation by their agents on their behalf and the defendant, the corporation agreed to let to the defendant and the defendant to take certain premises for three years; and the defendant also agreed to put and maintain the premises in tenantable repair, and to deliver them up at the end of the term. The agreement was executed by agents of the corporation and by the defendant, but the corporation seal was not affixed. The defendant occupied for the term, and held over afterwards, paying the rent received:—Held, that, although the

agreement was not under seal, the occupation and payment of rent admitted a tenancy from year to year under the corporation, and that on such tenancy being determined by regular notice to quit, the defendant was liable on an implied promise to deliver up the premises in tenantable repair. *Ecclesiastical Commissioners of England v. Merrill*, 38 L. J., Exch. 93; 4 L. R., Exch. 162; 17 W. R. 676; 20 L. T., N. S. 573.

A. sold to B. an estate in fee simple, expressly subject to a lease, which purported to have been granted by A.'s predecessor in title. The lease was in fact invalid:—Held, that the receipt by A., from the persons in possession under the invalid lease, of a rent of inadequate amount, purporting to be paid under the invalid lease, did not create a tenancy from year to year. *Smith v. Widdlake*, 25 W. R. 53.—C. A.

As to what occupation of premises gives rise to a mere tenancy at will,—see this title, XVII.

## 2. Nature and Incidents of the Relation; and Rights and Liabilities of the Parties.

**Nature of tenancy from year to year.]**—A tenant from year to year has a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it. *Cattley v. Arnold*, 1 Johns. & H. 651.

A tenancy from year to year is considered as recommencing every year. *Tompkins v. Lawrence*, 8 C. & P. 729—Patteson.

A tenancy from year to year is not to be considered as a continuous tenancy, but as recommencing every year. *Gandy v. Jubber*, 10 Jur., N. S. 652; 33 L. J., Q. B. 151; 5 B. & S. 78. But see, to the contrary, *Cattley v. Arnold*, 1 Johns. & H. 651, cited *supra*; *Pike v. Eyre*, 9 B. & C. 909; 4 M. & R. 661; and *Hayes v. Fitzgibbon*, 4 Ir. R., C. L. 500, 506, 507.

If a tenant enters in the middle of a quarter, and afterwards pays up to the beginning of a succeeding regular quarter, from which time he pays half-yearly, his tenancy commences from that regular quarter-day to which he paid up. *Doe d. Holcombe v. Johnson*, 6 Esp. 10—Ellenborough.

A demise by a tenant from year to year to another, also to hold from year to year, is in legal operation a demise from year to year during the continuance of the original demise to the intermediate landlord, and is properly so described in pleading, although at the time of making the contract no such qualification is mentioned. *Pike v. Eyre*, 9 B. & C. 909; 4 M. & R. 661.

A tenancy for "a year certain" is "less than a tenancy from year to year," because:—

Per Dowse, B.—A tenancy from year to year is a tenancy for a year certain, and every year afterwards it is a springing interest arising upon the first contract, and parcel of it, so that if the lessee occupies for a number of years, these years, by computation from

the time past, make an entire tenancy for so many years, and after the commencement of each new year it becomes one entire lease certain for the year past and also for the year entered upon, so that it is not a reletting after the commencement of the second and subsequent years. *Wright v. Tracey*, 8 Ir. R., C. L. 478—Exch. Cham.

If a tenant from year to year demises for a term of years, and the original tenancy from year to year lasts beyond that term, such a demise is not an assignment, but there is a reversion.—Deasy, B.

A tenancy for "a year certain" is not "less than a tenancy from year to year," because:—

Per Fitzgerald, J.—A tenancy from year to year is legally and technically a tenancy for one year certain and no more, but to which is super-added, by construction of law, that if neither party expresses his will to determine or give up at the end of the year, then it shall continue for another year. *Ib.*

Per Fitzgerald, B. (and adopted by White-side, C. J.)—A tenancy from year to year, in the uncertainty of its duration, still retains its character of a tenancy at will; but, by reason of judicial decisions, the will cannot be determined before the end of the first year at least, and thus the tenancy becomes certain for a year. *Ib.*

Per Palles, C. B.—The necessary duration of a tenancy from year to year in the abstract is a term fixed and certain, that is, the term of one year. *Ib.*

The non-payment of rent for the space of sixteen years, and no demand being proved to have been made, is of itself sufficient evidence to presume the determination of a tenancy from year to year. *Stagg v. Wyatt*, 1 Arn. 327; 2 Jur. 892.

A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least. *Doe d. Clarke v. Smarridge*, 7 Q. B. 957; 9 Jur. 781; 14 L. J., Q. B. 327.

**Use and enjoyment of the premises.]**—When a party enters into possession of a farm, and pays rent under an agreement for a lease, containing divers covenants to cultivate, pay rent, &c., he is bound by all the covenants in the agreement applicable to a tenancy from year to year; and therefore, where the agreement stipulated for the lease to contain a condition for re-entry if the tenant should grow two successive crops of white corn without fallow, he might be ejected without notice if he committed a breach of this covenant. *Doe d. Thompson v. Amey*, 4 P. & D. 177; 12 A. & E. 476.

A covenant in a lease for years, ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres) at the seed-time next after the end of the

term, and leave the standing thereof till the harvest then next following rent-free, with the use of the premises for threshing, &c. till a day named, is a term which may be made incident to a tenancy from year to year. *Hyatt v. Griffiths*, 17 Q. B. 505.

An agreement that an outgoing tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year. *Brocklington v. Saunders*, 13 W. R. 46—Q. B.

A tenant who had been let into possession under an instrument, which did not amount to a present lease, and had paid rent under the agreement, was held liable for the mismanagement of the farm, under a count stating the premises to have been demised to him. *Tempest v. Rawling*, 13 East, 18.

A term contained in a demise for a period exceeding three years to keep open a shop, and use the best endeavors to promote the trade of it, is a term applicable to a tenancy from year to year. *Sanders v. Karnell*, 1 F. & F. 856—Channell.

A tenant from year to year, who has been evicted by the reversioner after the determination of the interest of the landlord, cannot maintain an action upon an implied covenant for quiet enjoyment against his landlord. *Penfold v. Abbott*, 11 W. R. 169; 7 L. T., N. S. 384; 32 L. J., Q. B. 67; 9 Jur., N. S. 517.

A tenant from year to year, equally with a tenant having a larger interest, is bound to make proper inquiries into his landlord's title, and he is affected with the consequences of not doing so. *Wilson v. Hart*, 12 Jur., N. S. 460; 14 L. T., N. S. 499; 1 L. R., Ch. 463; 35 L. J., Chanc. 569—L. J.

**Repairs.]**—A tenant from year to year is only bound to fair and tenantable repairs, so far as to prevent waste or decay of the premises, and not to substantial and lasting repairs, such as new roofing. *Ferguson v. —*, 2 Esp. 590—Kenyon.

And not being liable to general repairs, he is only bound to use the premises in a husbandlike manner, but no further. *Horsefall v. Mather*, Holt, 7—Gibbs.

A tenant from year to year of a house is only bound to keep it wind and water-tight. A tenant who covenants to repair is to sustain and uphold the premises; but that is not so with a tenant from year to year. *Anworth v. Johnson*, 5 C. & P. 239—Tenterden.

A tenant from year to year is not bound to do substantial repairs. *Leach v. Thomas*, 7 C. & P. 328—Patteson.

A tenant from year to year is not liable for permissive waste, and is not liable to make good mere wear and tear of the premises. *Torriano v. Young*, 6 C. & P. 8—Taunton. See *Martin v. Gilham*, 2 N. & P. 568.

A devised estates to B. for life; the devise contained a limited power of leasing. The devisee leased part of the demised premises for a term beyond the limit appointed. The lease contained the usual covenants to repair,

and was afterwards assigned to the defendants, who, for several years, remained in possession, and paid the rent to the expiration of the term:—Held, that although the lease was void, the defendants held as tenants from year to year under the covenants of the lease, and were liable to repair up to the end of the term. *Beale v. Sanders*, 3 Bing. N. C. 850; 5 Scott, 58; 3 Hodges, 147; 1 Jur. 1083.

The jury having given damages (under 20L.) in an action by his landlord against a tenant for an injury to the former, arising from the tenant quitting premises occupied by him as tenant from year to year without having done repairs he was bound to do, the court refused to disturb the verdict, although it appeared that the larger portion of the repairs required ought to have been done by the landlord himself. *Woods v. Pope*, 1 Scott, 536; 1 Bing. N. C. 467; 6 C. & P. 783.

If a tenant, who is bound to repair, leaves, and at the end of the tenancy the premises are out of repair, the jury may give the landlord, in an action against the tenant, not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises while they were undergoing repair. *Id.*

As between the landlord and tenant of premises let from year to year, there is no obligation upon the former to do substantial repairs in the absence of an express stipulation to that effect. *Gott v. Gandy*, 2 El. & Bl. 845; 2 C. L. R. 392; 18 Jur. 310; 23 L. J., Q. B. 1.

The defendants having for several years as assignees, under a void lease, paid the rent reserved, and not having re-assigned:—Held, liable to repair to the end of the term according to the covenant in the lease. *Beale v. Sanders*, 3 Bing. N. C. 850; 5 Scott, 58; 3 Hodges, 147; 1 Jur. 1083.

When a tenant enters a house under an unsealed agreement to let for a term of more than three years, and occupies and pays rent till the end of the term, he is during the whole term a tenant from year to year, subject to all those stipulations in the agreement which are applicable to such a tenancy, and may be sued for the breach of any of them, e. g., one binding him to paint in the last year of the term. *Martin v. Smith*, 43 L. J., Exch. 42; 9 L. R., Exch. 50; 22 W. R. 336; 30 L. T., N. S. 268.

By an agreement not under seal, the landlord agreed to let to the tenant, and the tenant to take of him, a house and premises for seven years, upon the terms that he would, in the last year of the term, paint, grain and varnish the interior, and also whitewash and color. The tenant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, graining, and varnishing the interior, and whitewashing and coloring, in the seventh year:—Held, that he must be taken to have occupied on the terms that, if he should continue to occupy during the whole

period of seven years, he would do those things which were by the agreement to be done in the seventh year; and that he was therefore liable. *Id.*

**Rent.**—The defendant agreed by parol to rent a house as tenant from year to year, for the residue of a term, which was three years and three quarters; he held for three years and one quarter, and quitted:—Ruled, that though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the residue of the term. *Savage v. Dupuis*, 3 Taunt. 410.

A party occupied premises under an agreement for three years, at 45L. a year, which expired at Midsummer, 1826. He did not then go out, nor did his landlord take any steps to compel him; but, at Michaelmas following, gave him notice to quit at Lady-day, 1827, or pay the rent of 50L. a year. He continued in, but refused to pay any more than 45L. rent:—Held, that, under the circumstances, he must be taken to have acquiesced in the new proposal, and was bound to pay the rent of 50L. *Roberts v. Hayward*, 3 C. & P. 432.

A party was the tenant from year to year of a house and premises, at a rent payable half yearly, on the 1st April and the 1st October. The premises being required for the purposes of a railway, the railway company, in pursuance of a power given by their act of parliament, gave the tenant six months' notice to quit, which expired in the middle of a half year, viz., on the 28th July. The tenant gave up possession to the company accordingly at the expiration of six months, without obtaining or requiring compensation for his interest in the premises, which he was entitled to under the act:—Held, that he was liable for the rent of the half year ending on the following 1st October. *Wainwright v. Ramsden*, 5 M. & W. 602; 1 Railw. Cas. 714.

The rule that a tenant holding over, after the expiration of his lease, without entering into a new contract, continues to hold, upon the terms of the lease, so far as they are applicable to a tenancy from year to year, applies to a proviso for re-entry for non-payment of the rent. *Thomas v. Pucker*, 1 H. & N. 669; 3 Jur., N. S. 143; 26 L. J., Exch. 207.

A landlord agreed to let, and a tenant to take, an office from the 20th of September, 1869, at the yearly rent of 20L., payable quarterly in advance. The agreement alluded more than once to the term thereby created, and provided that in case the term should be determined otherwise than by effluxion of time or by legal notice, then the tenant should pay to the landlord 5L., equivalent to one quarter's rent, as and by way of liquidated and ascertained damages, and to be recoverable as such by the landlord. The tenant, without any notice, gave up possession of the premises before the 20th September, 1870, having paid in advance all rent for the year ending on that day:—Held, that the terms of



the agreement created a yearly tenancy, and that the landlord was entitled to recover 5*l.* from the tenant for the rent due on the 29th September in advance. *Florence v. Robinson*, 24 L. T., N. S. 703—C. P.

A tenant from year to year—evicted by a civil bill decree, but still in actual occupation—entered into an agreement with the landlord, by which it was agreed that he should thenceforth be tenant from year to year at a rent to be ascertained by three persons named; those persons having declined to determine the amount of the rent, and the tenant having refused to pay an increased rent demanded by the landlord, the latter took possession under the decree:—Held, that the tenant was entitled to maintain trespass against the landlord. *M'Creech v. McGough*, 7 Ir. R., C. L. 236—Exch.

**Assignment of reversion.**—A reversion of a tenancy from year to year cannot pass without deed. *Brawley v. Wade*, M'Clel. 664.

**Death of tenant.**—In a case of tenancy from year to year, the personal representatives of the tenant have the same interest in the land which he had. *Doe d. Shore v. Porter*, 3 T. R. 13. S. P., *James v. Dean*, 15 Ves. 241; *Parker d. Walker v. Constable*, 3 Wils. 24. And see *Mackay v. Mackreth*, 3 T. R. 13, n.; *Gulliver d. Tasker v. Burr*, 1 W. Bl. 596.

— of landlord.]—A tenancy from year to year of glebe land is determined by the death of the incumbent. *Doe d. Kirby v. Carter*, R. & M. 237—Littledale.

Where a tenancy from year to year has been originally created by the owner of the fee, it is not determined by the death of a tenant for life, claiming under the original lessor, and 11 Geo. 2, c. 19, s. 15, does not therefore apply to such a case. *Cattley v. Arnold*, 1 Johns. & H. 651; 5 Jur., N. S. 361; 23 L. J., Chanc. 352.

A tenancy from year to year under a middleman, whose own interest in the premises is derived under a lease for lives, does not, where the middleman has obtained a new lease, terminate, without notice to quit, upon the death of the last surviving life in the original head lease, even though the new head lease contains a covenant against subletting. *Hayes v. Fitzgibbon*, 4 Ir. R., C. L. 500—Exch.

**Surrender of tenancy.**—A tenancy from year to year cannot be determined, so as to bar the interest of the tenant's creditors, unless there is either a legal notice to quit, or a surrender in writing. *Doe d. Read v. Ridout*, 5 Taunt. 519.

A parol agreement between a landlord and a tenant from year to year, that another tenant should be substituted in his place, who was accordingly substituted, is a sufficient surrender according to the Statute of Frauds to determine the former tenancy. *Stons v. Whiting*, 2 Stark. 285.

But it is not sufficient if the third person

does not take possession. *Taylor v. Chapman*, Peake's Add. Cas. 19—Kenyon.

A verbal agreement to lease a ferry for a year may be put an end to by a verbal agreement before the expiration of the year. *Peter v. Kenial*, 8 B. & C. 703.

A., being tenant from year to year, underlet the premises to B., and the original landlord, with the assent of A., accepted B. as his tenant, but there was no surrender in writing of A.'s interest; rent being subsequently in arrear, the landlord distrained on B.'s goods:—Held, that these circumstances constituted a valid surrender of A.'s interest by act and operation of law within the Statute of Frauds. *Thomas v. Cook*, 2 B. & A. 119; 2 Stark. 408. But see *Matthews v. Sawell*, 2 Moore, 262.

Where premises had been let to B. for a term determinable by a notice to quit, and pending such term C. applied to A., the landlord, for leave to become the tenant instead of B., and, upon A. consenting, agreed to stand in B.'s place, and offered to pay rent:—Held, that (though B.'s term had not been determined either by a notice to quit, or a surrender in writing) A. might maintain an action for use and occupation against C., and that the latter could not set up B.'s title in defense to that action. *Phipps v. Southorpe*, 1 B. & A. 50.

Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease to be granted to him and another jointly, and both entered upon and occupied the premises jointly:—Held, that the first tenancy was determined, though the lease was never executed pursuant to the agreement. *Hamerton v. Stead*, 5 D. & R. 206; 3 B. & C. 478.

Where A., at the request of B., his yearly tenant, accepted C. as tenant in his stead, who proved to be insolvent, and it appeared that B., when he proposed C. to A., knew that C. had compounded with his creditors, but did not communicate the fact to A.:—Held, that the suppression of such a fact was a fraud in B., which rendered him still liable to A. for the rent. *Bruce v. Ruler*, 2 M. & R. 8.

Two persons being tenants from year to year of two closes under different lessors, agreed to exchange them; both the lessors had the same steward, to whom the arrangement was mentioned; he expressed his assent to it:—Held, that this amounted to evidence of new demises of the respective closes, and of a surrender by operation of law of the previous interests of the tenants. *Bees v. Williams*, 1 Gale, 332; 2 C., M. & R. 581; 1 Tyr. & G. 23.

The defendant held premises, as tenant to the plaintiff, under a memorandum of agreement for three years. He left the premises in the first year. On application being then made by the plaintiff for rent due, the defendant, by letter, authorized the plaintiff to let the premises to any one else. The plaintiff then let them to another tenant for three

years, and gave him possession:—Held, in an action for rent on the original agreement, that these facts constituted a surrender by operation of law. *Nickells v. Atherstone*, 10 Q. B. 944; 11 Jur. 778; 16 L. J., Q. B. 371.

A., being tenant from year to year to B., died, leaving his widow in possession. C., some time after, took out letters of administration to the deceased, and the widow continued in possession, paying rent to B., with the knowledge of C., who never objected to such payment, or made any demand of rent:—Held, that there was no evidence of a surrender by operation of law, so as to create the relation of landlord and tenant between B. and the widow. *Doe d. Hull v. Wood*, 14 M. & W. 682; 9 Jur. 1060; 15 L. J., Exch. 41.

The plaintiffs declared that they were tenants of chambers to H., at a certain rent, and that in consideration that they would let the chambers to the defendant, he promised to pay the same rent to H., and that if he did not do so he would indemnify the plaintiffs. The declaration averred the letting to the defendant on such terms, and that the defendant did not pay to H. rent which afterwards became due, nor indemnify the plaintiffs, who paid it. The defendant pleaded, first, that before rent became due the tenancy of the defendant to the plaintiffs was ended by surrender and operation of law; and secondly, that before rent was due the defendant agreed with the plaintiff C., on behalf of himself and the other plaintiff, to deliver up possession of the chambers to the plaintiff C., and that the defendant did accordingly so deliver up possession:—Held, that the pleas were good. *Coles or Smith v. Lovell*, 1 L. M. & P. 794; 10 C. B. 6; 15 Jur. 250; 20 L. J., C. P. 57.

To an action for a quarter's rent from Lady-day to Midsummer, the defendant pleaded that by agreement between the plaintiffs, executors of A., and the defendant, the defendant agreed to take of the plaintiffs, executors, the premises; that it was afterwards agreed between them and B., that B. should become tenant to the plaintiffs from Lady-day, and that the defendant should be discharged from liability to subsequent rent; that the defendant accordingly gave up possession to B., and the plaintiffs accepted him as tenant:—Held, that the plea was not proved by evidence that one of the plaintiffs had so agreed to accept B. as tenant in lieu of the defendant. *Turner v. Hardey*, 9 M. & W. 770.

A plea to a declaration in trespass *quare clausum fregit* stated that B. was seized in fee of the locus in quo, and that the plaintiff held it of him as tenant from year to year, upon terms that B. or his in-coming tenant, at any time after a certain day, when the plaintiff should have received notice to quit, should have liberty to enter and plow the arable land held by the plaintiff. Averment of notice to quit:—Held, agreed to let, and the defendant take, the premises as tenant

from year to year from and after the expiration of the plaintiff's tenancy; and that the defendant thereupon became the in-coming tenant, and entered after the certain day to plow the land:—Held, that the plea was good, inasmuch as enough appeared to warrant the allegation that the defendant was the in-coming tenant, which might have been traversed. *Milner v. Myers or Gordon*, 8 Q. B. 615; 10 Jur. 472; 15 L. J., Q. B. 158.

A tenancy from year to year, created by parol, is not determined by a parol license from the landlord to the tenant, to quit in the middle of a quarter, and the tenant's quitting the premises accordingly. *Mollett v. Brayne*, 2 Camp. 103—Ellenborough. S. P., *Thompson v. Wilson*, 2 Stark. 379.

One being in possession of premises as tenant from year to year, under an agreement for a lease for fourteen years, and the rent being in arrear, entered into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that he had agreed to quit and to deliver up the premises to them, and that a valuation should be made of his effects on the premises by two indifferent persons, and that the same should in the meantime be assigned and delivered up to a trustee for the landlords, he assigned his effects on the premises to such trustee, to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant:—Held, that the tenant not having in fact quit the possession, nor any valuation having been made of his effects, such agreement to quit being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year. *Coupland v. Maynard*, 12 East, 184.

Where, on a tenancy from year to year, determinable at a quarter's notice, the lessor licenses the tenant to quit in the middle of a quarter, and the tenant quits, and the lessor accepts possession, this is a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter. *Grimman v. Leggo*, 8 B. & C. 324; 2 M. & R. 438.

A tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year. Before the next half-year expired, the landlord let the premises to another tenant, who occupied the same:—Held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant. *Hall v. Burgess*, 5 B. & C. 332; 8 D. & R. 67.

Where a tenant from year to year, by a Lady-day holding, agreed by parol with his landlord's agent to quit at the ensuing Lady-day, which was within half a year, and the premises were re-let by auction, at which the tenant attended and bid, but the new tenant

was not let into possession:—Held, that the tenancy was not determined; there not having been either a sufficient notice to quit, or a surrender by operation of law, within the Statute of Frauds, 29 Car. 2, c. 3, s. 3. *Doe v. Huddleston v. Johnston*, 1 M'Clel. & Y. 141. And see *Johnstone v. Huddleston*, 4 B. & C. 922; 7 D. & R. 411; *Doe d. Murrell v. Milward*, 3 M. & W. 328; 1 H. & H. 79.

A party who occupied a house as tenant from year to year, entered into the following agreement with his landlord: "1831, September 2. S. S. (the tenant) purchased an estate in the parish of Corbeg, bought of R. G. (the landlord) at the sum of 100*l*. Received on account 10*s*. Mr. R. G. is willing to let the sum lie, by paying four per cent."—Held, that as there was an implied condition in the contract that the landlord should make out a good title, the agreement for the purchase did not operate as a surrender of the tenancy by operation of law. *Doe d. Gray v. Stanion*, 1 M. & W. 695; 2 Gale, 154.

As to surrender in general,—see this title, XII.

**Notice to quit.**—A notice to quit must be given previously to bringing ejectment, whenever there is an existing tenancy from year to year. *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717; *Doe d. Martin v. Watts*, 7 T. R. 83; 2 Esp. 501; *Doe d. Moore v. Lawder*, 1 Stark. 308; *Doe d. Warner v. Browne*, 8 East, 166.

An agreement for a lease at a certain rent, containing a stipulation that the lessor should not turn out the tenant so long as he paid the rent, and did not sell, &c. any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being creatable by parol, or, if it operates as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit. *Doe d. Warner v. Browne*, 8 East, 166.

A tenant in tail having received an ancient rent of 1*l*. 18*s*. 6*d*. from the lessee in possession, under a void lease granted by the tenant for life under a power, the rack-rent value of which was 30*l*. a year, cannot maintain an ejectment, at least after laying his demise on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser after such recognition of a lawful possession either in the relation of tenant, or at least as continuing by sufferance till notice. *Denn d. Brune v. Rawlings*, 10 East, 261. And see *Doe d. Brune v. Prideaux*, 10 East, 158; and *Whiteacre d. Boul v. Symonds*, 10 East, 18.

An agreement for a lease contained a stipulation that the tenancy should continue until after two years' notice to quit had been given. The tenant occupied the farm, paid rent for some years, but no lease was executed:—Held, that it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held. *Tooker v. Smith*, 1 H. & N. 732.

If, at the end of a year, when the tenancy

is from year to year, the landlord accepts another person as tenant in the room of the former tenant, without any surrender in writing, such acceptance will be a dispensation of any notice to quit. *Sparrow v. Hawkes*, 2 Esp. 505—Kenyon.

When a tenant from year to year dies, his personal representatives have the same interest in the land which he had, and are therefore entitled to the same notice to quit. *Doe d. Shore v. Porter*, 3 T. R. 13. S. P., *Parker d. Walker v. Con'table*, 3 Wils. 24. And see *Mackay v. Mackreth*, 3 T. R. 13, n.; *Gulliver d. Tasker v. Burr*, 1 W. Bl. 596.

A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession:—Held, that the landlord might recover in ejectment, unless it was shown that some other person, and not the widow, was the executor or administrator of the tenant; and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix. *Rees v. Perrot*, 5 C. & P. 230—Littledale.

An under-tenant (who was tenant from year to year), after the expiration of the tenant's lease, being acquainted with the circumstance, held on under the new tenant for one quarter, and paid him the same rent he had been accustomed to do. He then gave up the premises, not having given any previous notice:—Held, that there was no evidence of a new continuing tenancy, and that, therefore, the under-tenant was not obliged to give a notice to quit. *Freeman v. Jury*, M. & M. 19.

In the case of a tenancy from year to year, there must be a half-year's notice to quit, ending at the expiration of the year. *Right d. Flower v. Darby*, 1 T. R. 159. And see *Doe d. Puddicombe v. Harris*, 1 T. R. 161, n.

In all cases the notice to quit must have reference to the terms of the letting; therefore, in ejectment for a house, where the defendant had taken the house by the month:—Held, that a month's notice to quit was sufficient to entitle the plaintiff to recover. *Doe d. Parry v. Hazell*, 1 Esp. 94—Kenyon.

A tenancy from year to year may be determined at the end of the first year by a six months' notice to quit. *Doe d. Hogg v. Taylor*, 1 Jur. 960.

If a tenant from year to year gives notice to quit, not expiring with the year, the landlord, if the notice is in writing and signed by the tenant, may, if he pleases, treat this irregular notice as a surrender of the tenancy. *Allenburgh v. Peaple*, 6 C. & P. 212—Parke.

A verbal acquiescence by a landlord on receiving from a tenant from year to year a notice to quit, determining within the six months, is not sufficient. *Bessell v. Landsberg*, 7 Q. B. 638; 9 Jur. 576; 14 L. J., Q. B. 355.

To determine a tenancy from year to year, commencing on the 25th March, the landlord served, previously to the 25th of March, 1872, i. e., six months before the last gale day of the calendar year, a notice to quit and deliver up

possession on the 20th of September, 1872, but by the notice informed the tenant that he did not require the possession on that day unless the tenancy then commenced:—Held, that the notice did not determine the tenancy until the 25th of March, 1873, and that an ejectment brought before that day could not be sustained. *Ferguson v. Daly*, 8 Ir. R., C. L. 216—Exch.

A defendant leased about twenty acres of land for five years, at a yearly rent, from the owner in fee simple, under a memorandum of agreement, and immediately afterwards sublet about six acres, part of the premises, to another person on a yearly tenancy. At the conclusion of the term the defendant continued possession of the whole, and during the first year after the term expired the lessor conveyed to the plaintiff the six acres which the defendant had sublet, and agreed with the plaintiff, but without the consent of the defendant, as to the amount of rent to be apportioned to this part of the premises out of the rent which the defendant paid. Although notice of the conveyance and agreed apportionment of rent was afterwards given to the defendant, he never recognized the plaintiff as his landlord, but continued to pay rent for the whole premises to his lessor, who handed over the agreed portion to the plaintiff. The plaintiff gave the defendant notice to quit the sublet premises six months before the expiration of a year's tenancy; and the defendant forwarded this notice, with a further notice to quit from himself, to his sub-tenant. At the end of the year the sub-tenant gave up possession of his premises to the plaintiff, but the defendant wrote to the latter claiming to hold the same as tenant to the original lessor, and requiring possession. The defendant then did certain acts upon the premises which had been in his sub-tenant's occupation, for which the plaintiff brought an action of trespass:—Held, that his notice to the defendant to quit part only of the premises demised to him was invalid; that his passing on the notice to his tenant did not preclude his disputing it; and that the action could not be maintained. *Prince v. Evans*, 29 L. T., N. S. 835—Q. B.

A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted, and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and on possession being demanded at Midsummer, refused to quit the premises:—Held, that the tenancy was not determined by the notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing within the Statute of Frauds, the first being to take effect in futuro. *Doe d. Murrell v. Milward*, 3 M. & W. 328; 1 H. & H. 79.

But a second notice to the defendant to quit at Michaelmas, 1811, was a waiver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit

at Michaelmas, 1810. *Doe d. Brierly v. Palmer*, 10 East, 53.

Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods), for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to render him liable for another quarter. *Gray v. Bompas*, 11 C. B., N. S. 520; 5 L. T., N. S. 841.

When a person, who held as tenant from year to year, has been permitted to remain undisturbed in possession after the expiration of a notice to quit, the question, whether there is a subsisting tenancy from year to year, is one of fact for a jury. *Vance v. Vance*, 5 Ir. R., C. L. 803—C. P.

A tenant from year to year of a stone quarry in Yorkshire received from his landlord six months' notice to quit. The tenant claimed the right, under an alleged custom of the district, to be allowed to continue in possession a reasonable time after the expiration of the notice, to enable him to get the stone which he had "bared." At the expiration of the notice, the landlord brought ejectment against the tenant, who thereupon filed a bill to restrain the action, and setting up the custom as against the landlord:—Held, that the evidence failed to prove the existence of the custom as alleged; and that, even if it had existed, the proper remedy of the tenant would have been at law. *Vint v. Constable*, 25 L. T., N. S. 324—V. C. M.

By a notice to quit, given to a tenant from year to year, his tenancy is determined on the expiration of the current year, and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one. *Tyuleur v. Wildin*, 3 L. R., Exch. 303; 16 W. R. 1018; 18 L. T., N. S. 655; 37 L. J., Exch. 173.

As to notices to quit, in general,—see this title, XIV., 1.

#### XVII. WEEKLY TENANCIES.

**How created.]**—Where the only evidence of the terms on which a furnished house was taken, was the following receipt put in by the landlord:—"Received from C. 126*l*. for rent of furnished house, from the 8th May to the 1st August, 1846:"—Held, that the jury might properly infer that the tenancy was weekly. *Towns v. Campbell*, 8 C. B. 921; 16 L. J., C. P. 104.

**Amount of rent recoverable under execution.]**—[By 7 & 8 Vict. c. 96, s. 67, no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more

*than the arrears of rent accruing during four such terms or times of payment.]*

**Notice to quit.**—In the case of an ordinary weekly tenancy, a week's notice to quit is not implied as part of the contract, unless there is a usage to that effect; but, in the absence of such usage, a weekly tenant who enters on a fresh week may be bound to continue until the expiration of that week, or pay the week's rent. *Huffell v. Armitstead*, 7 C. & P. 56—Parke.

A tenancy from week to week can only be determined by a week's notice. *Jones v. Mills*, 10 C. B., N. S. 788; 8 Jur., N. S. 387; 31 L. J., C. P. 66.

A notice to a weekly tenant, whose tenancy commenced on a Wednesday, to quit on Friday, provided his tenancy commenced on a Friday, or otherwise, at the end of his tenancy, next after one week from the date of the notice, is sufficient. *Doe d. Campbell v. Scott*, 4 M. & P. 20; 6 Bing. 362.

Under an agreement for a demise for a year, the rent to be paid weekly, and to have a month's warning, if no default was made in payment of the rent, but which agreement the lessor afterwards refused to execute, and the tenant paid his rent weekly:—Held, that he was entitled to a month's notice to quit, although the agreement was not executed, and although, if he had been a weekly tenant, a week's notice would have been sufficient. *Doe d. Peacock v. Ruffan*, 6 Esp. 4—Ellenborough.

The defendant had for several years occupied a cottage as tenant from week to week to M. After his death, the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir at law of M., by his agent, demanded the rent, whereupon the defendant said he had received notice from the other party, and would not pay any more rent until he knew who was the right owner:—Held, that this did not amount to a disclaimer or a repudiation of the title of the heir at law, so as to entitle him to eject the defendant without any notice to quit. *Jones v. Mills*, 10 C. B., N. S. 788; 8 Jur., N. S. 387; 31 L. J., C. P. 66.

A stipulation on the occasion of a weekly letting, that, after the expiration of such tenancy by the usual week's notice, the tenant shall have a reasonable time for the removal of his goods, is a valid stipulation, and operates as an extension of the term, so as to give the tenant a right to enter and do what is necessary for such removal. *Cornish v. Stubbs*, 39 L. J., C. P. 202; 5 L. R., C. P. 334; 22 L. T., N. S. 21; 18 W. R. 547.

A weekly tenant continuing in possession several weeks after the expiration of a notice to quit, and a demand made, is not liable to an action for double value under 4 Geo. 2, c. 28, s. 1. *Lloyd v. Prosser*, 2 Camp. 453—Ellenborough.

As to notices to quit in other cases,—see this title, XIV.. XVI.

As to letting of lodgings and furnished apartments by the week,—see this title, XIX.

#### XVIII. TENANCIES AT WILL AND BY SUFFERANCE.

**How created.**—A person who lives in a house rent-free by the sufferance of the owner, is a tenant at will. *Rez v. Collett*, R. & R. C. C. 498. S. P., *Rez v. Jobling*, R. & R. C. C. 525.

The words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will. *Rez v. Fillongley*, 1 T. R. 458.

If an agreement is made to let premises so long as both parties like, and reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called. And though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he is indemnified. *Richardson v. Langridge*, 4 Taunt. 128.

A party who enters into the possession of premises under a paper signed by the owner, undertaking to execute to him a lease of them, is a tenant at will until he pays rent for the premises for either a year or some portion of time having reference to a year; after which he becomes a tenant from year to year. *Braythwaite v. Hitchen*, 10 M. & W. 404; 6 Jur. 976.

But a mere payment of rent, without having reference to a year or some aliquot part of a year, is not sufficient. *Id.*

Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of 5*l.* per cent. per annum on the purchase-money, until the completion of the purchase, which was to be in three months; and the purchase not being then completed, he continued in possession on the same terms:—Held, that this was only a tenancy at will, which might be determined without notice to quit. *Doe d. Thomas v. Chamberlaine*, 5 M. & W. 14.

Proviso in a deed; A. agrees to become tenant to C. and D. of the premises, "at their will and pleasure, at and after the rate of 25*l.* 4*s.* per annum, payable quarterly." A. remained in possession under this agreement for two years, and paid a year's rent, after which C. and D. distrained for four quarters' rent:—Held, that A. was tenant at will, and not from year to year. *Doe d. Bastow or Barrton v. Cox*, 11 Q. B. 122; 17 L. J., Q. B. 3.

A mere permission to occupy constitutes a tenancy at will. *Doe d. Huil v. Wood*, 14 M. & W. 682; 9 Jur. 1060; 15 L. J., Exch. 41.

The doctrine, that a cestui que trust who is in possession of the estate by the consent or acquiescence of the trustee must be regarded

as his tenant at will, only applies where the cestui que trust is the actual occupant; where he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of occupying tenants, he is merely the agent of the trustees. *Melling v. Leak*, 16 C. B. 652; 1 Jur., N. S. 759; 24 L. J., C. P. 187.

The management of an estate was intrusted by the trustees (in fee) to the cestui que trust (for life) as beneficial owner; and the latter, having never been in actual occupation, let C. into possession, who occupied during the life of the cestui que trust, for more than twenty years, without paying rent or acknowledging title:—Held, that a tenancy at will had not been created between the cestui que trust and the trustees, and that C. had therefore acquired a good title, by adverse possession under 3 & 4 Will. 4, c. 27. *Id.*

By indenture of lease of the 26th of June, 1810, between A. of the one part, and B. of the other part, after reciting a former lease, dated 27th of July, 1801, made between W. S. of the one part, and A. of the other part, whereby one undivided moiety of certain lands, and two undivided moieties of other lands, containing eighty acres, were demised by W. and M. S. to A., for the term of forty years, the whole of the lands, containing eighty acres, and the moiety of the other lands, were demised by A. to B. for the remainder of the term of forty years, except the last ten days. A. died in 1813, leaving the plaintiff his real and personal representative, and B. died in 1818, leaving the defendant his personal representative, who continued to occupy the lands demised until the time of the trial. The rent was regularly paid by B. and the defendant to A. and the plaintiff up to Lady-day, 1841, when the lease expired, and in December, 1841, the defendant paid rent for the whole of the eighty acres to M. S. The defendant went into evidence to show that neither A. nor the plaintiff had, in fact, any title to the undivided third part of the eighty acres, but that the whole was in M. S.:—Held, that, at all events, the lease of 1810 established a *prima facie* case of title in the plaintiff, which the defendant must rebut by his evidence; and that the plaintiff had a right to treat the defendant as a tenant at sufferance of the undivided third part of the eighty acres, and to sue him for the use and occupation thereof after the expiration of the lease. *Bayley v. Bradley*, 5 C. B. 396; 16 L. J., C. P. 206.

W. H. died intestate in 1798, seized of a house and land, leaving a widow and an only son (by her), J., fifteen years old. The widow continued to reside on the property, and, about a year after the death of W. H., married the defendant, and resided with him on the premises; J. also remaining with him till 1805, when he went away, but occasionally returned for about a fortnight at a time till 1842. About that time the defendant applied to the lessor of the plaintiff to advance 100*l.* on mortgage of the property, and on that occasion the title-deeds being produced, the solicitor stated that

it was necessary that J., being the heir-at-law of W. H., should execute the conveyance. The defendant accordingly brought J., who executed the mortgage and signed the receipt for the 100*l.*, which was received by the defendant:—Held, that a jury might well presume on the state of facts, that the defendant was tenant at will to J., and that the defendant by his conduct had waived all right to set up the Statute of Limitations, 3 & 4 Will. 4, c. 27, to defeat the right of entry of J. *Doe d. Groves v. Groves*, 10 Q. B. 486; 11 Jur. 558; 16 L. J., Q. B. 297.

Where one who had built a cottage on the waste had, on three occasions, paid sixpence as rent to the person who had bought the adjoining old inclosure:—Held, that it was a proper question for a jury whether there had been an acknowledgment of tenancy. *Doe d. Jackson v. Wilkinson*, 5 D. & R. 273; 3 B. & C. 413.

T., holding pictures of P.'s as a security for an alleged debt, hired rooms of the plaintiff in which to deposit them. P. having died, his administrators contested T.'s claim by a suit in Chancery. Pending the suit, in order to prevent the pictures from being distrained, they petitioned the court to satisfy the plaintiff's rent out of certain funds paid into court in the course of the cause. T.'s claim having been disallowed by the court, the pictures were ordered to be delivered to the administrators, who, in order to obtain them, paid rent to the time of delivery:—Held, that these circumstances did not constitute the defendants tenants to the plaintiff. *Strahan v. Smith*, 4 Bing. 91; 12 Moore, 289.

An under-tenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is quasi a tenant at sufferance; and the mere fact of occupation, coupled with the payment of rent for such time of occupation, does not raise the presumption of a demise for years unless there is some evidence to show an agreement for a demise for the term. *Simkin v. Ashurst*, 1 C., M. & R. 261; 4 Tyr. 781.

A tenant in common of five houses, occupying one of them, joined his co-tenant in the sale of the five, and continued in the occupation of the one for two years afterwards:—Held, that these facts alone were not evidence of a tenancy, and that he could not be sued by the purchaser for use and occupation. *Tew v. Jones*, 13 M. & W. 12; 14 L. J., Exch. 94.

A person who contracts for the purchase of land, and is let into possession by the vendor, but is prevented from completing the purchase by the vendor failing to make a good title, is not liable, in an action for use and occupation in respect of the time of his holding, in the expectation that such good title would be made, and the purchase would be completed. *Winterbottom v. Ingham*, 7 Q. B. 611; 10 Jur. 4; 14 L. J., Q. B. 208.

A contract was made for the purchase of a public-house; 50*l.* were paid as a deposit, 70*l.*

more were to be paid on the landlord's consent being obtained to a change of the tenancy. The purchaser sent some furniture to the house in question, and resided in a part of it; the vendor also still remaining in it:—Held, that the contract was conditional on a valid consent of the landlord being given; and that a verbal consent, afterwards revoked before any change of tenancy in fact had occurred, was not binding; that there had been no partial enjoyment of the object of the contract, and that therefore, on the failure of the condition, the 5*l.* might be recovered as money had and received. *Wrighton or Wright v. Newton*, 2 C., M. & R. 124; 1 Gale, 67; 5 Tyr. 736.

A. having agreed to buy certain lands of B. had paid part of the purchase-money, and was let into possession. B. had not executed any conveyance:—Held, that this was a mere tenancy at will in A., and that if B. had made a demand of possession to determine the tenancy at will, he might recover the lands by ejectment. *Doe d. Hiatt v. Miller*, 5 C. P. 595—Parke.

An occupation under an agreement for the sale of premises, if a title can be made, creates a tenancy. *Doe d. Newby v. Jackson*, 2 D. & R. 514; 1 B. & C. 448.

If, in an agreement for the sale of leasehold premises, to be paid for by installments, it is stipulated that, in default of payment of the installments at specified times, the former installments shall be forfeited, and the vendor shall not be compellable to convey, upon which the purchaser is let into possession, and makes default, he is thenceforth a mere tenant upon sufferance. *Doe d. Moore v. Lawder*, 1 Stark. 308—Ellenborough.

If the vendor of a term, before the whole of the purchase-money is paid, agrees with the purchaser that the latter shall have possession of the premises till a given day, paying the reserved rent in the meantime, and that if he does not pay the residue of the purchase-money on that day, he shall forfeit the installments already paid, and shall not be entitled to an assignment of the lease; the purchaser being thus put into possession, if the residue of the purchase-money is not paid at the day appointed, no tenancy is created, and the vendor may maintain ejectment without any notice to quit, or demand of possession. *Doe d. Leeson v. Sayer*, 3 Camp. 8—Ellenborough.

A party who has been let into the possession of land under a contract of sale which has not been completed, is a tenant at will to the vendor. *Ball v. Cullimore*, 2 C., M. & R. 120; 1 Gale, 96; 5 Tyr. 753.

An occupation under an agreement for assigning a lease, where it was agreed that the assignee should pay the lessee, until the completion of the assignment, at the rate of 10*l.* per year, constitutes the relation of landlord and tenant between the lessee and assignee. *Saunders v. Musgrave*, 6 B. & C. 524; 9 D. & R. 529; 2 C. & P. 294.

So, where a party is let into possession of

land under a contract of purchase, which afterwards goes off, he is liable for use and occupation, at the suit of the vendor, for the period during which he continues in possession after the contract went off. *Howard v. Shaw*, 8 M. & W. 119.

A. agreed with B. that he, A., would on payment of 900*l.*, as thereafter mentioned, grant, sell, and convey to B. the messuages, lands, and premises mentioned; and B. covenanted to pay the sum on or before the 1st January then next, or whenever a good title to the messuages, &c., should be tendered to him; but it was agreed that if B. should, on or before the 1st January, be desirous that that sum should remain a charge on the premises, then B. might require the same, so that upon completion by A. of the conveyances, B. should execute to A. proper conveyances for securing the 900*l.* on the premises, with interest. Covenant by B. to pay the interest so long as the principal should remain unpaid. Proviso, that, in case the interest should be in arrear thirty days next after the same should have become due, B. should be considered as a tenant to A. of the messuage, lands, &c., from the date thereof, at the yearly rent of 40*l.* 10*s.*, payable on the 16th April and the 16th October, in every year; and it should be lawful for A., his heirs and assigns, to enter and distrain, and to sell and dispose of the distress, or otherwise to deal with the same, in like manner as in distress for rent reserved by lease, to the end that A. might be fully paid and satisfied the interests and costs. B. gave due notice that he would require the purchase-money to remain a charge on the premises for five years; he was let into possession and received the rents, and in July, 1823, became bankrupt, and half-a-year's interest being in arrear for more than thirty days, A. distrained on the tenants then in possession of the premises. The assignees paid the amount of the distress:—Held, that the agreement was substantially an agreement for a purchase of the premises, and that it did not become a lease or an agreement for a lease, by reason of the interest having been in arrear more than thirty days, and of the proviso contained in the agreement; that the unpaid vendor was entitled to have the estate resold, and the produce and interest applied in payment of the purchase-money, and to prove against the estate for the residue; and consequently that the claim for interest was a debt provable under the commission, and therefore barred by the certificate. *Hope v. Booth*, 1 B. & Ad. 498.

If a man enters under a void lease, and pays rent, he is not a disseizor, but a tenant at will. *Denn d. Warren v. Fearnside*, 1 Wils. 170.

So, a parol agreement to lease lands for four years only creates a tenancy at will. *Goodtitle d. Gallaway v. Herbert*, 4 T. R. 680.

So, where one enters under a void lease by a tenant for life, and after his death the

remainderman receives rent. *Doe d. Martin v. Watts*, 7 T. R. 88; 2 Esp. 501. And see *Ludford v. Barber*, 1 T. R. 86.

Yet, if the remainderman receives money as rent after the death of the tenant for life, it is an admission of a tenancy from year to year. *Ib.*

And in such cases the tenant holds under the terms of the lease in all other respects except the duration of time. *Doe d. Rigge v. Bell*, 5 T. R. 471.

No tenancy can be implied under a party who has not the legal estate. *Morgell v. Paul*, 2 M. & R. 303.

As to creation of tenancies for years,—see this title, I., 2; of tenancies from year to year,—see this title, XVI., 1.

**Nature of the possession; disclaimer.]—**The possession of a tenant at will is the possession of the lessor. *Denn d. Warren v. Fearnside*, 1 Wils. 176.

A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase-money, the agent of the lessor applied to him to give up possession; to which he answered "that he had bought the property, and would keep it, and had a friend who was ready to give him the money for it."—Held, that this was no disclaimer; because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. *Doe d. Gray v. Stanion*, 1 M. & W. 695; 2 Gale, 154.

**How tenancy is determined; necessity of notice to quit or demand of possession.]—**A., in 1817, let B. into possession of a farm as tenant at will, and in 1827, A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—Held, that this entry amounted to a determination of the estate at will. *Turner v. Doe d. Bennett* (in error), 9 M. & W. 648—Exch. Cham.

A feoffment, with livery of seisin made on the land, determines a tenancy at will, though the tenant is not present, nor assenting to the feoffment; but the feoffee may maintain trespass against the tenant at will who has been entered on his possession. *Ball v. Cullimore*, 2 C., M. & R. 120; 1 Gale, 96; 5 Tyr. 753.

A letter from the attorney of a lessor to the attorney of a tenant at will, stating that, unless the tenant paid the lessor what he owed him, he would, without delay, take measures for recovering possession of the property, is a sufficient indication of the lessor's will to put an end to the tenancy, and equivalent to a demand of possession previously to the commencement of the action. *Doe d. Price v. Price*, 2 M. & Scott, 464; 9 Bing. 356.

A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord. *Pinhorn v. Bousler*, 8 Exch. 763; 22 L. J., Exch. 206.

If A. is lessor at will, B., lessee at will, C., under-lessee at will; a demand of the possession made upon the premises from the wife of C. is sufficient to entitle A. to maintain ejectment. *Roe d. Blair v. Street*, 4 N. & M. 42.

A party, who defends in ejectment as landlord as to W., and as tenant as to B., cannot take advantage of a defect in the service of a demand of possession, made upon the tenant of B. for the purpose of determining an estate at will. *Ib.*

A tenancy at will is determined by an agreement to purchase. *Daniels v. Davison*, 16 Ves. 252.

Where a party creates a tenancy at will, and afterwards becomes insolvent, the vesting order, with knowledge thereof by the tenant, is a determination of the tenancy; and if the tenant, after such information, continues in possession, he may be treated as a trespasser. *Doe d. Davies v. Thomas*, 6 Exch. 854; 20 L. J., Exch. 367.

Where a person, who has had the keys of a house given him in order that he may see over it, takes the opportunity to bring in his furniture and family, and the landlord afterwards sends for the keys, and, upon the refusal of them, enters himself, and turns out the party and his goods:—Held, that (the jury having found that a tenancy at will had been created) there was ample evidence in the facts to show a determination of the will. *Pullen or Pollon v. Brewer*, 7 C. B., N. S. 371; 6 Jur., N. S. 509.

The defendant occupied land, under parish officers, and had paid rent; they gave an invalid notice to quit at the end of the first year, and, by a lease signed only by two of them, demised to the plaintiff for a term of years, to commence from the end of the defendant's tenancy. Under this lease the plaintiff entered; but the defendant refused to give up certain plants he had himself planted, and subsequently entered and took them away:—Held, that he was liable in trespass; that though the lease was invalid, there was evidence that the plaintiff entered under the authority of all the parish officers, and that therefore the defendant's tenancy being either a tenancy at will or on sufferance, was lawfully determined, and his entry wrongful. *Wallis v. Delmar*, 29 L. J., Exch. 276.

A., having been in possession of a house and land adjoining, as tenant at will to the lord of a manor, was told by a subsequent lord that he must leave. On his refusal to do so, a writ of ejectment was served upon him: it was then verbally arranged that A. should give up part of the land, and retain the house and remaining land during the life of himself and wife:—Held, that these acts amounted to a determination of the tenancy at will, and as a new tenancy at will was thereby created, the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 7, 10 and 14, began to run from that time, and not from the date of the original tenancy. *Locke v. Matthews*, 13 C. B., N. S. 753; 9 Jur., N. S. 874; 11 W. R. 343; 7 L. T., N. S. 824.



One who is put in possession upon an agreement for the purchase of land, cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise. *Right d. Lewis v. Beard*, 13 East, 210.

An agreement between P. and W. for the sale of lands to W., was to be completed on the 25th March; but before the day W. agreed to let to the defendant from that day, and the defendant was let into possession before that day by the consent of P., upon notice to P. that W. had agreed to let to him; on the 29th May, a conveyance was executed as of the 25th March, subject to a term redeemable on payment by W. of purchase-money with interest, with power to P. to enter for default of payment by W.:—Held, that P. might bring ejectment for default of payment, without giving the defendant notice to quit. *Doe d. Parker v. Boulton*, 6 M. & S. 148.

Where J., who was tenant at will to W., died, and the defendant, who was heir at law to J., entered into possession, and claimed the land as his own:—Held, that the devisees of W. might bring an ejectment against the defendant, without giving him notice to quit or demanding possession. *Doe d. Burgess v. Thompson*, 1 N. & P. 215; 5 A. & E. 532.

A minister of a dissenting congregation placed in the possession of a chapel and a dwelling-house by certain persons, in whom the legal estate was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined instantaneously by a demand of possession. He is not entitled de jure before the determination of his tenancy to have a reasonable time for the removal of his furniture. *Doe d. Nicholl v. McKaig*, 10 B. & C. 721. S. P., *Doe d. Jones v. Jones*, 10 B. & C. 718.

Half a year's notice must be given to a tenant at will, or his executor, to quit, or ejectment does not lie. Six months' notice is not sufficient. *Parker d. Walker v. Constable*, 3 Wils. 25.

Where a tenant under lease continues to hold after the expiration of it as a tenant at will, and assigns to another, the tenancy of the assignee will be held to commence at the day on which the original tenancy commenced under the lease, and notice to quit on that day only is good, notwithstanding the assignee came in on a different day. *Doe d. Castleton v. Samuel*, 5 Esp. 173—Ellenborough.

As to notice to quit in cases of tenancies for years,—see this title, XIV.; of tenancies from year to year,—see this title, XVI., 2; of weekly tenancies,—see this title, XVII.

#### XIX. LETTING FURNISHED HOUSES, APARTMENTS AND LODGINGS.

Agents to let.]—[By 24 & 25 Vict. c. 21, ss. 10, 11, 12, 13, an agent for letting furnished houses exceeding the rent or value of 25L. must take out an annual license.]

The plaintiff employed the defendant, as a

house agent, to let a house for her on commission. In an action for introducing an insolvent tenant:—Held, that it was properly left to the jury upon the evidence to say whether it was part of the defendant's retainer to make reasonable inquiries as to the eligibility of the tenant. *Ileys v. Tindall*, 1 B. & S. 296; 9 W. R. 664; 4 L. T., N. S. 403; 80 L. J., Q. B. 362.

It is doubtful whether an agent to let a house has an implied general authority to let persons into possession, but slight evidence will be sufficient to show an express authority. *Slack v. Crewe*, 2 F. & F. 59—Pollock.

As to powers of agents to grant leases, generally,—see this title, I., 1.

Validity of contracts, in general; Statute of Frauds.]—An agreement to occupy lodgings at a yearly rent, payable in quarterly proportions (the occupation to commence on a future day), is an agreement relating to an interest in land within 20 Car. 2, c. 3, Statute of Frauds, s. 4. *Inman v. Stamp*, 1 Stark. 12—Ellenborough.

And a verbal agreement to take ready-furnished lodgings "for two or three years" is a contract for an interest in land, and valid as a lease for not exceeding three years. *Edge v. Stafford*, 1 Tyr. 293; 1 C. & J. 391.

A person who agrees to take furnished lodgings, but does not enter, is not liable to an action for use and occupation. *Id.*

By a parol agreement between the plaintiff, a boarding-house keeper, and the defendant, the defendant agreed to pay for the board and lodging of himself and man, and accommodation for his horse, at the boarding-house, 200L. a year from a fixed day; the agreement to be terminable by a quarter's notice on either side. The plaintiff having sued the defendant for a breach by him of this agreement, in refusing to become an inmate of the boarding-house:—Held, that though the agreement was unwritten, the action was maintainable; for that the contract was not one for any interest in or concerning land. *Wright v. Stuart*, 2 El. & El. 721; 6 Jur., N. S. 867; 29 L. J., Q. B. 164; 8 W. R. 413.

Letting lodgings is not a breach of a covenant not to under-let. *Doe d. Pitt v. Laming*, 4 Camp. 77—Ellenborough.

As to the operation and effect of the Statute of Frauds in respect of leases and agreements for letting, generally,—see this title, I., 3.

Implied terms as to fitness of premises.]—It is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation; if it is not (*e. g.*, where it is greatly infested with bugs), the tenant may quit it without notice. *Smith v. Marrable*, 11 M. & W. 5; 2 D., N. S. 810; 13 L. J., Exch. 223; Car. & M. 479.

Upon the letting of a furnished house for immediate occupation, with an express condition that it is fit for occupation, if it is not so, and is at once given up on that account,

the landlord cannot recover either the rent or for use and occupation. On such a contract, whether express or implied, it is a breach of the condition if the house is so infested and overrun with bugs, as to render it unfit for occupation; and as the condition applies to the whole house, it is a breach if any of the rooms are in that state. But it must appear that the nuisance existed to a serious and substantial extent, and was such as the tenant could not reasonably be expected either to endure or to extirpate. *Campbell v. Wenlock*, 4 F. & F. 716—Cockburn.

A defendant agreed to hire of the plaintiff a house and household furniture, and, at the expiration of the tenancy, to leave the furniture cleaned:—Held, that this contract was supported by proof that the furniture was clean at the time the defendant took possession of it, and that he agreed to leave it as he found it. *Stanley v. Agnew*, 12 M. & W. 827; 13 L. J., Exch. 197.

In an agreement to let a furnished house there is an implied condition that the house shall be fit for occupation at the time at which the tenancy is to begin, and if the condition is not fulfilled the lessee is entitled thereupon to rescind the contract. *Wilson v. Finch Hatton*, 2 L. R., Exch. Div. 836; 46 L. J., Exch. Div. 489; 23 W. R. 537; 36 L. T., N. S. 473.

The defendant agreed to rent the plaintiff's furnished house for three months from the 7th of May, but having at the beginning of the intended tenancy discovered that the house was, owing to defective drainage, unfit for habitation, refused to occupy it. The plaintiff repaired the drains, and on the 26th of May tendered the house in a wholesome condition to the defendant, who refused to occupy or to pay any rent. The plaintiff having sued for the rent, and for use and occupation:—Held, that the state of the house at the beginning of the intended tenancy entitled the defendant to rescind the contract, and that he was not liable for the rent or for use and occupation. *Ib.*

**Punishment of persons letting infected houses.**—[By the Sanitary Law Amendment Act, 1874, 37 & 38 Vict. c. 89, s. 56, if any owner or occupier or person employed to let for hire, or to show for the purposes of letting for hire, any house or part of a house, when questioned by any person negotiating for the hire of such house or part of a house, as to the fact of there being in such house, or having within six weeks previously been therein, any person suffering from an infectious, contagious, or epidemic disease, knowingly makes a false answer to such question, the person so answering falsely shall be guilty of an offence punishable on summary conviction, and, at the discretion of the justices having cognizance of the case, be liable to be imprisoned, with or without hard labor, for a period not exceeding one month, or to pay a penalty not exceeding 20l.]

**Enjoyment and use of premises.**—If a person takes lodgings on the first and second

floors of a house, he has a right to the use of the door-bell, the knocker, and the sky-light of the staircase, and the water-closet, unless it is otherwise stipulated at the time of the taking of the lodgings; therefore, if the landlord deprives the lodger of the use of either, an action lies. *Underwood v. Burrows*, 7 C. & P. 26—Abinger.

As to condition and use of demised premises, in general,—see this title, III., 2.

**Destruction of premises.**—When furnished apartments have been let by a verbal contract at a sum payable quarterly, and the premises are destroyed by fire in the middle of a quarter, an action lies for the use and occupation during the current quarter, until the fire, at a rate proportioned to the time of actual occupation, if it appears that both parties have agreed that the occupier's liability does not continue after the occurrence of the fire; for such agreement negatives the supposition of a demise for a certain time, and shows a contract in respect of the occupation *de die in diem*. *Parker v. Gibbins*, 1 Q. B. 421; 1 G. & D. 10; 5 Jur. 1036.

As to effect of destruction of demised premises,—see also this title, V., 1; VII., 2.

**Rent.**—A. let to B. a furnished house, at a certain rent payable in advance from a certain future day, and agreed that it should be furnished suitably for a school:—Held, that the suitable furnishing of the house was a condition precedent to the right to demand the rent. *Mechelin v. Wallace*, 6 N. & M. 310; 7 A. & E. 54, n.

An owner of a house, having mortgaged it in fee, and continuing in possession, let it as a ready-furnished house to the defendant. He afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished to the defendant by the week, who, after three weeks' occupation, received notice of the mortgagee to pay rent to him:—Held, in an action brought by the assignees for use and occupation of the house and furniture, that they were entitled to recover for the use of the furniture; that the rent of the house and furniture might be apportioned, or if not, that, upon the entry of the mortgagee claiming the house, and having no interest in the furniture, a new agreement might be inferred, to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as compensation for the use of the furniture to the assignees. *Silmon v. Matthews*, 8 M. & W. 827.

A declaration for rent stated a demise of a messuage, land, and premises, with the appurtenances. The proof was a demise of a messuage and land, together with the furniture, utensils, and implements:—Held, that as the rent issued out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of the real property, and therefore there was no variance. *Farewell v. Dickenson*, 6 B. & C. 251; 9 D. & R. 345.

Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant:—Held, that she could not recover rent against the lessee for a subsequent portion of the year, during which the apartments had been unoccupied. *Walls v. Atcheson*, 8 Bing. 462; 11 Moore, 379; 2 C. & P. 208.

But if a tenant quits apartments without giving notice, the landlord may recover the rent, although he has put up a bill in the window for the purpose of letting the apartments. *Redpath v. Roberts*, 3 Esp. 225—Kenyon.

So, if the landlord lights fires in the rooms, or even uses the fires, it will not deprive him of his right to rent. *Griffith v. Hodges*, 1 C. & P. 419—Abbott.

If a landlord of furnished lodgings, by his misconduct, justifies a tenant in an abrupt departure, during a tenancy limited to a specific period, he cannot recover rent for the whole time agreed on, but is entitled to rent for the time during which there has been an actual occupation. *Kirkman v. Jarvis*, 7 D. P. C. 678.

Goods of a tenant's lodger being distrained together with the tenant's, and sold first, after notice from the lodger, and the tenant's goods turning out to be sufficient to satisfy the rent and charges, the lodger is entitled to sue for an excessive distress. *Wilkinson v. Ibbett*, 2 F. & F. 300—Martin.

A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord's rent. *Rickett v. Tullick*, 6 C. & P. 56—Vaughan.

As to right to rent, generally, and remedies for its recovery,—see this title, VII.

As to rights and liabilities of keepers of lodging-houses,—see BOARDING AND LODGING-HOUSE KEEPER.

## Lands Clauses Act.

See PUBLIC COMPANY.

## Larceny.

See CRIMINAL LAW.

## Lease.

I. GENERALLY. See LANDLORD AND TENANT.

II. UNDER POWERS. See POWER.

III. OF ECCLESIASTICAL PROPERTY. See ECCLESIASTICAL LAW.

IV. PROOF. See EVIDENCE.

V. PAROL EVIDENCE TO VARY. See EVIDENCE.

## Leave and License.

I. EVIDENCE OF. See LICENSE.

II. PLEA OF. See TRESPASS.

## Lecturer.

See ECCLESIASTICAL LAW.

## Lectures.

See COPYRIGHT.

## Leet.

See INFERIOR COURT.

## Legacy.

I. SATISFACTION OF DEBTS, 8448.

II. ASSENT OF EXECUTORS, 8451.

III. PAYMENT, 8453.

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VI. VALIDITY AND INTERPRETATION OF BEQUESTS. See WILL.

VII. BEQUESTS TO EXECUTORS. See EXECUTORS AND ADMINISTRATORS.

VIII. RIGHTS AND LIABILITIES OF LEGATEES IN RESPECT OF ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS.

IX. CHARITABLE BEQUESTS. See WILL.

X. DONATIO MORTIS CAUSÂ. See WILL.

XI. LEGACY AND PROBATE DUTY. See WILL.

I. SATISFACTION OF DEBTS.

When legacy to creditor is a satisfaction of the debt, in general.]—A legacy to a creditor equal to or exceeding the amount of the debt is, in the absence of any intimation of a contrary intention, a satisfaction of the debt; but slight circumstances will be taken advantage of to withdraw a case from this rule. *Stroud v. Stroud*, 8 Scott, N. R. 166; 7 M. & G. 417.

A legacy will never be deemed a satisfaction of a legal demand, when that demand was unliquidated at the time of the legacy:

given, nor where it was given before the time the demand accrued or the debt was contracted, unless the will expressly directs that it shall be a satisfaction. *Le Sage v. Coussmaker*, 1 Esp. 187—Kenyon.

A direction by a testator that all his just debts shall be paid will not by itself suffice to prevent the application of the general rule, that a legacy to a creditor is to be taken as a satisfaction pro tanto of a debt. *Edmunds v. Lowe*, 3 Kay & J. 818; 3 Jur., N. S. 508; 20 L. J., Chanc. 432.

A running account, to prevent the application of such general rule, must be an account in which there are payments in and out on both sides, not where all the payments are in one direction, viz., in diminution of the debt. *Ib.*

Equity leans against satisfaction of a debt by a legacy, but in favor of a provision by will being in satisfaction of a portion by contract. *Thynne v. Glengall*, 2 H. L. Cas. 131; 12 Jur. 805.

Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. *Ib.*

A gift of residue cannot be a satisfaction of a debt, because the amount being uncertain, it may be less than the debt; but as a portion may be satisfied by a smaller legacy pro tanto, so on principle a residue ought to be considered as satisfaction of a portion altogether, or pro tanto, according to the amount. *Ib.*

A legatee, who is also a debtor to the testator's estate, cannot claim payment of the legacy without paying the debt; and the legacy given to a wife, but payable by law to the husband, is in the same position for this purpose as a legacy to the husband himself, subject to her right of survivorship where the interest is reversionary, and to her equity to a settlement when it becomes vested in possession. *Batchelor, In re, Sloper v. Oliver*, 21 W. R. 901; 43 L. J., Chanc. 101.

Where, however, the legacy to the wife is reversionary, and she, with her husband's concurrence, under 20 & 21 Vict. c. 57, assigns it to a purchaser for value, the deed acknowledged under the statute overreaches the *ius mariti*, and the purchaser takes the legacy discharged from all right of retainer which the executor might have asserted against the husband. *Ib.*

—*in particular instances.*—A. bequeathed to B. 1,200*l.*, and appointed C. executor of her will. C. had sufficient assets, but did not pay the legacy to B. C. afterwards made his will, by which he bequeathed to B. an annuity of 700*l.*, and expressed it to be "in satisfaction of the debt or sum of 1,200*l.*," but which annuity B. did not accept:—Held, that the sum of 1,200*l.* was money had and received to the use of B. *Gorton v. Dyson*, Gow, 78—Dallas.

A surgeon forbore to send in his bill for medicines and attendances to a deceased

patient in her life-time, under the expectation of a legacy. On her death, finding she had left him nothing, he made a claim on her executors:—Held, that he was entitled to recover, no proof having been given of any understanding between the parties that he was to be paid only by a legacy. *Baxter v. Gray*, 3 M. & G. 771; 4 Scott, N. R. 374.

A testator, who had advanced money to his son, and paid large sums on his account, bequeathed him a legacy without making mention of the debt:—Held, that the loan and unascertained balance must be set off against the legacy. *Smith v. Smith*, 3 Giff. 203.

A legacy by a debtor to her creditor is a pro tanto discharge of the debt, when it appears that the testatrix had made a proposal to that effect to her creditor, and that he had not objected to the arrangement. *Hammond v. Smith*, 33 Beav. 452; 10 Jur., N. S. 117; 12 W. R. 328; 9 L. T., N. S. 746.

After payment of his debts a testator gave certain legacies, one of 150*l.* to B., and he directed his executors to pay "my bequests only to the individuals herein named." The testator owed B. 150*l.*:—Held, that the legacy was not a satisfaction of the debt, but that B. was entitled to both. *Jefferies v. Mitchell*, 20 Beav. 15.

A debtor by deed assigned his effects for the benefit of his creditors, who thereby covenanted not to sue him. One of these creditors by will gave the residue of his estate among six persons, and directed that such of them as should be indebted to him at his decease, should accept the debt as part of his share. One of these persons was the debtor:—Held, that the debt was satisfied by the assignment of the testator's covenant not to sue, and that the executors were bound to pay to the debtor his full share of the residue. *Golds v. Greenfield*, 2 Sm. & G. 476; 23 L. J., Chanc. 630.

A debt due on a bond executed in contemplation of marriage:—Held, not to be satisfied by a legacy of a greater amount. *Haynes v. Mico*, Romilly's Notes of Cases, 41; 1 Brown C. C. 120.

A husband, on separating from his wife, covenanted by the deed of separation to pay to a trustee for her an annuity of 52*l.* per annum, payable on the 1st May, the 1st August, the 1st November, and the 1st February in every year, such annuity to be for her separate use, &c. He afterwards devised specific real estate to trustees, upon trust, out of the rents, to pay his wife 52*l.* per annum, by equal quarterly payments on the 1st February, the 1st May, the 1st August, and the 1st November in each year. The will contained no direction for payment of debts:—Held, that the annuity given by the will was a satisfaction of the debt created by the deed of separation. *Atkinson v. Littlewood*, 31 L. T., N. S. 225; 18 L. R., Eq. 595—V. C. M.

As to effect of bequests to executors,—see EXECUTORS AND ADMINISTRATORS.

## II. ASSENT OF EXECUTORS.

**What amounts to assent.**—The doctrine that slight evidence is sufficient of the assent of executors to a bequest, or that it may be implied applies only, in ordinary cases, where the assent would be rightful, and not where it must be implied against their own acts. *Taylor v. Guest*, 27 L. J., Exch. 395.

Where a bequest to the defendant was by a husband, of leasehold property, devised to his deceased wife for her separate use, and which she had bequeathed to the plaintiff, and the husband's executors joined with the devisee of the wife in suing:—Held, that even supposing that the husband's assent was necessary to the validity of the wife's will, the assent of the executors to the bequest by him to the defendant must be proved by express evidence, and was not to be presumed or implied opposed to their own act in suing. *Ib.*

H. devised a term to his nephew for life, with remainder over, with a leasing power for twenty-one years, and made him and two others executors; the nephew entered, and was possessed, and alone demised the premises for forty-two years, reserving rent to himself, his executors, &c.:—Held, that neither his entry on the land, nor his sole lease reserving rent to himself and his executors, which was alike inconsistent with his interest as tenant for life and his duty as executor, should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor. *Doe d. Hayes v. Sturges*, 7 Taunt. 217; 2 Marsh. 505.

A. devised the residue of a term determinable on lives, to B. After the decease of the testator the administrator with the will annexed paid the rent reserved for six years, and charged it to B.:—Held, that this was sufficient evidence of his assent to the bequest to enable B. to maintain ejectment. *Doe d. Mabberty v. Mabberty*, 6 C. & P. 126—Tindal.

Where an executrix has a life estate in a chattel under a bequest, her taking possession of the chattel is no assent to a further bequest thereof in remainder. *Richards v. Browne*, 3 Bing. N. C. 493; 4 Scott, 262; 3 Hodges, 27.

Where A., the legatee of a term, entered and occupied for a short time, and then quit the possession, it is a question for the jury whether the executors have or have not assented to the bequest; and whether a contract with A. for an under-lease was made with A. in his own right, or as agent to the executors. *Richardson v. Gifford*, 3 N. & M. 825.

The assent of an executor to a bequest is not a matter of law, but a question of fact for the jury. *Mason v. Farnell*, 12 M. & W. 674; 1 D. & L. 576; 13 L. J., Exch. 142.

A. bequeathed to his two sons his two carriage manufactories, with all fixtures, implements, tools, stock, job-carriages, harness, and everything appertaining to his trade in

the manufactories. At the time of his death, a carriage was in one of the manufactories, unfinished, which was being built to the order of a purchaser. A question arose between the executors and the sons, whether this carriage fell within the bequest; and the executors paid the legacy duty on the whole, but annexed the following memorandum to the legacy receipt:—"A disagreement arising between the sons and the executors, as to whether the whole of this item belongs to the sons, or part to the residue, the executors desire to pay the duty on the whole, leaving it for them to settle with the legatees the proportion of duty when the matter in dispute shall be determined." The sons retained possession of and finished the carriage, delivered it to the purchaser and received the price. In an action by the executors against them for money had and received, commenced two years afterwards:—Held, that there was no evidence to go to the jury of assent by the executors to the legacy of the carriage to the sons. *Elliott v. Elliott*, 9 M. & W. 23.

F., the elder, bequeathed leasehold premises to F., the younger, in trust to sell the same, and out of the proceeds to retain for his own use 150*l.* to reimburse himself funeral expenses, and to divide the surplus, if any, among the testator's children and grandchild. F. did not take out probate of his father's will, but entered into possession of the premises and retained them till his death, having by his will bequeathed them to his executors, who demised them to the defendant. The plaintiff having taken out administration with the will annexed of F., the elder, and brought ejectment to recover the premises:—Held, that he was not entitled to recover, as the act of bequeathing the premises by F., the younger, was evidence of the latter having elected to take the premises as legatee. *Fenton v. Clegg*, 9 Exch. 680; 2 C. L. R. 1014; 23 L. J., Exch. 197.

Leasehold property was bequeathed to three persons, who were also appointed executors of the will, upon certain trusts. One only of the executors proved the will. Six years afterwards he conveyed the whole property, professing to do so as executor:—Held, that lapse of time from the probate of the will was no evidence of an assent to the legacy, and that, therefore, the whole property passed. *Hawkins v. Williams*, 10 W. R. 692—Q. B.

### Operation and effect of executor's assent.]

—Whenever an executor assents to a bequest in his testator's will, there is an end of his interest in the thing bequeathed, and he cannot afterwards dissent. And it is equally true that the executor's assent to the first devise is an assent to the remainder over. *Foley v. Burnell*, 4 Bro. P. C. 34.

An assent to a legacy, given by an executor who dies without proving the will, becomes operative, on administration being afterwards taken out, with the will annexed. *Johnson v. Warwick*, 17 C. P. 516; 25 L. J., C. P. 102.

## III. PAYMENT.

**Validity and effect, in general.]**—Where a party entitled to a legacy under a will has a claim against the testator, which he conceals from the executor until after he has received the legacy, he cannot afterwards, in an action against the executor, object that the amount of the legacy was not paid in a due course of administration. *Stroud v. Stroud*, 7 M. & G. 417; 8 Scott, N. R. 160.

If on the footing of a supposed illegitimacy the title of the cestui que trust to a legacy is disputed and denied by the trustee, and the former is thereby induced to accept from the trustee a smaller sum than that to which he is entitled under the will, and by deed to release the trustee from the payment of the legacy, equity will not permit such a transaction to stand. *Thompson v. East-Wood*, 2 L. R., App. Cas. 215—II. L.

Even without any evidence of fraud, such a transaction is null and void. *Ib.*

**Repayment by legatee.]**—An executor who compels a legatee to refund can recover only the capital which he has paid to the legatee, without any intermediate income. *Jervis v. Wolferstan*, 18 L. R., Eq. 18; 43 L. J., Chanc. 809; 30 L. T., N. S. 452—R.

There being a dispute on the construction of a will as to how a fund should be divided between two legatees, both parties took counsel's advice, and the executor divided the fund in accordance with such advice, the dissatisfied legatee assenting in order to avoid litigation. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee to have the will construed by the court, and the money received by the other legatee repaid:—Held, that as the fund had been divided by consent with a perfect knowledge of the facts on both sides, and as the mistake, if any, was a mistake of law, the suit could not be maintained. *Rogers v. Ingham*, 35 L. T., N. S. 677; 46 L. J., Chanc. Div. 322; 3 L. R., Ch. Div. 351; 25 W. R. 338—C. A.

**Payment into court, under 36 Geo. 3, c. 52, s. 32,** of a legacy bequeathed to an infant, does not constitute such infant a ward of court. *Hillary, In re*, 3 Drew. & Sm. 461; 12 L. T., N. S. 840; 13 W. R. 959.

When executors paid residue into the bank to the credit of infants, under the Legacy Duty Act, 36 Geo. 3, c. 52, and subsequently incurred costs in the Probate Court, repayment was allowed to them on petition out of fund so paid in. *Blight, In re*, 21 W. R. 578—V. C. W.

When persons entitled to a legacy under a will were minors domiciled in Scotland, and the executor lodged the money so bequeathed in court:—Held, that the money so lodged might be paid out on the joint receipt of the minors and their curator appointed according to the law of Scotland. *Ferguson, In re*, 22 W. R. 762—Ir. R.

## IV. INTEREST.

**When allowed; and from what time.]**—It is a general rule for convenience, to consider the personal estate to have been reduced into possession in a year from the death of the testator, and therefore interest is given upon legacies from that period, unless some other is fixed by the will, though actual payment within that time may in many instances be impracticable. *Wood v. Penoyre*, 13 Ves. 333. S. P., *Bourke v. Ricketts*, 10 Ves. 333.

Interest on legacies is given for delay of payment, and, consequently, until the day of payment arrives, no interest is, in general, demandable. *Donovan v. Needham*, 9 Beav. 164; 10 Jur. 150; 15 L. J., Chanc. 193.

The rule that general legacies bear interest only from the end of a year from the death of the testator, applies to similar legacies under a feme coverte's will made in exercise of a power of appointment. *Tatham v. Drummond*, 2 H. & M. 262.

A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfill his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest. *Rouse, In re*, 9 Hare, 649.

The allowance of interest upon a legacy charged upon real estate, and due upwards of six years, is to be calculated from the filing of the bill in equity and not from the date of the decree, though the bill is not filed by the legatee. *Chappell v. Rice*, 1 De G., M. & G. 393; 16 Jur. 417.

A testator made a settlement on his daughter, who was adult, and gave her a legacy by his will:—Held, that the legacy did not bear interest from the death of the testator, but only from the end of the first year after that event. *Wall v. Wall*, 15 Sim. 513; 11 Jur. 403; 16 L. J., Chanc. 305.

A., who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estates:—Held, that the legatee was not barred by the 3 & 4 Will. 4, c. 27, s. 42, from claiming interest on the legacy from the end of the first year after the testator's death. *Gough v. Bull*, 16 Sim. 323; 12 Jur. 859; 17 L. J., Chanc. 486.

A testator, after bequeathing an annuity, charged the same upon his real estates, and then devised his real estates, subject to, and charged with, the payment of the annuity, to his grandson in fee:—Held, that the grandson was not a trustee for the annuitant, within 3 & 4 Will. 4, c. 27, s. 25, so as to entitle the latter to recover more than six years' arrears of the annuity. *Francis v. Grover*, 5 Hare, 39; 10 Jur. 280.

Interest on a legacy bequeathed in trust to apply the income or the principal for the benefit of an infant, is payable from the death of the testator. *Chidzey v. Whitby*, 41 L. J., Chanc. 690—V. C. W.

Devise of real estate upon trust for sale, and out of the proceeds of such sale to pay legacies:—Held, that interest on the legacies was payable from a year after the testator's death. *Turner v. Buck*, 18 L. R., Eq. 801; 43 L. J., Chanc. 583; 22 W. R. 748—R.

A testatrix gave legacies to J. and R., the legacies to be paid to each on attaining thirty, with a power to the executors to advance part of the income for maintenance, and directed that the surplus should be accumulated, and added to the principal, with limitation over in case of either, or both, not attaining thirty. The will then directed that, in every case in which any person should under the will be entitled to an estate for life in the income of any sum of money, such sum should bear three per centum interest, and no more, until the principal should become payable; and in case any of her personal property should produce a greater amount of interest than that rate, that the surplus should belong to, and form part of, her residuary property:—Held, that the legatees were entitled to have the whole income of the funds in which their legacies were invested, after providing for their maintenance and education, accumulated for their benefit, and that the interest on their legacies was not to be limited to three per cent. *Bayley v. Birch*, 4 Ir. R., Eq. 142—V. C. C.

As to right to and recovery of interest, generally,—see INTEREST OF MONEY

#### V. RECOVERY.

When action lies for legacy; and proceedings in general.]—No action lies for a pecuniary legacy. *Deeks v. Strutt*, 5 T. R. 690. S. P., *Farish v. Wilson*, Peake, 73. And see *Southampton (Mayor, &c.) v. Graves*, 8 T. R. 593.

But an action lies against an executor to recover a specific chattel bequeathed after his assent to the bequest. *Doe d. Saxe and Sels v. Guy*, 3 East, 120; 4 Esp. 154.

An action lies against an executrix for a legacy upon a promise in consideration of assets; but if the action is brought against her personally in her own right, the judgment can only be de bonis propriis. *Hawkes v. Saunders*, Cowp. 289. S. P., *Atkins v. Hill*, Cowp. 284.

The plaintiff and three others being residuary legatees, the defendants, as the executors named in the will, accounted with them; and having paid to the latter the respective sums due to them thereon, took from them and from the plaintiff a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands:—Held, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it. *Gregory v. Harman*, 1 M. & P. 209; 3 C. & P. 205.

Where an executor agrees with a legatee to allow him interest on his legacy, if he will

permit it to remain in his hands, it becomes a loan to the executor, for which he is personally responsible at law, and cannot plead *administravit* in bar to an action by the legatee. *Wasney v. Earnshaw*, 4 Tyr. 806.

In an action against executors (upon an account stated) for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. *Rose v. Savory*, 2 Scott, 199; 1 Hodges, 289; 2 Bing. N. C. 145.

E. bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, T., W., and H., and the remaining as therein mentioned, and appointed M. his executor, who duly proved the will. M., having taken upon himself the execution of the will, called a meeting of the residuary legatees, at which H. was present, and exhibited an account charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay H., but was prevented from so doing. Another meeting was afterwards called, at which H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, among others, with having paid "cash for legacy duties." To this was appended a supplemental account, containing the following item:—"By cash retained for H., 179l. 10s." In an action for money had and received, and on an account stated, brought by H. against the executor, to recover the amount of the legacy:—Held, that the action was maintainable. *Hart v. Minors*, 2 C. & M. 700.

An action does not lie for the amount of the plaintiff's distributive share of the personal estate of an intestate, admitted by the administrator to be in his hands. A fortiori it will not lie against the executor of such administrator, upon an admission made by the former, although the latter has expressly promised payment. *Jones v. Tanner*, 1 M. & R. 420; 7 B. & C. 542.

An executor of a mortgagee cannot maintain an action of covenant for a specific bequest, although his executor has assented to the bequest, as the covenant with the mortgagee is collateral, and does not run with the land. *Canham v. Rust*, 2 Moore, 164.

A legatee cannot maintain a suit in the ecclesiastical court to recover his legacy when there are only equitable and not legal assets. *Barker v. May*, 9 B. & C. 489; 4 M. & R. 386.

The Wills Act (7 Will. 4 & 1 Vict. c. 26) does not enable a testator to bequeath a chose in action, so as to pass the right of suing to the legatee. *Bishop v. Curtis*, 17 Jur. 23; 21 L. J., Q. B. 291; 18 Q. B. 878.

— in county court.]—Where real and per-

sonal property is left to executors upon trust to sell, and after paying legacies to divide the residue among certain persons, a county court has jurisdiction under 9 & 10 Vict. c. 95, s. 65, to adjudicate on a claim made by one of such persons to a share of the residue against the executors. *Pears v. Williams*, 2 L. M. & P. 515; 6 Exch. 833; 15 Jur. 932; 20 L. J., Exch. 381.

A testator bequeathed to the defendant 100*l.*, in trust to pay that amount to the plaintiff on his attaining twenty-one, and in the meantime to invest it, and to pay the plaintiff the interest, with power to the defendant, whom he styled "trustee," to advance either a part or the whole for the education of the plaintiff, or otherwise for his benefit during his infancy. The plaintiff, on attaining his majority, sued the defendant in the county court for the residue of the 100*l.*, part having been applied pursuant to the terms of the will:—Held, that the county court had no jurisdiction, the 100*l.* not having been given as a legacy, but by way of trust. *Phillips v. Hewston*, 11 Exch. 699; 25 L. J., Exch. 133.

**When action is barred by effluxion of time.**—[By 3 & 4 Will. 4, c. 27, s. 40, money charged upon land and legacies shall be deemed satisfied at the end of twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person to whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no action or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last, if more than one.]

This section applies to legacies payable out of personal estate, as well as to legacies charged on real estate. *Sheppard v. Duke*, 9 Sim. 567; 8 Jur. 108.

A devise of lands, charged with payment of legacies, devised his estate to a trustee, in trust, to sell, and in the meantime to let the estate, and apply the rents and net proceeds towards payment of his debts, and the legacies charged thereon by his testator's will:—Held, an express trust for the payment of the legacies; and that the claim was not barred. *Watson v. Saul*, 1 Giff. 183; 5 Jur. N. S. 404.

A devise of real estate, subject to and charged with the payment of legacies, does not create a trust for securing their payment or prevent the above statute from running against the legatees. *Proud v. Proud*, 32 L. J., Chanc. 125; 32 Beav. 224; 7 L. T., N. S. 553.

By a will of a testator who died in 1827, of which W. was sole executor, a legacy was bequeathed to E., who died in 1830, having bequeathed her residuary personal estate to W. E.'s will was proved in 1835 by W., who

was afterwards found to be a lunatic from the 3d December, 1840. On the 12th October, 1848, administration with the will annexed of the testator's estate during the lunacy was granted to M. W. died in 1857, and in December, 1858, a bill was filed for the administration of his estate. The legacy had never been paid. The Statute of Limitations, which applies to the recovery of legacies, passed in 1833:—Held, that a present right to receive the legacy, within 3 & 4 Will. 4, c. 27, s. 40, did not accrue to any one until the administration granted to M. in October, 1848; and hence, that the right to sue for the legacy was not barred. *Binns v. Nichols*, 2 L. R., Eq. 236; 35 L. J., Chanc. 635; 14 W. R. 727.

Where the person liable for the payment of a legacy, and the person entitled to receive it, are the same, no question of limitation under the statute can arise. *Ib.*

When a legacy, charged upon the residuary real estate, was bequeathed to trustees for B. for life, and after his death for his children, and there was not, during his life, from 1806 to 1863, any payment made on account of the legacy, or any trustee capable of giving a discharge for it:—Held, that the Statute of Limitations did not begin to run against the children until the death of B. *Carroll v. Hargrave*, 5 Ir. R., Eq. 123—V. C.

A legatee, after the lapse of twenty-three years, sent in a claim for his legacy. The surviving executrix had, during part of the time, been a lunatic:—Held, that her lunacy was no bar to the statute running. *Boldero v. Halpin, Ilaves, Ex parte*, 19 W. R. 320—V. C. M.

A testatrix gave property, consisting partly of realty and partly of personality, over which she had a power of appointment, and also all her own property, to three gentlemen, whom she also appointed her executors, upon trust to pay the income to her daughter for life, and after her daughter's death upon trust to pay several charitable legacies, and she constituted her executors residuary legatees. On a bill, filed nearly thirty years after her death, to obtain payment of one of the legacies:—Held, that the legacy was barred by the statute, and that there was no trust so as to take it out of the operation of the statute, as there had been no fund set apart for the payment of it. *Cadbury v. Smith*, 24 L. T., N. S. 52—R.

The executors paid the amount of one of the charitable legacies as a gift from themselves, but they obtained a receipt for the amount, releasing them from all liability in respect of the legacy:—Held, notwithstanding the release, that this was not an admission of assets to pay all the legacies. *Ib.*

After the death of one of the executors, his representatives paid the surviving executor 700*l.* as his share of the residuary estate:—Held, that this did not amount to an admission of assets for payment of the legacies in full, but only to an admission that there would have been so much money applicable towards payment of the legacies if they had not been barred by the statute. *Ib.*



As to limitations of actions for legacies charged on lands, annuities and arrears,—see **LIMITATION OF ACTIONS AND SUITS.**

**Costs.**—In an administration suit a legatee who has assigned his interest, and the assignee to whom he has assigned it, are only entitled to such an amount of costs as the legatee would have been entitled to had he made no assignment. And as between the assignor and assignee, even where the assignment includes only a part of the assignor's interest, and he therefore remains a necessary party to the suit, the assignee will be paid in full out of the amount allowed in priority to the assignor. *Turner v. Goudon*, 19 W. R. 403—V. C. M.

## Letters.

- I. PROPERTY, 8459.
- II. CONTRACTS BY CORRESPONDENCE. See CONTRACT OR AGREEMENT.
- III. TRANSMISSION BY POST. See POST-OFFICE AND POSTAGE.
- IV. PROOF. See EVIDENCE.
- V. ADMISSIBILITY AND EFFECT IN EVIDENCE. See EVIDENCE.
- VI. DEFAMATORY. See DEFAMATION.
- VII. LETTERS OF CREDIT. See BANKER AND BANKING COMPANY.
- VIII. LETTERS PATENT. See PATENT.

### I. PROPERTY.

**Who entitled to property in letters.**—The receiver of a letter is the owner of it, and may use it for all lawful purposes; the only right which the writer of it has in reference to it is to restrain publication. *Hopkinson v. Burghley*, 86 L. J., Chanc. 504; 2 L. R., Chanc. 447—L. J.

The receiver of a letter has a sufficient property in the paper upon which it is written to entitle him to maintain detinue for it against the sender, into whose hands it has come as a bailee. *Oliver v. Oliver*, 11 C. B., N. S. 139; 8 Jur., N. S. 512; 31 L. J., C. P. 4; 10 W. R. 18; 5 L. T., N. S. 287.

When the solicitor of a company writes a letter apparently on the behalf of the company, he has no such property in the letter as to entitle him to prevent its publication, although he swears that it was written in his private capacity. *Howard v. Gunn*, 32 Beav. 462.

A solicitor is entitled to retain as his own property letters addressed to him by his client and copies in his letter-book of his own letters to the client, after the client has transferred the business to which such letters related to other solicitors. *Wheatcroft, In re*, 6 L. R., Ch. Div. 97; 46 L. J., Chanc. Div. 669; 26 W. R. 69—R.

## Legislature.

- I. PARLIAMENT. See PARLIAMENT.
- II. COLONIAL. See COLONIES.

## Legitimacy.

See HUSBAND AND WIFE.

## Levari Facias.

See EXECUTION.

## Levy.

See EXECUTION; ATTACHMENT OF GOODS.

## Lex Loci.

- I. VALIDITY, INTERPRETATION AND PERFORMANCE OF CONTRACTS. See CONTRACT OR AGREEMENT; BILLS OF EXCHANGE AND PROMISSORY NOTES; AND THE TITLES OF THE VARIOUS CLASSES OF CONTRACTS.
- II. VALIDITY AND INTERPRETATION OF DEVICES AND BEQUESTS. See WILL.
- III. ADMINISTRATION AND DISTRIBUTION OF DECEDENT'S ESTATES. See DISTRIBUTION OF ESTATE; EXECUTORS AND ADMINISTRATORS; WILL.
- IV. MARRIAGE AND DIVORCE. See HUSBAND AND WIFE.
- V. RIGHTS OF ACTION AND REMEDIES. See ACTION AND SUIT; LIMITATION OF ACTIONS AND SUITS; TRESPASS.
- VI. LAWS OF PARTICULAR COUNTRIES AND PLACES. See THEIR SEVERAL TITLES.

## Libel.

See DEFAMATION.

## Liberties.

UNION OF, WITH COUNTIES. See 13 & 14, VICT. C. 106.

## Liberum Tenementum.

See TRESPASS.

## Libraries.

**Statutes.**—[18 & 19 Vict. c. 70, amended by 29 & 30 Vict. c. 114, and 40 & 41 Vict. c. 54, provides for the establishment of public free libraries in boroughs, towns, and parishes.]

Where the question is put to a meeting of ratepayers held under the Public Libraries Act, 1855, 18 & 19 Vict. c. 70, s. 8, whether the act shall be adopted for the parish, a poll can be demanded as of right. *Reg. v. Saint Matthew, Bethnal Green (Vestry)*, 32 L. T., N. S. 558—Q. B.

For analogous statutes and decisions in respect of public museums,—see MUSEUMS.

## License.

- I. IN RESPECT OF LANDS, 8461.
- II. FOR PUBLIC ENTERTAINMENTS, 8466.
- III. FOR ALE AND BEER HOUSES, AND OTHER PUBLIC HOUSES. See ALE AND BEER HOUSES.
- IV. FOR HACKNEY CARRIAGES AND CABS. See HACKNEY CARRIAGE AND CAB.
- V. FOR HAWKERS AND PEDDLERS. See HAWKER AND PEDDLER.
- VI. FOR PAWNBROKERS. See PAWNBROKER AND PLEDGE.
- VII. FOR USE AND SALE OF PATENTED ARTICLES. See PATENT.
- VIII. FOR PUBLICATION AND SALE OF COPYRIGHTED ARTICLES. See COPYRIGHT.
- IX. PLEA OF LEAVE AND LICENSE. See TRESPASS; TROVER.

### I. IN RESPECT OF LANDS.

**Grant.**—A beneficial license to be exercised upon land may be granted without deed, and without writing. *Taylor v. Waters*, 7 Taunt. 374.

A verbal license is not sufficient to confer an easement of having a drain in the land of another to convey water, and such license may be revoked, though it has been acted upon. *Cocker v. Cowper*, 1 C., M. & R. 418; 5 Tyr. 103.

A license under seal, if a mere license, is as revocable as a license by parol; and a license by parol, coupled with a grant of a nature capable of being made by parol, is as irrevocable as a license by deed. *Wood v. Ledbitter*, 18 M. & W. 838; 9 Jur. 187; 14 L. J., Exch. 161.

But a license by parol, coupled with a parol grant, or a pretended grant of something which can only be granted by deed, is a mere license; it is not an incident to a valid grant, and is, therefore, revocable. *Id.*

A., being possessed of a close of land, on which was erected a stand, which overlooked a race-course, authorized the issuing of tickets for admission to that stand during the continuance of the races, one of which tickets was purchased by B. for valuable consideration:—Held, that A. had a right, without assigning any reason, and without offering to return the value of the ticket, to order B. to quit the stand, and, on his refusal, to remove him by force. *Id.*

A., being on the eve of insolvency, made a bona fide verbal assignment of all his goods to B. in trust for the payment of his debts, and to hold the surplus for relations who had advanced money to him. An order was given by B., with A.'s consent, for sending the goods to an auctioneer for sale from time to time, and several portions were accordingly parted with and sold:—Held, that the successive deliveries were made under a mere license to sell the goods from time to time, and that the property in the whole did not pass to B. *Normansell v. Creft*, 17 L. J., Q. B. 297.

A license is not implied by law to a purchaser of goods (though sold under an execution or a distress), to enter upon the premises of the former owner and take them away, although they have remained there with his assent. *Williams v. Morris*, 8 M. & W. 488.

A parol demise of land reserved to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top:—Held, that such reservation operated as a license to enter the land for the purpose of cutting and carrying away the trees. *Hewitt v. Isham*, 7 Exch. 77; 21 L. J., Exch. 35.

An auctioneer who is employed to sell goods on the premises of the proprietor has not such an interest in the goods as will make a license to enter on the premises irrevocable. *Taplin v. Florence*, 10 C. B. 744; 15 Jur. 402; 20 L. J., C. P. 137.

A parol agreement, by which a person is authorized to enter on premises, cannot make the license to enter irrevocable. *Id.*

A plaintiff, a tenant of a house for a term of years, being possessed of shelves, stoves, ranges, ovens, boilers, and other articles of household use, his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away by the plaintiff if the tenant should refuse them. The landlord wrote an answer, declining to purchase, but adding, "I have no objection to your leaving them on the premises, and making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold till the entry of the new tenant, who came in under a demise from the same landlord, but who declined to take them. The plaintiff (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures, but the tenant refused permission; and the plaintiff thereupon brought an action for the hin-

drance and trover against the tenant:—Held, that if the landlord's letter to the plaintiff amounted to a license to take away the articles, yet not being under seal it was no valid grant of such privilege as against a new tenant in possession, and not party to the license. *Roffey v. Henderson*, 17 Q. B. 574; 31 L. J., Q. B. 49; 16 Jur. 84.

**Operation and effect.**—A party claiming ownership in a field granted to the plaintiff a parol license to search therein for minerals. The plaintiff, acting under this license, dug pits in the field, and threw up sand and gravel, mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel, and ore, the party who gave the plaintiff the parol license granted him a similar license by deed:—Held, that the plaintiff was entitled to maintain an action for the gravel, sand, and ore, as against the defendant, who was a wrong-doer. *Northam v. Bouden*, 11 Exch. 70; 24 L. J., Exch. 237.

Before bathing-machines came into use, certain parts of the shore of Hastings had been used from time immemorial for the purpose of bathing. Subsequently an act was passed prohibiting persons from bathing from the shore, except from bathing-machines, the owners of which were obliged to obtain a license from the local board for permission to ply for hire:—Held, that this license did not confer a right on the proprietors of bathing-machines to place them on the shore without the permission of the owner of the shore. *Mace v. Philcox*, 15 C. B., N. S. 600; 10 Jur., N. S. 630; 33 L. J., C. P. 124; 12 W. R. 670; 9 L. T., N. S. 766.

A canal company, in consideration of the lessee's expenditure on certain ice-houses on the banks of the canal, granted a lease thereof, with license to take ice from a part of the canal:—Held, that the license was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the ice-houses; and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licenses which would interfere with it. *Newby v. Harrison*, 2 Johns. & H. 303; 9 W. R. 840; 4 L. T., N. S. 397; affirmed on appeal, 4 L. T., N. S. 424; 30 L. J., Chanc. 863; 8 De G., F. & J. 287.

The proprietors of a canal by deed granted to the plaintiff the sole and exclusive right of putting or using pleasure-boats for hire on the canal:—Held, that this did not confer such an interest in the plaintiff as to give him a right of action against another person for using pleasure-boats for hire on the canal. *Hill v. Tupper*, 33 L. J., Exch. 217; 11 W. R. 784; 2 H. & C. 121; 9 Jur., N. S. 725.

**Revocation and countermand.**—An agreement to let a party have a trench for water, though given for a valuable consideration, if there is no conveyance, is a parol license revocable at the will of the grantor. *Fentiman*

*v. Smith*, 4 East, 107. S. P., *Cockerv. Couper*, 1 C., M. & R. 418; 5 Tyr. 102.

But a parol license to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), cannot be recalled at pleasure after it has been executed at the defendant's expense; at least not without tendering the expenses he had been put to; and therefore no action lies as for a private nuisance arising from the existence of such sky-light. *Winter v. Brockwell*, 8 East, 308.

A parol license, after it is executed at the expense of the grantee, is not countermandable by the grantor. Where, therefore, the plaintiff's father gave the defendant leave, by parol, to lower the bank of a river and erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted:—Held, that his son could not maintain an action against the defendant for continuing the weir, although his father, a few years after the license was given, had required them to raise up the bank and pull down the weir. *Liggins v. Inge*, 5 M. & P. 712.

A license to be exercised upon land for twenty-one years, granted for a valuable consideration, and acted upon, cannot be countermanded. *Wallis v. Harrison*, 4 M. & W. 538; 2 Jur. 1019; 1 H. & H. 405.

Action for disturbing the possession of a pew; plea, an agreement by the plaintiff with the defendant and A., being churchwardens, that they should make a partition and divide the pew into two unequal pews, and that the churchwardens should have license to place parishioners in the lesser of them; and that the defendant and A. did, at their expense, so divide the pew, and place parishioners in the pew:—Held, that the agreement not being by deed, the license thereby granted was revocable, though acted upon at the expense of the defendant. *Adams v. Andrews*, 15 Q. B. 284; 15 Jur. 149; 20 L. J., Q. B. 33.

Where a party, on the 28th of October, sold a rick of hay on his land, with the condition that it might remain there, and be carried away from time to time by the purchaser, up to Lady-day next:—Held, that this license could not be revoked. *Wood v. Manley*, 3 P. & D. 5; 11 A. & E. 84; 3 Jur. 1028.

The locking of a gate, through which parol leave has been given to pass, is of itself a sufficient notice of revocation of the leave. *Hyde v. Graham*, 8 Jur., N. S. 1220; 1 H. & C. 598; 7 L. T., N. S. 563.

The plaintiff and the defendant having agreed, on a dispute existing between them as to a right of way, that the defendant should use the way, ad interim, without prejudice, until it should be determined how the question should be settled:—Held, the plaintiff having locked the gate, and the defendant broken the lock, that the equitable position of the parties was not such

of the peace to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place is situate (who are hereby authorized and empowered to grant such licenses as they in their discretion shall think proper), signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place; and it is further, amongst other things, provided by section 8 of the said act that no such house, room, garden, or other place kept for any of the said purposes, although licensed as aforesaid, shall be open for any of the said purposes before the hour of five in the afternoon:

And whereas it is expedient to amend the said Act as hereinafter mentioned:

Be it enacted, &c., as follows:—

1. Amendment of section 8 of 25 Geo. 2, c. 36.—Section three of the recited act shall be construed as if, instead of the proviso, "that no such house, room, garden, or other place kept for any of the said purposes, although licensed as aforesaid, shall be open for any of the said purposes before the hour of five in the afternoon," there were substituted the proviso, "that no such house, room, garden, or other place kept for any of the said purposes, although licensed as aforesaid, shall be open for any of the said purposes before the hour of noon."

Provided, that if on any special occasion an occasional license of exemption shall have been granted under section 29 of the Licensing Act, 1872, in respect of any house, room, garden, or other place licensed under the recited act, no penalty or forfeiture shall be incurred for contravention of section 3 of the recited act, as hereby amended, on account of such house, room, garden, or other place being kept open for any of the purposes aforesaid on such special occasion from midnight until the hour specified in such occasional license as the hour for closing.

2. This act shall be deemed to have come into operation on the 29th September, 1874, and all proceedings now pending for forfeitures or penalties on account of any breach of either of the conditions mentioned in section 3 of the recited act shall be forthwith stayed, and no proceedings shall be instituted for any forfeiture or penalty on account of any such breach committed before the passing of this act.

3. This Act may be cited as the Public Entertainments Act, 1875.]

**Suing for penalties.**—A person keeping a house open is (at all events during the same licensing year) liable only to one penalty. *Garrett v. Messenger*, 86 L. J., C. P. 837; 2 L. R., C. P. 588; 16 L. T., N. S. 414; 15 W. R. 164; 10 Cox C. C. 498.

The 18th section, which gives a form of declaration, extends to common informers. *Green v. Botheroyd*, 3 C. & P. 471—Tenterden.

**Revocation of license.**—By a local act for the government of Cardiff, no house or room shall be kept or used for public dancing or music without a license from the justices on their general annual licensing day, and any house or room so kept and used without such license shall be deemed a disorderly house, and the persons occupying or rated as the oc-

cupier of the same, shall, on conviction before any two justices, be liable to a penalty. An inscription on the door or entrance is to be affixed, "Licensed pursuant to Act of Parliament." No house or room, although licensed, shall be opened for any of the said purposes except between the hours stated in the license, and notice as to the inscription and the limitation of time is to be inserted in the license. In case of a breach of these conditions the license may be forfeited, and revoked by the justices at any subsequent annual licensing day. Provided that it shall be lawful for every person who shall think himself aggrieved by any order of such justices to appeal therefrom to the Queen's Bench. L. received from the justices a license for a room in 1870, and in each subsequent year until 1873, when they refused a further renewal. The license in 1871 contained no limitation as to time, but the others both before and after were for one year. In 1871 L. transferred all his interest in this room to H., and some of his performance were indecent. On these grounds the justices revoked the license in 1873, and neither L. nor H. appealed. H. afterwards opened the room as before, and was convicted of so doing without a license:—Held, that the conviction was right. *Hoffmann v. Bond*, 32 L. T., N. S. 775—Q. B.

## Lien.

I. HOW CREATED OR ACQUIRED; AND NATURE AND INCIDENTS OF LIENS, IN GENERAL, 8471.

II. HOW WAIVED, DISCHARGED OR LOST, 8484.

III. RECOVERING BACK MONEY PAID ON CLAIM OF LIEN. See MONEY COUNTS.

IV. LIENS IN FAVOR OF PARTICULAR CLASSES OF PERSONS.

1. *Agents.* See PRINCIPAL AND AGENT.

2. *Brokers.* See PRINCIPAL AND AGENT.

3. *Attorneys.* See ATTORNEY AND SOLICITOR.

4. *Bankers.* See BANKER AND BANKING COMPANY.

5. *Carriers.* See CARRIER.

6. *Dock Companies.* See SHIPPING.

7. *Innkeepers.* See INNKEEPER.

8. *Insurance.* See INSURANCE.

9. *Judgment Creditors.* See JUDGMENTS.

10. *Livery Stable Keepers.* See HORSE.

11. *Mortgagees.* See MORTGAGE; BILLS OF SALE.

12. *Pawnbrokers.* See PAWNBROKER AND PLEDGE.

13. *Printers.* See PRINTER.

14. *Publishers.* See COPYRIGHT.

15. *Revenue Duties.* See EXTENT.

16. *On Shipping.* See SHIPPING.

17. *Vendors of Real and Personal Property.* See SALE.

18. *Wharfingers.* See WHARFINGER.

# I. HOW CREATED OR ACQUIRED; AND NATURE AND INCIDENTS OF LIENS, IN GENERAL.

**How created.**—The right of lien arises either by implication of law, or by express contract between the parties. *Kirchner v. Venus*, 12 Moore P. C. C. 361.

A party cannot acquire a lien by his wrongful act. *Madden v. Kempster*, 1 Camp. 12—Ellenborough.

Therefore, goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere v. Pasley*, 2 T. R. 485.

**Interpretation and effect of agreements to give liens.**—The plaintiff's intestate bought a coach of the defendant, and gave him bills for the price, and agreed that the defendant "do have and hold a claim upon the coach until the debt be duly paid." One of the bills being dishonored, and the testator dead, the defendant obtained possession of the coach by a trick:—Held, that the agreement operated as a mere personal license from the testator to the defendant to retain possession of the coach, and would have been a defense to an action brought by the testator, but was not available after the property had been transferred to the administrator. *Howes v. Ball*, 7 B. & C. 481; 1 M. & R. 288.

Where A. pledges a chattel with B., and, pursuant to an agreement made between them at the time, A. has the possession of it for a limited period, for the use of B.; and at the end of such period it is returned to its ordinary place of custody, B. does not forfeit his lien, the possession of A. being, in such case, the possession of B. *Reeves v. Capper*, 5 Bing. N. C. 136; 6 Scott, 877; 1 Arn. 427; 2 Jur. 1067.

A. being possessed of an old vessel, sent her to B.'s yard to be repaired. B. agreed to find timber for the repairs, and materials were accordingly supplied by B. and other persons to the amount of 200*l.* The vessel was repaired in B.'s yard with these materials, but no work was done upon her either by B. or the other creditors. On the vessel being advertised for sale, B. and the other persons insisted that she should not be removed until they were paid. A.'s agent assented, and said they should be paid out of the purchase-money, and signed an authority to the auctioneer to that effect. The sale then proceeded, and the vessel was knocked down to C. for 300*l.* Immediately after the sale, B. and the other creditors applied to C. for payment, and he promised that he would, the following Thursday, bring the purchase-money for the auctioneer to pay the creditors with. C. did not do so:—Held, that the agreement for payment of the repairs out of the purchase-money, of which C. was cognizant, and to which he had assented, precluded him from maintaining trover until such payment was made. *Norris v. Williams*, 1 C. & M. 842.

The plaintiff having a cow at grass in the defendant's field, and being indebted for the agistment, agreed with him that the cow should be a security, that he would not remove her till the defendant was paid, and that, if he did, the defendant might take her wherever she might be, and keep her till he was paid. The plaintiff removed the cow, not having paid the debt, and the defendant seized her in the high road. In trespass for the taking:—Held, that the agreement might be set up as a defense under a plea that the cow was not the plaintiff's. *Richards v. Symons*, 8 Q. B. 90; 10 Jur. 6; 15 L. J., Q. B. 35.

To detain for title deeds, the defendant pleaded that K. was seized of the messuages to which they related, and devised them to D. for life, who agreed with the defendant to sell him all her interest therein; that before this agreement the deeds were in the custody of the defendant as D.'s agent, and that upon the making of the agreement D. left them in the possession of the defendant, that he might hold them till the agreement was performed:—Held, that this statement did not show, with sufficient certainty, any contract whereby the defendant acquired a lien on the deeds. *Robertson v. Showler*, 13 M. & W. 609; 2 D. & L. 687; 14 L. J., Exch. 120.

A. opened an account with a bank, it being agreed that he should be allowed to overdraw to a certain amount, but that for further overdrafts beyond that amount he should find security. A. overdraw beyond the specified amount without depositing any security. The bank pressed for payment of the whole, or at least a portion of the balance. A., in reply, wrote to the manager to state, that the arrival of the ship Tagus, which was daily expected, would put him in ample funds to adjust the account, and inclosed a policy on the cargo of the Tagus for 5,000*l.*, indorsed payable to the manager of the bank:—Held, that this was not such a specific appropriation of the cargo of the Tagus as would give the bank a lien upon it in preference to other creditors of A. *Jones v. Starkey*, 16 Jur. 510—V. C. T.

To constitute a lien on any property, there must be a clear agreement for the specific appropriation of that property. *Id.*

By agreement between A., a publican, and B., a brewer, it was stipulated that A. should deposit the lease of his house with B. as security for an advance of 150*l.*, for which A. had given B. a promissory note, payable on demand, and B. engaged not to call upon A. to pay the 150*l.* for two years, on condition that the interest thereon should be duly paid half-yearly; that the rent should be paid agreeably to the covenants of the lease, and that A. should take of B. all the beer consumed on the premises, and pay for it every twenty-eight days. The agreement then provided, that in case of failure on the part of A. to perform any or either of the conditions after fourteen days' notice, B. should be at liberty immediately to put the note in force,

and if not paid with interest, to sell the lease, and that the expenses attending such sale, together with the principal and interest due on the note, should be deducted from the amount realized by such sale, as also any account that might be then due and owing for beer:—Held, that the power of sale not having been exercised, on payment or tender of the principal and interest due on the note, A. (or his assignee) was entitled to maintain detinue for the lease; and that B. could not set up a lien on it for the balance due on the beer account. *Chilton v. Carrington*, 15 C. B. 95; 1 Jur., N. S. 89; 24 L. J., C. P. 10; 3 C. L. R. 138.

In December, 1861, a bankrupt contracted with W. to build a barge for him, to be paid for in bricks; the barge to be completed on the 5th of June, 1862. The bankrupt hired a yard for a certain number of months, for the purpose of performing the contract, which period expired before the completion of the work. In June it was agreed by the bankrupt in writing that the barge should be held as a security by W. for advances made by him; and in July the bankruptcy took place. The advances made by W. having exceeded the amount of work done and materials supplied by the bankrupt:—Held, that W. had a lien upon and was entitled to the custody of the barge, unless the assignees chose to complete the contract. *Watts, Ex parte*, 9 Jur., N. S. 238; 32 L. J., Bank. 35; 7 L. T., N. S. 585—C.

B. & Co. agreed to build a ship for A. To enable them to proceed with the work, and before the agreement was signed, C. advanced money on the understanding that he should have an assignment of the agreement, and a lien upon the ship. The agreement was canceled. B. & Co. then agreed to sell the vessel, which was in an unfinished state, to C. Four days previously they had stopped payment, and shortly afterwards were made bankrupts:—Held, that C. was entitled to a lien upon the ship. *Swainson v. Gay*, 11 W. R. 811; 8 L. T., N. S. 563; 32 L. J., Chanc. 503—L. J.

**When lien is excluded by special agreement.**—An agreement that a miller should be paid in a particular manner does not deprive him of his right of lien. *Chase v. Westmore*, 2 Marsh. 346. And see *S. C.*, 5 M. & S. 180.

The right of lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Chambers v. Davidson*, 36 L. J., P. C. 17; 1 L. R., P. C. 296; 15 W. R. 34; 4 Moore P. C. C., N. S. 158.

**Liens for services and expenditures in respect of particular property.**—Generally speaking, a bailee has a lien on goods bailed to him in those cases only where an additional value has been conferred by him on the chattels, either directly, by the exercise of personal labor and skill, or indirectly, by the intermediate use of any instrument over which he has control; and, therefore, an angster to whom cattle have been bailed, has, by the general law, no lien on them for the value of the pasturage consumed; and this holds whether they are milch cattle or not. *Jackson v. Cummins*, 5 M. & W. 342; 3 Jur. 436.

A bailee can have no lien on a chattel, where, by the essence of the contract, he has no right to the uninterrupted possession of it. *Id.*

A workman having bestowed his labor on a chattel, in consideration of a price, the amount of which was fixed by an agreement with the owner, may detain such chattel until the price is paid, although it was delivered to the workman in different parcels and at different times, if the work to be done under the agreement is entire. *Chase v. Westmore*, 5 M. & S. 180. And see 2 Marsh. 346.

Generally speaking, if a chattel delivered to a party receives improvement from his labor and skill, he has a specific lien upon it for his remuneration, whether the contract for it is express or implied; provided there is nothing in the nature of the contract inconsistent with the existence of a lien. *Scarfe v. Morgan*, 4 M. & W. 270; 1 H. & H. 262; 2 Jur. 569.

A. put a phaeton into the possession of M. for him to paint it, and paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months:—Held, that B. had no lien on the phaeton for his charge for the standing of it, unless the jury was satisfied that M. had placed it there by the authority of A. *Buxton v. Baughan*, 6 C. & P. 674—Alderson.

A., having two pipes of wine lying in a bonded warehouse in the name of B., who had given bond for the duties, sold them to C., and gave him a delivery order, and it was at the same time agreed that C. should pay the duties. When they became payable, B. was called upon and paid them, and took away the wine to his own cellar. A. repaid the amount of duties to B.; C. never required B. to transfer the wine to his name, but he afterwards took away one pipe, and was charged with and paid warehouse rent to B.; C. afterwards became bankrupt, and his assignees demanded the other pipe:—Held, that B., at A.'s request, was entitled to keep it till the duties were paid. *Winks v. Hasall*, 9 B. & C. 372.

A quantity of timber placed in a dock on the bank of a navigable river, being accidentally loosened, was carried by the tide to a considerable distance, and left at low water upon a towing-path. A. finding it in

that situation, voluntarily conveyed it to a place of safety, beyond the reach of the tide at high water:—Held, that A. had no lien on the timber for the trouble or expense to which he might have put himself in the carriage of it; but was liable to an action of trover unless he delivered it up to the owner, on demand, though nothing was tendered him by the owner by way of compensation. *Nicholson v. Chapman*, 2 H. Bl. 254.

The labor and skill employed on a race-horse by a trainer are a good foundation for a lien; but if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien. *Furth v. Simpson*, 13 Q. B. 680; 18 L. J., Q. B. 263.

T. & Co., owners of flats or barges at Liverpool, were employed by H. & Co. to carry certain copper-ore to L., an owner of crushing mills at Birkenhead, who, in consideration of being employed to crush the ore, agreed to indemnify H. & Co. against all risk in the transit. While on its way to Birkenhead, the barge with the ore on board foundered in the river. T. & Co. thereupon gave notice of the loss to H. & Co. and requested to be employed to raise the cargo, to which a clerk in the employ of H. & Co. replied, "We have nothing to do with it; you had better see Mr. L. He has the management of it." T. & Co. then went to L., who said, "Oh, I am all right. I am insured with M.;" and, in answer to a suggestion of T. & Co. as to the necessity for prompt action, he added, "You had better prepare for getting it up; but you must go to M. for orders." T. & Co. then went to M., who said, "You had better go on with it, and do the best you can for us." T. & Co. thereupon proceeded with the work, and, after incurring great labor and expense, succeeded in recovering the ore. H. & Co. afterwards tendered the sum agreed to be paid for the carriage of the ore to Birkenhead, and demanded it; but T. & Co. refused to part with it, claiming a lien upon it for the expenses incurred in raising it from the bottom of the river:—Held, that there was no contract for the work done, as between T. & Co. and H. & Co., in respect of which such claim of lien could be sustained. *Custellin v. Thompson*, 13 C. B., N. S. 103; 32 L. J., C. P. 70; 11 W. R. 147; 7 L. T., N. S. 424.

A packer has by custom of trade a general lien upon all the goods of a customer in his possession or in his hands for all moneys due to him from that customer, and not merely for money owing in respect of those particular goods. *Will & Co., In re, Shubbrook, Ex parte*, 45 L. J., Bank. 118; 2 L. R., Ch. Div. 480; 24 W. R. 891; 34 L. T., N. S. 785—C. A.

**Liens of consignees for advances, &c.]—**A delivery to a master of a vessel, where the consignor has written to the consignee, apprising him that he has consigned to him, and requesting him, on the faith of such consignment, to accept bills (which he ac-

cordingly accepts and pays), is not such a constructive delivery to a consignee as will give him an alien against the assignees; it is not within the principle of the cases, which decide that an equitable right will supply the deficiency of an actual delivery, in support of a well-founded lien not perfected by possession. *Nichols v. Clent*, 3 Price, 547.

The indorsing a bill of lading by a consignor to the consignee does not constitute a lien in favor of the latter for his advances to the consignor. *Smith v. Burridge*, 4 Taunt. 684.

If A. consigns a cargo to B., with a direction to pay to C. out of the proceeds a sum of money, and writes to C. to that effect, C. has no lien on the proceeds. *Heywood, Ex parte*, 2 Rose, 355.

A. being interested in a moiety of a cargo, and having entered into a contract with B. to let him have half his share, wrote to C. and D., the consignees, informing them, and authorizing them to sell the cargo, and carry the proceeds to their separate accounts. The consignees acted upon this, and made advances to B., and B. also charged his interest in favor of E. It had been agreed between A. and B. that they should pay for the cargo by two bills, each to be paid by one of them. B. did not pay his bill; it did not appear whether A. had paid it or not:—Held, that A. had no lien on the proceeds of B.'s share, either as against him, or as against C. and D., or against E. *Holroyd v. Griffiths*, 3 Drew. 428.

If the consignee of a cargo, by agreement with the owner, chartered a ship, and expends the money necessary and proper in order to enable her to fetch the cargo, he is, without any special agreement to that effect, entitled to a lien on the proceeds of such cargo in his hands for the advance so made, and a person who is not the consignee has, under such circumstances, a similar lien on the proceeds of the cargo, if he can arrest such proceeds before they come to the hands of the shipper of the cargo. *Young v. Neill*, 32 Beav. 529; 9 Jur., N. S. 976; 11 W. R. 1052; 9 L. T., N. S. 9.

D. advanced to S., who was about to speculate in sugars, 10,990/., on a verbal agreement that D. should have a lien on the sugars imported by S. from the Mauritius and Batavia. S. assigned his property to trustees for creditors before any sugars were bought in Batavia. D. having filed a bill, praying a declaration that he had a lien on sugars sent to S. from Batavia, but omitting any mention of Mauritius sugars:—Held, that D. was precluded from afterwards insisting on any claim in respect of Mauritius sugars. *Deun v. Byrnes*, 11 L. T., N. S. 97; 13 W. R. 209; 2 Moore P. C. C., N. S. 92.

Held, also, that it being no part of the contract that S. should invest the moneys lent in any particular mode, and S. having in fact assigned his property to trustees for his creditors before the purchase, and so S.'s money not being used in purchasing the

sugar from Batavia, D. had no lien upon the sugars. *Th.*

Held, also, that the fact of S.'s trustees allowing S. to purchase Batavian sugar on their account, did not affect them with any equities in favor of D. under his contract with S. *Th.*

Goods, arriving at Quebec, were taken to the customs' examining warehouse, according to the regulations of the port. The goods were entered by the officer in charge, as consigned to M. & S. The goods remained subject to the lien for freight, and to the charges for customs' duties and storage. Till these several claims were discharged the officer in charge was bound not to part with the goods. Subsequently M. & S. obtained an advance from Y. & Co. on the security of these goods, and gave to them a request note, signed by M. & S., and directed to the officer in charge, requesting him to hold the goods "subject to the order" of Y. & Co., "they paying the duty and storage charge before removal." This note was sent to the officer in charge, who accepted it and made a corresponding entry in his book. Afterwards the goods, while still lying at the customs' warehouse, were seized by a judgment creditor of M. & S.:—Held, that the seizure was bad, there having been a valid constructive delivery and transfer of the goods to Y. & Co. as pledgees. *Young v. Lambert*, 22 L. T., N. S. 499; 3 L. R., P. C. 142; 18 W. R. 497; 6 Moore P. C. C., N. S. 400.

**Liens upon deeds for services, &c.]**—Every one has by law a lien upon a specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the same party, unless the person claiming the lien is an attorney or a solicitor. *Hollis v. Claridge*, 4 Taunt. 807. See *Sanderson v. Bell*, 2 C. & M. 304.

A certificated conveyancer is not entitled to a lien upon deeds delivered to him, and "with and in respect of" which he has done business; the business not having been done upon the deeds, or their value thereby increased. *Steadman v. Hockley*, 15 M. & W. 553; 10 Jur. 819; 15 L. J., Exch. 332.

A mortgage deed was delivered to A., an auctioneer, for the purpose of obtaining payment of the principal and interest due thereon from the mortgagor, and A. made several applications for that purpose:—Held, that A. had no lien on the deed in respect of the charge for making those applications. *Sanderson v. Bell*, 2 C. & M. 304.

**Liens in equity.]**—The rules with respect to lien are the same in equity as at law. *Ozenham v. Esdaile*, 2 Y. & J. 493; 5 D. & R. 49; 8 B. & C. 225.

The equitable rule as to the effect of a person's lying by, and allowing another to expend money on his property, does not apply where the money is expended with knowledge of the real state of the title. *Rennie v. Young*, 2 De G. & J. 136; 27 L. J., Chanc. 753.

A. agreed to grant a lease to B., who was to enter at once and expend money on im-

provements, with a proviso that if he failed within three months to grant a valid lease he would repay to B. the amount of his outlay, and from and after such failure B. should be at liberty to quit, and the agreement should cease except as to B.'s right to payment. A. being unable to grant a lease for want of title:—Held, that B. had a lien on A.'s interest on the premises for his outlay. *Middleton v. Magnay*, 2 H. & M. 233; 12 W. R. 706; 10 L. T., N. S. 408.

An equitable owner of land erected a granary thereon; he afterwards allowed his two sons to use and occupy them, and they erected other buildings thereon at a great expense:—Held, that the sons had a lien on the premises for their outlay. *Unity Joint Stock Mutual Banking Association v. King*, 25 Beav. 72; 4 Jur., N. S. 470; 27 L. J., Chanc. 585.

When a debtor gave authority by parol to his creditor to take certain goods, passing by delivery, and to sell them, and out of the proceeds to retain his debt:—Held, that the creditor, against the administrator of the debtor, had a lien on such goods to the extent of his claim. *Gurnell v. Gardner*, 4 Giff. 626; 9 Jur., N. S. 1220; 12 W. R. 67; 9 L. T., N. S. 367.

**To and against what parties liens may be made available.]**—As between debtor and creditor, the doctrine of lien is so equitable that it cannot be favored too much; but as between one class of creditors and another, there is not the same reason for favor. *Jacobs v. Latour*, 5 Bing. 130; 2 M. & P. 201.—Best.

A person can only give a lien on deeds as against himself, and to the extent of his own interest. *Turner v. Letts*, 20 Beav. 185; 1 Jur., N. S. 1057; 24 L. J., Chanc. 638.

A. and B. were joint owners of a house, and A. had laid out on it moneys which he had obtained from B.:—Held, that B. had no lien on the house for the amount. *Kay v. Johnston*, 21 Beav. 536.

The indorsee of a bill has a lien upon property deposited with the drawer as security. *Perfect*, *Ex parte*, 1 Mont. 25.

A holder of a bill has no lien on property deposited by the drawer with the acceptor to cover the liability of the latter in respect of his acceptance, but, on the bankruptcy of drawer and acceptor, the arrangement of property between the two estates may indirectly render such an equity available. *Waring*, *Ex parte*, 2 Rose, 182.

Goods pledged (expressly) to secure, by the produce of the sale, acceptors who have taken up and paid bills drawn on them by the owners, are released from further charge as to other bills so taken up and paid subsequently, if the amount of the original sum paid on account of the owner has been repaid to them without resorting to a sale. *Birdwood v. Raphael*, 5 Price, 593.

Where a person, who is in reality the agent of another, deposits exchequer bills with his



**own bankers**, without informing them whose property these bills are, the bankers may be held entitled to consider these bills as the depositor's property, and to hold them as security for any money due to them from him, if the mode of deposit or the circumstances attending it gave them a lien on the bills as against him. *Brandao v. Barnett*, 12 C. & F. 787.

**What debts secured by liens, generally.]—**

A person has a lien on goods for a debt, though his remedy for part of it is barred by the Statute of Limitations. *Spears v. Hartly*, 3 Esp. 81—Eldon.

A book-keeper in Smithfield market must pay money which he receives for the sale of beasts to the vendor, and cannot retain it for the private debt of the salesman employed by the vendor. *Goode v. Jones*, Peake, 177—Kenyon.

A distrainer has no lien upon goods taken under a distress for rent and replevied, but is left to his remedy on the replevin bond. *Bradyll v. Ball*, 1 Bro. C. C. 427.

A farmer who has received sheep from an agister is liable in trover to the owner, on his claiming to detain them for a debt due to the agister, and not allowed to deduct from the amount of the credit the sum for feed which had been tendered by the owner and refused. *Prentice v. Taylor*, 1 F. & F. 469—Wightman.

Where chattels are deposited with a party who claims a lien on them, after notice from the bailor of the sale of the chattels to a third party, the bailee cannot, as against the vendee, claim a further lien in respect of a debt incurred to him by the bailor after such notice, though the chattels remain in his books in the name of the bailor. *Barry v. Longmore*, 4 P. & D. 344; 12 A. & E. 639; 1 A. & H. 14.

**General lien.]—**The question whether a tradesman has a lien on goods in his hands for his general balance, or only for so much as relates to the particular goods, is decided on the same grounds at law and in equity. To extend it, the party must show an agreement, or something from which to infer an agreement. *Gladstone v. Birley*, 2 Mer. 404.

A factor has a lien both for his expenditure on the goods in his possession, and his general balance. *Cowell v. Simpson*, 16 Ves. 280.

Calico printers have a lien for a general balance on goods delivered to them to print. *Weldon v. Gould*, 3 Esp. 268—Kenyon. S. P., *Webb v. Fox*, Peake's Add. Cas. 167.

So, where calico goods are delivered to a person to have them printed, and such person delivers them to a calico printer for that purpose, to whom he is indebted, the calico printer may hold these goods against the owner, by virtue of his lien. *Id.*

Semble, that by the custom of trade in Manchester, as between calico printers and engravers, the latter have no right of general lien for balances due to them from the former. *Lidley v. Barnsley*, 1 C. & K. 344—Rolfe.

A dyer has no lien upon an article delivered to him to be dyed, for a general balance, but only for the particular price of dyeing that article. *Bennett v. Johnson*, 2 Chit. 455; 3 Dougl. 387. S. P., *Green v. Farmer*, 4 Burr. 2214; 1 W. Bl. 651.

But in one case at nisi prius it was held, that a dyer had a lien for a general balance. *Savill v. Barchard*, 4 Esp. 58—Kenyon.

A general lien established in the bleaching trade at Nottingham. *Plaice v. Alcock*, 4 F. & F. 1074.

The dyers of Halifax were held to have no lien for their general balance, and that they could not retain for the price of dyeing any other than the particular goods dyed, or at most only for the dyeing of such goods as were delivered to them at one and the same time, under one entire contract. *Gloss v. Waterhouse*, 6 East, 523, n.

But an agreement entered into by some dyers, that they would not receive any more goods to be dyed, unless they might have a lien on those goods for their general balance, is good; and a person who, after notice of it, delivers goods to be dyed, must be taken to have assented to the terms of the agreement. *Kirkham v. Shawcross*, 6 T. R. 14.

Cloths were left by a bankrupt, before his bankruptcy, with a fuller to be dressed. A balance was then due from the bankrupt to him for work done on other cloths. The assignees having tendered him the sum due for work done on the cloths in his possession, and demanded them: on his refusal to deliver them up:—Held, that he had no right to detain them for his general balance; and that the assignees were entitled to recover in an action of trover. *Rose v. Hart*, 2 Moore, 547; 8 Taunt, 409.

Proprietors of a scribbling and fulling mill, stipulated that all goods on hand should be subject to a lien for a general balance. Having received certain wool and cloth of C., to be scribbled and fulled, and certain oil and dyeing materials to be used by him on the wool, for which purpose he had access to the oil and dyes in a room of which the proprietors of the mill kept the key:—Held, that goods on hand meant the yarn or cloth sent to the mill, and that they had no lien for their general balance on the oil and dyeing materials. *Cumpston v. Haigh*, 2 Scott, 684; 2 Bing. N. C. 449; 1 Hodges, 373.

The law does not favor general liens, and a general lien can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors, and bankers, in which the existence of a general lien has been judicially acknowledged, or in other trades where there is express evidence of custom. *Bock v. Gorriszen*, 7 Jur., N. S. 81; 30 L. J., Chanc. 39; 2 De G., F. & J. 434; 9 W. R. 209; 3 L. T., N. S. 424.

Foreign correspondents of a London firm directed the firm to purchase for them Mexican bonds to a specified amount, at a specified price, and to hold the bonds at the disposal of the correspondents. The London

firm made and notified the purchase, and wrote to the correspondents, that they would, until further orders, retain the bonds for safe custody:—Held, that the letters constituted a special contract sufficient to exclude a general lien on the part of the London firm, if they would otherwise have been entitled to any. *Id.*

S., a woolstapler at Huddersfield, was in the habit of making purchases of wool, which he directed to be consigned to the defendant, a wharfinger and shipping agent at Hull who forwarded them to him at Huddersfield by carrier. In July, 1841, S. purchased certain wool in Scotland, which was paid for by E., his agent there, and by him forwarded to the defendant at Hull. Part of this wool, consisting of ten bags, arrived at Hull on the 27th of September, and a portion of it was, at ten o'clock on that morning, taken possession of by the defendant, the remainder being taken possession of by him between ten o'clock and four. E. received from S., in repayment of the advances made by him for the purchase of the wool in question, acceptances of S., which were running at the time of S.'s bankruptcy, and were afterwards dishonored. On the 21st of September, E. received a letter from S., in which he informed him of his insolvency, and directed him to get the wool and to do the best he could to save himself. Accordingly, on some day between the 26th of September and the 1st of October, E. gave directions to the defendant to seize the wool. The remaining portion of the wool arrived at Hull on the 3d of October, and was delivered into the defendant's warehouse on the 6th, 7th and 8th of that month. An act of bankruptcy was committed by S. on the 22d of September. The defendant, who claimed to retain the wool in satisfaction of a general balance, had been in the habit of sending to the bankrupt, by the carrier, together with the goods, printed delivery orders, which stated that all goods were considered as general lien, subject not only to freight, but also to the balance of any former account due from the owners or consignors. These orders had been seen more than once in the bankrupt's hands, and, on one occasion, the weights therein stated had been altered by him:—Held, in trover by the assignees of S. to recover the value of the thirty-six bags of wool, first, that E. had no right to the goods, in respect of which the defendant could retain them. *Bouman v. Malcolm*, 11 M. & W. 833.

Held, secondly, that the defendant had not established any right of general lien, by virtue of which he could retain any part of the goods. *Id.*

The general lien of a consignee upon a cargo consigned to him cannot be set up in opposition to positive directions given him by the consignor, as to a third party's claim upon the cargo. If a consignee thinks proper to accept such a consignment with such directions, only what remains, after answering the particular directions, can become

subject to the general lien. *Prith v. Forbes*, 4 De G., F. & J. 409; 8 Jur., N. S. 1115; 33 L. J., Chanc. 10—L. J.

B. & Co. consigned a cargo to the defendants and sent to them the bill of lading in a letter: "The present serves to cover bill of lading for timber, &c., shipped per China, against which we have valued on you, at six months in favor of F., S. & Co., for 1,200*l.* which please kindly protect." On the same day B. & Co. sent to F., S. & Co. the bill of exchange which was drawn on the defendants to the order of F., S. & Co., and concluded "place the same with or without advice to account consignment per China." After the bill of lading arrived F., S. & Co. presented the bill of exchange, but the defendant refused to accept it. Shortly afterwards B. & Co. stopped payment, and afterwards the cargo arrived:—Held, that it was effectually appropriated to meet the bill, and that F., S. & Co. had a lien upon it in priority to the claim of the defendants for the balance due to them on their general account as consigners. *Id.*

When a company has been wound up under the Companies Act, 1862, 25 & 26 Vict. c. 89, and the business is duly carried on by the official liquidator, a creditor who has continued his dealings with the company cannot exercise a general lien on its goods for the whole amount due to him, by virtue of an agreement made between him and the company previously to the winding up. *Wiltshire Iron Company v. Great Western Railway Company*, 40 L. J., Q. B. 43; 6 L. R., Q. B. 101; 19 W. R. 177; affirmed on appeal, 49 L. J., Q. B. 308; 6 L. R., Q. B. 770; 19 W. R. 935—Exch. Cham.

A company was wound up, and the business carried on by the official liquidator. Previously to the winding up the company had made an agreement with a railway company for the carriage of goods on a credit account, upon the terms that goods belonging to or sent by them should be subject to a general lien in favor of the railway company, to take effect, at their option, at any time after failure of any sum due on the credit account, or in case of bankruptcy, insolvency or stoppage of payment:—Held, that the railway company could not enforce this lien upon goods which they had received after the winding up, to be carried on account of the new business. *Id.*

B. consigned to the defendants, by the ship *Acacia*, a cargo which had been purchased at the joint risk of himself and the defendants, and advised them of the particulars of bills which he had drawn against the cargo payable to his own order. The defendants replied, promising to protect the bills. B. indorsed to the plaintiffs three of these bills, which ran, "Pay to the order of myself the sum of 830*l.*, which place to account cargo per A." B. having stopped payment, the defendants refused to accept the bills; but after selling the cargo, offered to pay to the plaintiffs the surplus of the proceeds, after

satisfying a balance due to them from B. on the general account between them. The plaintiffs refused to accept this, and filed a bill, claiming a lien for the full amount of the three bills.—Held, that they had no lien on the proceeds of the cargo. *Robey & Co.'s Perseverance Ironworks v. Ollier*, 7 L. R., Ch. 695; 20 W. R. 956; 27 L. T., N. S. 362.

A right of general lien can only be established either by contract, express or necessarily implied, or by custom; and such a custom in a particular trade is not established by mere evidence of the popular opinion of the members of that trade that a right of general lien was or ought to be a privilege of their trade. *Spotten, In re, Provincial Bank, Ex parte*, 11 Ir. R., Eq. 412—Bank.

**Necessity of possession of the property.**—A party cannot have a lien on goods if he never was in possession of them or their produce, whatever equitable interest he may have had. *Heywood v. Waring*, 4 Camp. 291—Ellenborough.

There can be no lien upon any property unless it is in the possession of the party who claims the lien. *Shaw v. Neale*, 4 Jur., N. S. 695; 27 L. J., Chanc. 444—Chelmsford, C.

The general rule of the civil law is, that possession of movables is not necessary to the validity of a lien, whether created by contract or act of law, and that such lien will attach upon movable property, even in the hands of a bona fide purchaser without notice. *Tatham v. Andree*, 1 Moore P. C. C., N. S. 386; 9 Jur., N. S. 1019; 9 L. T., N. S. 2.

**Right to detain the property; expenses, sale, &c.**—A shipping agent having a lien on a bill of lading of goods which he has shipped, may, if the lien is not satisfied before the goods have reached their destination, have them brought home in order to retain his lien on them, and is not liable to any action for so doing. *Edwards v. Southgate*, 10 W. R. 528.

An artificer who, in the exercise of his right of lien, detains a chattel upon which he has expended his labor and materials, has no claim against the owner for taking care of the chattel while so detained. *Somes v. British Empire Shipping Company*, 8 H. L. Cas. 338; 6 Jur., N. S. 761; 30 L. J., Q. B. 229; 8 W. R. 707. Judgment of Exchequer Chamber and of Queen's Bench, El., Bl. & El. 353; 5 Jur., N. S. 675; 28 L. J., Q. B. 220, affirmed.

If an owner of a chattel (for instance, a ship) knew that he must pay for dock room, while his ship was undergoing repairs, and if, while he was unable to pay for those repairs, and the ship was detained in exercise of the shipwright's lien, he received notice that he must pay dock room during the detention, such facts would not create an implied contract on his part to pay it. *Id.*

The lien at law upon a chattel for a portion of the price unpaid confers no right of sale upon the person having such lien, although the retention of the chattel may be attended

with expense. *Thames Ironworks Company v. Patent Derrick Company*, 1 Johns. & H. 93; 6 Jur., N. S. 1013; 29 L. J., Chanc. 714.

## II. HOW WAIVED, DISCHARGED OR LOST.

**By claiming in a different right or on a different ground.**—A person having a lien upon goods does not waive that lien by the mere fact of his omitting to state that he claims to retain the goods in that right when they are demanded; nor is it sufficient evidence of a waiver of his lien, that he bought these goods with others, which he also refused to deliver up, although he had no lien on them, the sale as to the whole being void. *White v. Gainer*, 9 Moore, 41; 2 Bing. 23; 1 C. & P. 324.

But a man waives his right of lien, if, upon being applied to to deliver up goods, he claims to retain them on a different ground than that upon which he rests his case of lien. *Boardman v. Sill*, 1 Camp. 410, n.—Ellenborough.

A lien may be waived by a party's setting up a claim to retain the chattel upon a different ground, and making no mention of the lien. *Weeks v. Goode*, 6 C. B., N. S. 367.

In an action against A. and B. for a lease, the evidence of conversion was as follows: A demand having been made upon A. he declined to give up the lease until rent due to B. was paid, but he added that it was more B.'s business than his own, and as he was not in, he (A.) would either send the lease in the course of the day, or would write the plaintiff a letter declining to return it. The plaintiff receiving neither lease nor letter, issued a writ on the following morning:—Held, that this amounted to an absolute refusal, notwithstanding A. and B. had, at the time (though it was not mentioned), a lien upon the lease for a small sum due to them for business done by them as attorneys for the plaintiff. *Id.*

Where a party claims to detain goods upon two causes of lien, in such a way as to dispense with tender of either, he is guilty of a conversion, unless he can sustain both. *Kerford v. Mondel*, 28 L. J., Exch. 303.

In trover by a freighter against a shipowner to recover goods, the charter-party giving a lien for dead freight, but the master to sign bills of lading, which bound the goods for "freight as agreed," the freighter having when he demanded the goods been prepared to pay the freight for carriage, and the shipowner refused to deliver the goods except on payment of the dead freight:—Held, that freight for carriage alone was due, that the refusal was an implied dispensation of the tender of it, and that trover was maintainable. *Id.*

**By claiming a larger or a different sum.**—If a party has a specific lien on the goods of another, and when required to deliver them up, claims a lien upon them for a sum either greater than or different from that for which he is entitled to hold them, his lien is gone;

but if he claims to hold them both for the sum to which he is entitled, and also for a further sum to which he is not entitled, his lien in respect of the former remains, and the owner ought, on such refusal, to tender that sum. *Scarfe v. Morgan*, 4 M. & W. 270; 1 H. & H. 292; 2 Jur. 569.

Where a party who has a specific lien on goods refuses to deliver them up unless the amount of a general balance is paid, it is unnecessary for the owner to tender the sum due in respect of those goods, in order to support trover. *Jones v. Tarleton or Tarlton*, 9 M. & W. 675; 6 Jur. 848.

A picture was placed by A. in the hands of B. for sale. B. deposited it with C. On its being demanded by A., C. claimed 5s. for warehouse room; but, on a second demand being made, with an offer to pay any claim which C. might have for warehouse room, C. refused to give up the picture without being paid 8l., due to him from B.:—Held, that the demand of the 8l. amounted to a waiver of the claim for warehouse room, and that it rendered a specific tender in respect thereof unnecessary. *Dirks v. Richards*, 4 M. & G. 574; 5 Scott, N. R. 534; Car. & M. 626; 6 Jur. 502.

If A. delivers a chattel to B. under a contract by the latter to perform certain work thereon at a fixed price, and, before such work is completed, A. countermands the order and demands the chattel from B., at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover therefor without tendering the contract price. *Lilley v. Barnsley*, 1 C. & K. 344—Rolfe.

In trover for certain iron-work, the defendant set up as a defense a lien on the iron-work, for work done to it at the plaintiff's request:—Held, that a claim of set-off to a larger amount on the part of the plaintiff was no answer to the lien, unless it had been agreed between the parties that the one should be deducted from the other. *Pinnock v. Harrison*, 3 M. & W. 532; 1 H. & H. 114.

The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender from the debtor of the sum really due; but if the demand of the larger sum is so made that it amounts to an announcement that it is useless to tender any smaller sum, this dispenses with any tender, even if it appears that the debtor was unwilling to tender the amount really due. *The Norway*, B. & L. 404; 3 Moore P. C. C., N. S. 245; 13 L. T., N. S. 50; 13 W. R. 1085.

**By taking security.**—If a security is taken for a debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone. *Hewison v. Guthrie*, 3 Scott, 298; 2 Bing. N. C. 755; 2 Hodges, 51.

A., and B., a solicitor, were executors. B. deposited some of his deeds in the trust box, to secure some money due to the testator's estate. The box remained in B.'s possession,

and on his death the deeds were found to have been abstracted from it, and they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt:—Held, assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still that he had waived it by taking the particular security from the legal personal representative. *Mason v. Morley*, 34 Beav. 471.

If a tradesman, having goods in his possession upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds, and may be by parol. *Castling v. Aubert*, 2 East, 325. S. P., *Houlditch v. Milne*, 3 Esp. 86.

Where a vendor received part of the purchase-money, which had been borrowed from the defendant, and took a bond with sureties for the residue:—Held, that by entering into the deed of conveyance, which recited the assignment of the premises to the defendant by way of mortgage for the sum advanced, the vendor waived his lien. *Cool v. Pollard*, 10 Price, 109; 9 Price, 544.

**By surrendering possession of the property.**—One who has a lien on goods in his possession, if he afterwards delivers them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet v. Pym*, 1 East, 4.

If A., having repaired a carriage for B., allows him to take it away from time to time, he cannot afterwards detain it for the amount of the repairs, neither can he detain it upon a claim for standage, without an express contract to pay for standage, or unless the owner leaves it upon the premises beyond a reasonable time after notice. *Hartley v. Hutcheon*, 1 Stark. 408—Ellenborough.

The plaintiffs were merchants in London and Melbourne. The defendant consigned goods to the Melbourne house, on an agreement that the advances made to him by the plaintiffs in London and Melbourne should be retained out of the proceeds of the goods, and that the surplus should be handed over to the defendant. The Melbourne house remitted to the defendant a sum as the balance, but omitted to retain the advances made in London:—Held, that the plaintiffs had merely a right of lien or of retainer, which they had abandoned by remitting the balance. *Bligh v. Davies*, 23 Beav. 211.

**By other acts or conduct inconsistent with right of lien.**—If a party, having a lien on goods, causes them to be taken in execution at his own suit, he thereby destroys his right of lien, although the goods were never removed from his premises. *Jacobs v. Latour*, 2 M. & P. 201; 5 Bing. 130.

A. delivered to B. a pawnbroker's duplicate, for B. to take some goods of A.'s out of pledge. B. did so, but on A. sending to B. for the goods, B. said that he had not got them, and refused to tell who had:—Held, that if, after this, trover was brought against B., he could not insist on a lien on the goods for the money he had advanced to get them out of pledge. *Jones v. Cliff*, 5 C. & P. 560—Taunton.

A., B. and C., being part owners of a vessel, were partners in whale fishery adventures, in which the course had been for C., as ship's husband, to sell the whalebone towards expenses, to deposit the blubber in a warehouse rented by A., B. and C. of D., to divide the oil there produced, to put it into separate casks marked with their respective initials, and for D., the warehouseman, to deliver out the oil upon the order of each partner respectively, unless notice was given by C. that such partner's share of the disbursements was unpaid, and in that case, to detain the oil until payment. Twenty-nine tons having been set apart for A., and placed in casks marked with his initials, and twenty tons having been delivered to his order, he became bankrupt, his share of the disbursements being unpaid. Afterwards notice of non-payment was given by C. to D.:—Held, that B. and C. had a lien as against the assignees of A., upon the remaining nine tons, for A.'s share of the disbursements, not abandoned by the qualified appropriation of the twenty-nine tons, or by the assent to the removal of the twenty tons. *Holderness v. Shackels*, 3 M. & R. 25; 8 B. & C. 612.

H. & Co. of Newfoundland, by order of D. of Jamaica, shipped a cargo of fish on board a vessel chartered by D., and consigned it to S., D.'s factor, at Kingston, Jamaica. After D. had ordered this cargo, he required from S. a further advance of money (D. being at that time largely indebted to him), and told him that he expected this cargo, and that S. might sell it on D.'s account, and give him credit for the proceeds. S. made the advance required, but nothing was reduced into writing as to the pledge of the cargo. Before the vessel arrived D. became insolvent, and told S., his factor, that, such being the case, he could not think of receiving the cargo. The cargo arrived, and D., by letter to S., repeated his determination not to receive the cargo, and told S. to sell it, and remit the proceeds to H. & Co.'s house at Liverpool. D. also wrote to H. & Co. at Liverpool, to inform them of the transaction, but H. & Co. did not write to acquiesce in that arrangement until eight months afterwards. S. appeared to acquiesce in the wish of D., and did not at that time claim any lien. S. sold the cargo, but refused to account for the proceeds to H. & Co., who thereupon brought an action for their recovery:—Held, that S. must be taken to have acted in the sale as the agent of H. & Co.; and that if S. had any lien originally,

he had, by his conduct, waived it. *Harrison v. Scott*, 5 Moore P. C. C. 357; 10 Jur. 443.

A. agreed to buy of B. a stack of hay for 80*l.*, to be paid for as taken away, and to be removed by the 31st of May. Part of the hay was removed and paid for by A. before the 31st of May, and in August the remainder was cut up and used by B.:—Held, that as B.'s lien on the hay was determined by the act of conversion, A. was entitled to the possession of the hay, and might maintain trover. *Gurr v. Cuthbert*, 12 L. J., Exch. 309.

## Life Estate.

See ESTATE; DEED; WILL.

## Life Insurance.

See INSURANCE.

## Lighthouse.

- I. RATABILITY. See POOR LAW.
- II. DUES. See SHIPPING.

## Light and Air.

- I. RIGHTS IN RESPECT OF, 8488.
- II. OBSTRUCTION, 8500.
  - 1. *What constitutes; and Right to obstruct*, 8500.
  - 2. *Injunction to Restrain*, 8505.
  - 3. *Recovery of Damages*, 8513.

### I. RIGHTS IN RESPECT OF.

**In general.**—Light and air are bestowed by Providence for the common benefit of men, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. *Embrey v. Owen*, 6 Exch. 353; 15 Jur. 633; 20 L. J., Exch. 212.

The intrusion upon a neighbor's privacy, even by opening a new window to overlook adjoining premises, is not a ground for interference either at law or equity. *Turner v. Spooner*, 1 Drew. & Sm. 467; 7 Jur., N. S. 1063; 30 L. J., Chanc. 801; 9 W. R. 634; 4 L. T., N. S. 732.

And shutting out a man's house from public view is not a legal injury. *Butt v. Imperial Gaslight Company*, 15 W. R. 92—C.

**Easements and other rights acquired under grants or covenants.**—The lessee of a house and garden, forming part of a large area of building ground, will not be entitled, under his ordinary covenant for quiet enjoyment, or otherwise, in the absence of special contract, to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden. *Potts v. Smith*, 38 L. J., Chanc. 58; 6 L. R., Eq. 311; 16 W. R. 891; 18 L. T., N. S. 629—V. C. M.

The owner of two leasehold messuages, held on a term for ninety-nine years, demised one for the residue of the term, less one day, to L., he himself occupying the other, in which he carried on the trade of a jeweler. L., on entering, paid a premium of 300*l.*, and a rent of 7*l.* 10*s.* was reserved. Subsequently the owner became, by the completion of twenty years' uninterrupted enjoyment, entitled to the use of windows in the rear of his house, looking into a yard upon which the house demised by him also looked, as ancient lights. In the demise there was a covenant restraining each party from building on the space between the backs of the houses so as to obstruct the light and air between certain points marked in an annexed plan. L. pulled down his house and commenced building nearer and higher than the former erections:—Held, that there was a violation of the covenant, a material injury in the obstruction of light and air, and a clear right to the ancient lights; and a perpetual injunction was granted with costs. *Robinson v. Lory*, 17 L. T., N. S. 641—V. C. M.

An owner of two contiguous houses in the city of London sold one to the defendant by a conveyance which correctly marked out the ground site of the house conveyed. One of the first-floor rooms in the house retained by the owner projected over the site, and was supported by the other house:—Held, that the vertical column of air over so much of the room as overhung the defendant's site belonged, not to the owner, but to the defendant. *Corbett v. Hill*, 9 L. R., Eq. 671; 22 L. T., N. S. 263; 39 L. J., Chanc. 547—V. C. J.

A general grant of land, with an intimation by the purchaser of an intention to build, creates a legal easement of light and air, and gives the right to prevent the subsequent obstruction of light by subsequent purchasers of neighboring land by the same grantor. *Robinson v. Grace*, 27 L. T., N. S. 648; 21 W. R. 223—V. C. W.; affirmed on appeal, 21 W. R. 569; 29 L. T., N. S. 7—L. J.

In 1854, a conveyance was executed of land contracted to be sold in 1853; between those dates houses were erected:—Held, that the conveyance conferred on the purchaser the right of light sufficient for the windows in the houses so erected, and to an injunction to restrain interference with it by purchasers, subsequent to the contract, of neighboring land. *Ib.*

Upon a general conveyance of land, there is no implied grant, by the purchaser, of the

easement of light necessary for the enjoyment of an adjacent house of the vendor. *Ellis v. Manchester Carriage Company*, 2 L. R., C. P. Div. 13; 35 L. T., N. S. 476; 25 W. R. 229.

When the owner of a house which has by prescription acquired a right to light over the adjoining land, becomes the owner of such adjoining land and sells it without reserving the easement of light, the purchaser may build so as to obstruct the light. *Ib.*

In 1867, the plaintiff bought houses in Manchester, the backs of which abutted on a street or way, on the opposite side of which were certain cottages. In 1868 he purchased these cottages, but by a different title. Both sets of premises had existed in their then state for more than twenty years. In 1870, the plaintiff sold the cottages to D., and ultimately D.'s interest therein became vested in the defendants, who pulled down the cottages and erected a large building upon the site of them and also upon a portion of the intervening street or way, and so obstructed the light to the plaintiff's windows. The conveyance to D. contained no reservation of any easement to the plaintiff's houses: and it professed to convey the land up to the back wall of the plaintiff's premises:—Held, that, notwithstanding the plaintiff's houses had acquired an "absolute and indefeasible" right to light at the time of the conveyance of the cottages to D., inasmuch as that conveyance was without reservation, the defendants were guilty of no wrongful obstruction of the plaintiff's lights. *Ib.*

A., the owner of two adjoining houses, granted the lease of one to B., there then existing in it a certain window, for a term which expired at Michaelmas, 1875; and afterwards, in 1874, leased the other house to C.:—Sembles, that, during the currency of B.'s lease, C. could not build so as to interfere with the light coming to B.'s window; and that, on the expiration of B.'s lease, C. could build so as to interfere with the light coming to the window, as the lease to C. had been made by A. without any reservation of the right to light. *Warner v. M'Bryde*, 36 L. T., N. S. 360—V. C. M.

— under the Prescription Act.]—[By The Prescription Act (2 & 3 Will. 4, c. 71), s. 3, when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose, by deed or writing.]

The right to ancient lights depends upon this statute, and not upon any presumption of grant or fiction of license; and being an absolute, indefeasible and unqualified statutory right, cannot be lost by a subsequent intermission of enjoyment, not amounting to

intentional abandonment, nor can it be prejudiced by an attempt to extend the access of light beyond that access which has so become indefeasible. *Tupling v. Jones*, 11 H. L. Cas. 270; 12 C. D., N. S. 166; 11 Jur., N. S. 339; 14 L. J., C. P. 342; 13 W. R. 617; 12 L. T., N. S. 555.

In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted, and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years. *Leafrunchi v. Mackenzie*, 4 L. R., Eq. 421; 36 L. J., Chanc. 518; 15 W. R. 614; 16 L. T., N. S. 114—V. C. M.

Under 2 & 3 Will. 4, c. 71, ss. 3 and 4, a party is prescriptively entitled to the access and use of light, if his enjoyment thereof commenced twenty years next before the bringing of an action in which the right is contested; provided such enjoyment has not at any time been interrupted, and the interruption acquiesced in for a whole year. *Flight v. Thomas*, 8 C. & F. 231; West, 671; 5 Jur. 811; *S. C.*, in King's Bench and Exchequer Chamber, 11 A. & E. 688; 3 P. & D. 442.

The period of twenty years' enjoyment, which confers a right to the access of light, under 2 & 3 Will. 4, c. 71, s. 3, is, by s. 4, the period of twenty years next before any suit or action wherein the claim to the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action. *Cooper v. Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 328; 6 L. T., N. S. 826; 9 Jur., N. S. 575.

An actual enjoyment of lights for twenty years, even under a permission verbally asked for by the occupier of a house, and given by the person having right to obstruct, is sufficient to confer a right under 2 & 3 Will. 4, c. 71, s. 3. The enjoyment under that section need not be as of right or adverse. *London (Mayor, &c.) v. Pewterers' Company*, 2 M. & Rob. 409—Tindal.

Under 2 & 3 Will. 4, c. 71, s. 3, a party is not entitled of right to the access and use of light over contiguous land, unless his enjoyment thereof has been for the full period of twenty years, in the character of an easement, distinct from the enjoyment of the land itself. *Harbridge v. Warwick*, 3 Exch. 552; 18 L. J., Exch. 245.

Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within 2 & 3 Will. 4, c. 71, s. 3. *Plasterers' Company v. Parish Clerks' Company*, 6 Exch. 630; 15 Jur. 965; 20 L. J., Exch. 362—Exch. Cham.

The 2 & 3 Will. 4, c. 71, s. 3, limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by virtue of enjoyment prior to the passing of the act. *Simper v. Foley*, 2 Johns. & H. 555; 5 L. T., N. S. 669.

To acquire a right to the access of light and air by actual enjoyment, under 2 & 3 Will. 4, c. 71, s. 3, it is not necessary that the house should be occupied, or that it should be fit for immediate occupation during the statutory period. *Courtneil v. Legh*, 4 L. R., Exch. 126; 39 L. J., Exch. 45; 17 W. R. 406; 19 L. T., N. S. 737.

A house was structurally completed, the roof finished, the floors laid, and the windows put in, but it was not internally completed nor fit for habitation. It so remained till within a period of twenty years before action, and was then finished:—Held, that the owner was entitled to maintain an action for the obstruction of its windows. *Ib.*

A right to the access and use of light to a house cannot be acquired, under 2 & 3 Will. 4, c. 71, s. 3, by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend. *Ludgman v. Grace*, 6 L. R., Ch. 763; 25 L. T., N. S. 52; 19 W. R. 863.

During such period of unity of occupation, the running of the twenty years under the statute is only suspended. *Ib.*

Seemle, that the owner in fee of land demised for a term of years is subject to any right to access and use of light over his land which may be acquired by the owner of an adjoining house during the demise. *Ib.*

A right to free passage of air is not an easement within the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Webb v. Bird*, 31 L. J., C. P. 335; 13 C. B., N. S. 841; 8 Jur., N. S. 621—Exch. Cham.

The presumption of a grant from long-continued enjoyment only arises where the person against whom the right is claimed might have interrupted or prevented the exercise of the subject of the supposed grant:—Held, therefore, that a grant of the right to the free and uninterrupted passage of the currents of wind and air to a mill from over the soil of another, cannot be presumed from an uninterrupted use of the mill for twenty years. *Ib.*

The twenty years' enjoyment which, under 2 & 3 Will. 4, c. 71, s. 3, gives an absolute and indefeasible right to the access of light, need not be an enjoyment in fact "without interruption" for the period mentioned, but an enjoyment without such an interruption as is contemplated by section 4, viz., "an interruption submitted to or acquiesced in by the party interrupted for one year" after notice. *Glover v. Coleman*, 10 L. R., C. P. 103; 23 W. R. 163; 44 L. J., C. P. 66; 31 L. T., N. S. 684.

And, in order to negative submission to or acquiescence in the interruption, it is not necessary that the party interrupted shall have brought an action or a suit, or taken any active steps to remove the obstruction; it is enough to show that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or acquiesce in it. *Ib.*

When, therefore, the plaintiff had for more than twenty years enjoyed the access of light to his workshop, through a window against which the defendant had about fourteen months before action brought erected a permanent building which obstructed it, and the plaintiff had taken no active measures to cause the obstruction to be removed, but had several times, himself or by his tenant, complained of and protested against it:—Held, that it was a question proper to be left to the jury whether or not there had been such a submission to or an acquiescence in the interruption of the enjoyment as to deprive the plaintiff of the right to the light. *Ib.*

Semble, that the same sort of evidence of user or enjoyment need not be given in the case of a light as in the case of a claim of a right of way. *Ib.*

The word "use" in s. 3 of 2 & 3 Will. 4, c. 71 (The Prescription Act), points to the actual admission of light into a building, and not to the existence of any particular user either in kind or degree, the object of the section being to give title to relief, but not to define its extent. *Mackey v. Scottish Widows' Fund Life Assurance Society*, 11 Ir. R., Eq. 541—Ch. App.

As to statutes of limitation in respect of real property, generally,—see LIMITATION OF ACTIONS AND SUITS.

— by prescription or presumption of grant, independent of statute.]—Before the statute, twenty years' uninterrupted enjoyment of windows looking upon the land of another was sufficient ground for presuming a grant or a license to open the windows, in the absence of evidence to the contrary. *Cross v. Lewis*, 4 D. & R. 284; 2 B. & C. 686.

It is a rule of law that there can be no prescription for an easement of light and air over open land. *Potts v. Smith*, 6 L. R., Eq. 811; 38 L. J., Chanc. 58; 18 L. T., N. S. 620; 10 W. R. 891—V. C. M.

An owner of a windmill cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill. *Webb v. Bird*, 10 C. B., N. S. 268; 30 L. J., C. P. 384; 9 W. R. 899; 4 L. T., N. S. 445; affirmed on appeal, 13 C. B., N. S. 841; 8 Jur., N. S. 621; 31 L. J., C. P. 335—Exch. Cham.

The use of an open space of ground in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air. *Roberts v. Mncord*, 1 M. & Rob. 230—Patterson. Recognized and acknowledged to be good law in *Potts v. Smith*, 18 L. T., N. S. 629; 10 W. R. 891—V. C. M.

Where lights had been enjoyed for more than twenty years, adjoining land which within that period had been glebe land, but was conveyed to a purchaser under 55 Geo. 8, c. 147:—Held, that no action would lie

against such purchaser for building so as to obstruct the lights, as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. *Barker v. Richardson*, 4 B. & A. 579.

In a suit to restrain a defendant from building so as to obstruct the plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to within a very short time before the bill was filed, there had been unity of possession of the properties of the plaintiff and the defendant, but there was no evidence of there ever having been any unity of title; and it was proved that before the unity of possession commenced the access of light to the windows had been enjoyed as far back as living memory went:—Held, that the plaintiff had established his title to the access of light, by proof of enjoyment from time immemorial, independently of the 2 & 3 Will. 4, c. 71; for that the statute does not take away any of the modes of claiming easements which existed before its passing. *Aynley v. Glover*, 10 L. R., Ch. 283; 44 L. J. Chanc. 523; 23 W. R. 459; 32 L. T., N. S. 345; affirming the decision of the Master of the Rolls, 8 L. R., Eq. 544; 43 L. J., Chanc. 777; 31 L. T., N. S. 219; 23 W. R. 147.

— by license and acquiescence.]—No license or covenant from A., the owner of adjoining land, to put out or not to obstruct windows in the house of B., is to be inferred from the circumstance of A. being a party to the deed by which the house, with the windows in it, was conveyed to B., and by which deed A. conveyed part of the adjoining land to B. *Blanchard v. Bridges*, 5 N. & M. 567; 4 A. & E. 176; 1 H. & W. 630.

Where the owner of adjoining land witnesses, without objection, alterations in the windows, there is no agreement on his part to be inferred at any time before the expiration of twenty years not to obstruct the access of light and air, by building up to the extremity of his land. *Ib.*

If A., in licensing B. to build to the extremity of B.'s ground adjoining that of A.'s, expressly reserves to himself the right of building to the extremity of his own ground when he shall think proper to do so, A. may at any time, within twenty years, build to the extremity of his own land, though he thereby renders the house of B. dark, damp and uninhabitable. *Ib.*

A., the side of whose house adjoined B.'s lawn, wrote to B. as follows:—"Before the last coat of paint is put on the side wall, we wish to place a window in it, and our workmen say it can be finished off more neatly with your permission to place the necessary ladder. The motive for doing this is, that I should gain a more cheerful view of the common, and passing objects." B. replied, "You are welcome to place a ladder in my grounds."—Held, that this did not amount to a license by B. to A. to open a window in the side of A.'s house; and therefore that B. might ob-



struct the window by an erection on her own land. *Bridges v. Blanchard*, 3 N. & M. 691; 1 A. & E. 536.

If an adjoining owner knowingly permits a messuage and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they are complete, or assert a right to raise a party wall, and build upon his own property so high as to render the new buildings less accessible to light and air than they were at the completion of the work. *Cotching v. Bassett*, 9 Jur., N. S. 590; 32 L. J., Chanc. 286; 32 Beav. 101; 11 W. R. 107.

By a parol agreement between A., the owner of land and dwelling-houses, and B., also the owner of land and buildings adjoining, a rocky piece of ground which stood close to A.'s freehold was reduced by B., so as to admit further light and air to A.'s dwellings, and buildings were erected by B., so as to be attached to, and to constitute an encroachment on, A.'s freehold. A. was cognizant of and offered no objection to the work as it proceeded, but acquiesced therein:—Held, that the Statute of Frauds did not apply to such an agreement. *Fisher v. Moon*, 11 L. T., N. S. 623.

As to effect of licenses, in general,—see LICENSE.

**Nature and extent of right acquired.**—An act of parliament alone can give any person the right of taking the property of another without his consent on payment of an adequate pecuniary compensation, and the right to light and air is as much property as the land which enjoys this easement on the land of another. *Dunball v. Walters*, 35 Beav. 505.

If the owner of a tenement has windows looking upon the premises of another, he cannot increase their size or number, or claim more extensive rights. *Cooper v. Hubbuck*, 30 Beav. 160; 31 L. J., Chanc. 123; 7 Jur., N. S. 457; 9 W. R. 352.

Where a purchaser takes with notice of adjoining windows, he is thereby put upon his inquiry as to whether they are privileged or not, and if privileged it is immaterial whether as modern windows by grant, or as ancient by prescription. *Miles v. Tobin*, 16 W. R. 465; 17 L. T., N. S. 433—C.

The title to light acquired under 2 & 3 Will. 4, c. 71, s. 3, by a twenty years' enjoyment, is a right to a certain amount of light only, and does not prevent the owner of one of the adjacent tenements from altering the aperture through which that amount of light approaches. *Maguire v. Grattan*, 16 W. R. 1189; 2 Ir. R., Eq. 246.

The 2 & 3 Will. 4, c. 71, has not altered the law as to the nature and extent of light to which the owner of an ancient light is entitled. *Kelk v. Pearson*, 6 L. R., Ch. 809; 24 L. T., N. S. 890; 19 W. R. 655.

The owner of an ancient light is entitled to prevent his neighbor from obstructing the

access of light, so as to render the house possessing the ancient light substantially less fit for occupation. *Id.*

The right conferred or recognized by 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it is used. *Younge v. Shaper*, 27 L. T., N. S. 643; 21 W. R. 185—V. C. M.

A man is entitled to the preservation of his ancient lights, even though, at the time, he is not using them for purposes requiring the amount of light laid claim to. *Id.*

The Bristol Improvement Act, 1840, enacts, that no opening shall be made in any party-wall except for communication from one building to another. The plaintiff had a house, one wall of which was to the height of the first story a party-wall between his house and a building belonging to the defendant, but above that height had ancient windows opening to the external air. The plaintiff pulled down his house, and proposed to rebuild it with windows in the same position as before. Before doing this, he gave notice to the defendant, under the act, that the wall, which he described as a party wall, was out of repair, and a certificate of two surveyors was given, directing the party-wall to be built at the joint expense of the plaintiff and of the defendant. The defendant afterwards proceeded to erect a building which would obstruct the light coming to the ancient windows of the plaintiff:—Held, that the wall above the defendant's building was not a party-wall; and that the plaintiff was not precluded from making windows in it; and an injunction was granted, restraining the defendant from obstructing his ancient lights. *Weston v. Arnold*, 8 L. R., Ch. 1084.

The plaintiff obtained an ex parte injunction upon filing the bill; but no mention was made in the bill, or in the affidavit in support of the motion, of the notice to pull down the wall, or the certificate of the surveyors:—Held, that inasmuch as these facts were only important as raising a point of law, based on an unreasonable construction of the act, they were not material facts, and the plaintiff was justified in omitting them. *Id.*

There is no difference in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law. *Leech v. Schweder*, 9 L. R., Ch. 463; 22 W. R. 633; 43 L. J., Chanc. 487; 30 L. T., N. S. 586; reversing the decision of the Master of the Rolls, 22 W. R. 203; 43 L. J., Chanc. 232.

But it is otherwise where the right to light claimed is not the ordinary easement, but a

special right created by the covenant; in which case a court of equity will grant an injunction without regard to the amount of damage. *Id.*

When the court was not satisfied from the evidence whether the wall proposed to be built by the defendant would or not be a material obstruction to the plaintiff's lights, the court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect. *Id.*

The right of an owner of ancient lights is to prevent his neighbor from obstructing the access of sufficient light and air to such an extent as to render his house substantially less comfortable and enjoyable, and The Prescription Act, 2 & 3 Will. 4, c. 71, has not altered the nature of the right or the principle on which it is to be determined whether it has been infringed, but has merely substituted a statutory title for an assumed grant. *City of London Brewery Company v. Tennant*, 43 L. J., Chanc. 457; 9 L. R., Ch. 212; 29 L. T., N. S. 755; 22 W. R. 172.

An agreement to grant A. a lease, in a form set out in a schedule, of property in the city, as soon as the house then in course of erection by A. on the property should be completed, contained a proviso that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, nor to any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the house erected thereon, and all lights, easements, and appurtenances thereto belonging, in accordance with the scheduled form:—Held, that the grant by the lease of lights and easements was controlled by the antecedent agreement, which was to be read as part of the lease; and that A. was not entitled to restrain the lessees of the opposite houses from building so as to obstruct the access of light and air to his premises from over such houses. *Salaman v. Glover*, 20 L. R., Eq. 444; 44 L. J., Chanc. 551; 32 L. T., N. S. 792; 23 W. R. 722—V. C. B.

**Abandonment and alteration.**—If an ancient light has been completely shut up with brick and mortar above twenty years, it loses its privilege. *Laurence v. Obee*, 3 Camp. 514—Ellenborough.

A right to light is acquired by mere user, and may be forfeited by non-user, though for less than twenty years, unless an intention is manifested, when the non-user commences, to resume the right within a reasonable time. *Moore v. Rawson*, 5 D. & R. 234; 3 B. & C. 332.

The right to an unobstructed access of light and air through a window is lost by a material alteration in the side of the wall in which the window was placed. *Blanchard v. Bridges*, 5 N. & M. 567; 4 A. & E. 176; 1 H. & W. 630.

The plaintiff was owner of a house in which there were ancient windows. His predecessor

blocked them up, and they continued blocked up for nearly twenty years. The defendant purchased the adjoining land, and proposed to build upon it. The plaintiff, by way of asserting the right to the light, reopened his ancient windows. The defendant obstructed them. On the trial of an action for this obstruction, the judge directed the jury that, if the right to light had once been acquired, it continued, unless lost; and he directed them, if they thought the right had once been acquired, to find for the plaintiff, unless they thought his predecessor had, in blocking up the windows, manifested an intention of permanently abandoning his right to the light, or unless they thought that the windows had been kept so closed as to lead the defendant to alter his position in the reasonable belief that the windows had been permanently abandoned. The plaintiff having had a verdict:—Held, that the defendant had no ground to complain of this as a misdirection. *Stoke v. Singers*, 8 El. & Bl. 31; 3 Jur., N. S. 1256; 26 L. J., Q. B. 257.

Where an owner of the dominant tenement has exceeded the limits of the right which he has acquired to the access of light and air, by opening an additional window, leaving his ancient windows unaltered, he has not necessarily lost or suspended his admitted right, but the opening of the additional window justifies the owner of the servient tenement in obstructing the ancient windows, if the doing so is unavoidable, in the exercise of his right to obstruct the new window. *Binckes v. Pask*, 11 C. B., N. S. 324; 8 Jur., N. S. 360; 31 L. J., C. P. 121; 10 W. R. 424; 6 L. T., N. S. 125.

The principle as to ancient lights is, that the owner of the dominant tenement cannot depart from the mode of user substantially. He cannot change the position of his lights, nor increase the original aperture into which windows have been put; but if he has, in using his right, contracted to any given extent the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows by windows of an improved structure that let in more light and air. *Turner v. Spooner*, 1 Drew. & Sm. 467; 7 Jur., N. S. 1068; 30 L. J., Chanc. 801; 9 W. R. 684; 4 L. T., N. S. 732.

If a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, in its new state it is entitled only to the same degree of light which was necessary to it in the former state, and the owner of the adjoining ground may lawfully erect a wall which prevents the admission of sufficient light for domestic purposes, if what is still admitted would be enough for the making of malt. *Martin v. Goble*, 1 Camp. 822—Macdonald.

If an ancient window is raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air is admitted through the un-

obstructed part of the enlarged window than was anciently enjoyed. *Chandler v. Thompson*, 3 Camp. 80—Lo Blanc.

A party may so alter the mode of enjoyment of ancient lights as to lose the right to them altogether. *Garritt v. Sharp*, 4 N. & M. 834; 3 A. & E. 325; 1 H. & W. 224.

Where lights had been put out and enjoyed without interruption for above twenty years, during the occupation of the opposite premises, by a tenant, that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him, and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights. *Daniel v. North*, 11 East, 372.

Where the plaintiff is entitled to lights by means of blinds fronting a garden of the defendant's, which he takes away, and opens an uninterrupted view into the garden, the defendant cannot justify making an erection to prevent the plaintiff from so doing, if he thereby renders the plaintiff's house more dark than before. *Cotterell v. Griffiths*, 4 Esp. 69—Kenyon.

The easement of a party to have his light and air unobstructed by newly-erected buildings is not lost or diminished by the circumstance that, by means of clearances effected in the neighborhood by other parties shortly before the alterations, the party acquired more light than the buildings could subtract. *Dyers' Company v. King*, 9 L. R., Eq. 438; 39 L. J., Chanc. 339; 18 W. R. 404; 22 L. T., N. S. 120—V. C. J.

Where a house is erected on the site of an old house which has been burnt down, the windows of which were ancient lights, the question whether the character of ancient lights attaches to the new windows depends on the question whether the servitude they would impose on the servient tenement is substantially the same as that which previously existed; and where the windows of a new house so erected, although somewhat differing in form from the windows of the old house, were of about the same area, and very nearly in the same positions:—Held, that the servitude imposed on the servient tenement, not being a more onerous nor a different servitude, the character of ancient lights attached to the new windows. *Curriers' Company v. Corbett*, 2 Drew. & Sm. 35; affirmed on appeal, 11 Jur., N. S. 719; 13 W. R. 538; 13 L. T., N. S. 154—L. J.

Where the owner of a house sells a piece of adjoining land, the purchaser may build on it as he pleases; and the vendor cannot prevent his doing so, even although the buildings erected on it may interfere with his ancient lights. *Id.*

A building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a sky-light. Held, that the right to access of light was not lost.

*National Provincial Plate-Glass Insurance Company v. Prudential Assurance Company*, 6 L. R., Ch. Div. 757; 40 L. J., Chanc. Div. 871; 37 L. T., N. S. 91; 26 W. R. 26—Fry, J.

Held, also, that any substantial alteration in the plane of the windows destroys the right. *Id.*—Jessell, M. R.

Held, also, that the right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows. *Id.*—Fry, J.

As to right to obstruct alterations,—see this title, II., 1; effect of alterations upon remedy for obstruction,—see this title, II., 2.

**Extinguishment; merger.**—A union of the ownership of dominant and servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives. *Simper v. Foley*, 2 Johns. & H. 555; 5 L. T., N. S. 669.

Where a right to an easement of this description is acquired against an owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion. *Id.*

A. and B. occupied houses adjoining each other, as tenants under leases, both of which were granted by the same lessor on the same day, and both expiring at the same time. B. by building on his own premises obstructed a window in the house of A., though the latter had had an uninterrupted enjoyment of light and air for more than twenty years:—Held, that the circumstance of the two houses being held under the same landlord, and for the same term, did not prevent the one tenant from acquiring an indefeasible right to light as against the other. *Froese v. Philipps*, 11 C. B., N. S. 449; 7 Jur., N. S. 1246; 30 L. J., C. P. 358; 9 W. R. 786—Exch. Cham.

## II. OBSTRUCTION.

### 1. What constitutes; and Right to obstruct.

**What amounts to an illegal obstruction.**—That diminution of light and air which the law recognizes as the ground of an action, against a party who builds near another's premises, is such as really makes them, to a sensible degree, less fit for the purposes of business or of occupation. *Parker v. Smith*, 5 C. & P. 438—Tindal.

To constitute an illegal obstruction, by building, of ancient lights, it is not sufficient that the plaintiff has less light than he had before; but there must be such a privation of light as will render the occupation of his house uncomfortable, and prevent him, if in trade, from carrying on his business as beneficially as he had previously done. *Back v. Stacey*, 2 C. & P. 465—Best.

To sustain an action for darkening windows, it is not sufficient that a ray or two of light

should be obstructed. The question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure his property in point of value or occupation. *Pringle v. Wernham*, 7 C. & P. 377—Denman. S. P., *Wells v. Ody*, 7 C. & P. 410—Parke.

As to injunction against obstruction,—see this title, II., 2; recovery of damages,—see this title, II., 3.

**Right to create obstruction.]**—The right to obstruct light possessed by an owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner of the dominant tenement neither confers nor enlarges such right. *Tapling v. Jones*, 11 H. L. Cas. 290; 20 C. B., N. S. 106; 11 Jur., N. S. 309; 34 L. J., C. P. 342; 13 W. R. 617; 12 L. T., N. S. 555. Compare *Staight or Straight v. Burn*, 5 L. R., Ch. 163; 39 L. J., Chanc. 289; 23 L. T., N. S. 831; 18 W. R. 243.

The "invasion of privacy by opening windows" is not a legal wrong or an injury, the opening of new windows being in law an innocent act. *Id.*

Where, therefore, the owner of a dominant tenement, while preserving one ancient window, altered old windows, and opened new windows upon the same side of his house, so that the owner of the servient tenement was obliged, in obstructing the new and altered lights, also to obstruct the ancient lights:—Held, that such obstruction was illegal. *Id.*

A. was an owner and occupier of a house of three stories, which had an ancient window on each floor. He altered the windows in the two lower floors, leaving the window in the third floor unaltered. He also built two new stories to his house, with windows intended to be permanent. He did not intend by making these alterations to abandon any privilege of his ancient windows. B., the owner of adjoining premises, could not obstruct the new windows in the upper floors, without also obstructing the old windows, and he built on his own land a wall which had the effect of obstructing all A.'s windows. A. afterwards blocked up his new windows, and sued B. for continuing the obstruction of the wall, which he refused to remove:—Held, that B. had not at any time the right to build a wall which would have the effect of obstructing the ancient lights in A.'s house, although the new windows could not otherwise have been obstructed. *Jones v. Tapling*, 11 C. B., N. S. 289; 8 Jur., N. S. 333; 31 L. J., C. P. 342; 10 W. R. 441; 5 L. T., N. S. 728; and *S. C.*, in Exch. Cham., 12 C. B., N. S. 826; 9 Jur., N. S. 426; affirmed, but on a different ground. *Id.*

In 1855, the owners in fee of a house and adjoining land granted to trustees a lease of the land for ninety-nine years, and they covenanted to build upon it according to a plan. In 1856, the owners conveyed the reversion in fee of the lands to the trustees; in

1857, the owners conveyed the house in fee to a person under whom the plaintiff obtained possession. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct the light and air, which for upwards of twenty years had come to the windows of the plaintiff's house. If he had built according to the plan in the lease, the obstruction would not have been to the same extent. Until the lease was granted there had never been any severance either in the title to or possession or occupancy of the land and house, and the same had been occupied and used together by the proprietors for upwards of fifty years:—Held, that the plaintiff could maintain no action against the defendant for building on the land, so as to obstruct the light and air which formerly came to the windows of the plaintiff's house. *White v. Bass*, 7 H. & N. 722; 8 Jur., N. S. 312; 31 L. J., Exch. 283; 5 L. T., N. S. 843.

Where an owner of ancient lights puts in new lights, the owner of the adjoining land has a right to obstruct the new lights, and, if it is necessary for that purpose, even to obstruct the old lights. *Daries v. Marshall*, 7 Jur., N. S. 720; 9 W. R. 368; 4 L. T., N. S. 105; 1 Drew. & Sm. 557.

A landlord of two houses granted a lease of one house and its appurtenances in consideration of certain repairs, part of which was the addition of windows. The tenant of the adjoining house afterwards surrendered his lease to the landlord, and took a new lease from him:—Held, that the tenant of the adjoining house could not obstruct the windows so added. *Id.*

The plaintiff purchased a house of A., and the defendant at the same time purchased of A. the adjoining land, upon which an erection of one story high had formerly stood. In the conveyance to the plaintiff, his house was described as bounded by building ground belonging to the defendant:—Held, that the defendant was not entitled to a greater height than one story, if by so doing he obstructed the plaintiff's lights. *Seansborough v. Coventry*, 9 Bing. 305; 2 M. & Scott, 362.

A., the owner of two adjoining houses, granted a lease of one of them to B. He afterwards leased the other to C., there then existing in it certain windows. After this B. accepted a new lease of his house from A.:—Held, that B. could alter his tenement, so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows were not twenty years old at the time of the alteration. *Coutts v. Gorham*, M. & M. 396—Tindal.

An owner of a house, in which there were ancient lights, rebuilt it, and in so doing altered the position of some of the ancient windows, and also opened new windows. The defendant proposed to build so as to obstruct both the new and ancient windows:—Held, that as he could not possibly obstruct the new windows without at the same time obstructing the ancient lights, the owner was

not entitled to an injunction. *Weatherly v. Ross*, 32 L. J., Chanc. 128; 1 H. & M. 349.

Any alteration of ancient lights, although not prejudicial to the owner of the servient tenement, gives him a right to obstruct them. *Catching v. Bassett*, 32 Beav. 101; 32 L. J., Chanc. 236.

As to effect of alterations, generally,—see this title, I.

In 1864, A. granted to B. a lease for twenty-one years of a house "together with all edifices . . . lights . . . easements, advantages and appurtenances thereto belonging, or therewith held, used or enjoyed." At the date of the lease A. held, for the residue of a term expiring at Christmas, 1868, an adjoining house, over which most of the light came to the back windows of the house leased to B. On the expiration of his lease A. purchased the fee simple of the adjoining house, and in 1872 he pulled down that house with the intention of rebuilding it to a greater height than its former height. B., whose lights were not ancient lights, filed a bill to restrain A. from raising the new house to a greater height than the old house:—Held, that the lease to B. only amounted to a grant of the light coming over the adjoining house during A.'s term in it, and that on subsequently acquiring the fee simple of the adjoining house A. was not estopped either at law or in equity from dealing with the house in such a way as to interfere with B.'s lights. *Booth v. Alcock*, 20 L. T., N. S. 231; 21 W. R. 743; 8 L. R., Ch. 663; 42 L. J., Chanc. 557.

A lessor granted a lease for twenty-one years of a house with its appurtenances, among which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, those lights not being ancient lights:—Held, that the lessor was not by his grant prevented from so building. *Id.*

A lease of a house for twenty-one years was made by a deed containing general words including "lights." At the date of the lease, the defendant was entitled, as under-lessee, for a term of which rather more than four years were then unexpired, to certain premises adjoining the house so leased to the plaintiff, and over which light found access to the house. Nine years after the date of the lease, the defendant, having purchased the fee of these adjoining premises, commenced building thereon so as to interfere with the light of plaintiff's house. In a suit by the plaintiff for an injunction to restrain the defendant from so building as to interfere with the light thus coming to his house:—Held, that no warranty or bargain could be implied from the general words that the plaintiff should have the access of light over the de-

fendant's premises unimpeded for a longer time than that for which the defendant was, at the date of the lease, entitled to the adjoining premises. *Id.*

Held, also, that during the period for which the defendant was entitled as under-lessee to the adjoining premises, he could not lawfully have interfered with the plaintiff's light coming across the adjoining premises. *Id.*

In an action for obstructing light and air by the erection of a wall upon the defendant's premises, contiguous to and against the plaintiff's premises, the defendant relied upon an agreement entered into by the former owners of the respective premises, reserving liberty to the then owner of the defendant's premises to build a wall which would or might obstruct light and air from the plaintiff's premises:—Held, that the agreement, not being in writing, was ineffectual to prevent the easement becoming indefeasible after twenty years' user, and that as a license it was extinguished by the change of ownership. *Judge v. Lowe*, 7 Ir. R., C. L. 291—C. P.

**Right of obstruction in the metropolis.]—**The Metropolitan Building Act of 1855, s. 83, par. 6, which gives "a right to the building owner to raise any party structure permitted by this act to be raised, upon condition of making good all damage occasioned thereby to the adjoining premises," does not authorize the raising of a structure so as to obstruct ancient lights in the adjoining premises. *Crofts v. Haldane*, 2 L. R., Q. B. 194; 10 L. T., N. S. 116; 8 B. & S. 104.

The courts of common law, in deciding cases of light and air within the metropolitan district, require persons erecting additional walls to their premises to carry them back from the original wall in a proportionate distance to the height they are about to be erected. A court of equity, following this rule, restrained a party from building a wall more than ten feet higher than his original wall, this being the distance between the two walls. *Beadel v. Perry*, 15 W. R. 120; 15 L. T., N. S. 345—V. C. S.

A window-frame erected on a party-wall was not a common nuisance within 14 Geo. 3, c. 78, so as to deprive the owner of it of his right to the windows, which were proved to be ancient lights; and even if it was, that would not, without conviction, be an answer to an action for obstructing them. *Titterton v. Conyers*, 1 Marsh. 140; 5 Taunt. 463.

— in the city of London.]—A prescriptive title is acquired under 2 & 3 Will. 4, c. 71, by an adverse enjoyment for twenty years, without interruption, of the access of light to the windows of a house in the city of London, notwithstanding a local custom of the city for the owners of an ancient messuage or foundations to build thereon to such height as the owner may please against the windows of any adjoining house and darken them. *Salter's*

*Company v. Jay*, 2 G. & D. 414; 3 Q. B. 111; 6 Jur. 803.

The custom to rebuild to any height upon ancient foundations, in the city of London, is destroyed by the 2 & 3 Will. 4, c. 71, s. 3. *Truscott v. Merchant Taylors' Company* (in error), 11 Exch. 855; 2 Jur., N. S. 856; 25 L. J., Exch. 173. S. P., *Cooper v. Hubbuck*, 12 C. B., N. S. 456—Exch. Cham.

## 2. Injunction to restrain.

**What interference or interruption may be restrained, generally.**—An injunction against darkening ancient windows is not granted in every case affecting the value of premises in a sufficient degree to support an action; the effect must be that material injury amounting to nuisance, which should not only be redressed by damages, but upon equitable principles prevented. *Att. Gen. v. Nichol*, 16 Ves. 338.

An owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he has enjoyed previously to the interruption sought to be restrained. *Yates v. Jack*, 1 L. R., Chanc. 295; 12 Jur., N. S. 305; 14 W. R. 618; 14 L. T., N. S. 151; overruling *Jackson v. Newcastle*, 3 De G., J. & S. 275; 83 L. J., Chanc. 698; 10 Jur., N. S. 688, 810; 10 L. T., N. S. 635, 802; 12 W. R. 1000. See *Aynley v. Glover*, 18 L. R., Eq. 544; 43 L. J., Chanc. 777; 81 L. T., N. S. 219.

In order to entitle a plaintiff to an injunction against a defendant obstructing the access of light and air to his house, the obstruction complained of must be such an interference with the light and air as to cause material annoyance to those who occupy the house; and the locality of the house, whether in a large town or in the country, is to be taken into consideration in estimating the amount of obstruction necessary to justify the interference of the court. In a large city the mere obstruction of the direct rays of the sun for two hours in the day, during the winter months, is not a sufficient ground for granting an injunction. *Clarks v. Clark*, 1 L. R., Chanc. 16; 35 L. J., Chanc. 151; 11 Jur., N. S. 914; 14 W. R. 115; 13 L. T., N. S. 482—C.

There is no essential difference in the amount of light and air that may be claimed in town and country, and the court will interfere, though the amount of sky area abstracted is small, if its proportion to the previous amount of sky is such that the abstraction causes inconvenience. *Martin v. Meadon*, 2 L. R., Eq. 425; 12 Jur., N. S. 837; 35 L. J., Chanc. 602; 14 W. R. 723; 14 L. T., N. S. 585—V. C. K.

Where there is, substantially, interference with comfort, and diminution of light for carrying on business, so that substantial damages would be given at law, a court of equity will restrain injury to ancient lights; and the fact that the amount of compensation is capable of being ascertained by a jury does

not prevent the court from acting on the ground of irreparable mischief. *Dent v. Auction Mart Company*, 2 L. R., Eq. 238; 12 Jur., N. S. 447; 35 L. J., Chanc. 555; 14 W. R. 700; 14 L. T., N. S. 837—V. C. W.

The court will not grant an injunction to restrain the erection of a building on account of its obstructing the plaintiff's light, unless the plaintiff can show that he will sustain substantial damage. *Robinson v. Whittingham*, 1 L. R., Chanc. App. 442; 12 Jur., N. S. 40; 35 L. J., Chanc. 227; 14 W. R. 291; 13 L. T., N. S. 730—L. J.

A plaintiff coming to the court for an injunction to restrain the erection of new buildings by his neighbor, on the ground of interference with his light and air, must show that his own residence will be rendered substantially less comfortable for purposes of occupation. *Johnson v. Wyatt*, 83 L. J., Chanc. 394—L. J.

The question to be determined in a suit for an injunction to restrain an interference with light and air is still, as it was before the 2 & 3 Will. 4, c. 71, whether the acts of the defendant will materially interfere with the access of light and air to the plaintiff's house, so as substantially to affect the comfortable occupation of the house. *Kelk v. Pearson*, 19 W. R. 665; 24 L. T., N. S. 890; 6 L. R., Ch. 809; reversing *S. C.*, 23 L. T., N. S. 458; 19 W. R. 267—V. C. B.

The defendant was erecting a row of houses running east and west. The western wall of the house at the west end of the row immediately adjoined the eastern boundary of the plaintiff's garden, which was on the north side of his house. The south frontage line of the row of houses was almost in a line with the north side of this house. The defendant's houses when completed were intended to be about thirty-two feet deep, and forty-five feet high, which height would exceed by a few feet that of the plaintiff's house. The evidence showed that the nearest house to the plaintiff's house would interfere with the access of light and air thereto, to such an extent as substantially to affect the comfortable enjoyment of his house:—Held, that he was entitled to a perpetual injunction to restrain the building of the house nearest to his own. *Id.*

Where an occupier of a house and grounds in London erected a translucent screen of glass thirty-five feet high, and thirty feet distant from the plaintiff's dwelling, having louvres to admit air, the court refused to grant an injunction. *Raddiffe v. Portland*, 3 Giff. 702; 8 Jur., N. S. 1007; 10 W. R. 687; 7 L. T., N. S. 126.

It is not every impediment to the access of light or of air which will warrant the interference of the Court of Chancery by way of injunction, or even entitle the person alleging himself to be injured to damages at law. In order to found a title to relief in equity, or even at law, in respect of such an impediment, some material or substantial injury must be established, and the onus of

proving the injury rests with the plaintiff. *Curriers' Company v. Corbett*, 4 De G., J. & S. 764.

The reversioners in fee of houses on both sides of a court in the city of London, sold their reversion of a house on one side of the court to a person who at the same time obtained from the termor an assignment of his interest. The purchaser cleared the site so obtained by him, and on it, and on adjoining land, commenced building in such a way as to interfere with the access of light and air to the vendor's houses on the opposite side of the court, and the latter filed a bill for an injunction to restrain him from proceeding with or completing his buildings, and for a preventive and mandatory injunction against any building to a greater height than that of the buildings pulled down, or so as to obstruct the light and air to a greater extent than had been the case prior to the clearance of the site:—Held, that there was no such material injury done or occasioned, or likely to be done or occasioned, to the vendors by the acts of the purchaser, as would warrant the interference of a court of equity, and the bill was dismissed without costs, but without prejudice to any remedy at law. *Id.*

The Court of Chancery has never assumed or exercised jurisdiction to order a building, which so far as it can impede the progress of light and air has been actually completed, to be pulled down. *Id.*

The plaintiff had for fifteen years used an upper room in his house for the special purpose of drying tobacco. There was a free flow of light and air through this room by means of two windows, one at each end of the room, both of them ancient lights. On motion for an injunction to restrain the defendant from raising the roof of his house to a height which would occasion some, but not a material diminution of light to one of these windows:—Held, that as the plaintiff had not used the room for the special purpose for twenty years, he could claim no special right on that account; that to obtain an injunction he must show a material diminution in the quantity of light and air required for the ordinary purposes of the room. *Dickinson v. Hurbottle*, 28 L. T., N. S. 183—V. C. M.

A mandatory injunction was granted on an interlocutory application, the defendant against whom it was sought failing to show that the buildings which he was erecting would not materially interfere with the plaintiff's ancient lights. *Younge v. Shaper*, 27 L. T., N. S. 643—V. C. M.

The School Board of London having, under the Elementary Education Act, 1870, and the Lands Clauses Act, 1845, acquired land as a site for a school, proceeded to build so as to interfere with the light of an adjoining owner, whose houses the board had not acquired power to take:—Held, that the board was not entitled by its building to interfere with the plaintiff's rights, leaving him to claim compensation under the Lands Clauses Act, s. 68, but that he was entitled to an in-

junction. *Clark v. London School Board*, 28 L. T., N. S. 657—V. C. M.

In a suit by the owner and occupier of a house and workshop, complaining of the obscuration of his ancient lights by the defendant raising a low party wall, distant only eight feet from his windows, to a height of twenty-six feet:—Held, that as the plaintiff had not lost his right to relief by delay or acquiescence, he was entitled to a mandatory injunction for the removal of the additional building. *Smith v. Smith*, 20 L. R., Eq. 500; 23 W. R. 771; 32 L. T., N. S. 787—It.

On a bill filed to compel the removal of so much of a large shed as interfered with the lights of a chapel and school-room below it, and to restrain the carrying on of the business of the defendants as boiler makers so as to interfere with the user of the chapel:—Held, that having regard to the nature of the building, relief as prayed would be granted at the hearing, though the shed was allowed to be erected and completed and the works carried on for some months without complaint. *Baxter v. Bower*, 44 L. J., Chanc. 625; 23 W. R. 803; 33 L. T., N. S. 41; affirming the decision of Bacon, V. C., 28 W. R. 834.

It is to be understood that an injunction is not to be used oppressively; but the court will not too carefully limit its orders, and will leave any abuse to be dealt with when it arises. *Id.*

"Air" is not to be coupled with "light" in an injunction, as a matter of common form. *Id.*

As a general rule, in the absence of special circumstances, the owner of a house in a narrow street will be restrained from raising it to a height which will obstruct the access of light below the angle of forty-five degrees to ancient windows opposite. *Hackett v. Bains*, 45 L. J., Chanc. Div. 13; 20 L. R., Eq. 494—It.

In a street varying from thirty-seven feet six inches to thirty-four feet in width, and having ancient houses on its eastern side, of the average height of forty-four feet, a building owner was restrained from raising a building on the opposite side to a greater height in front than forty-six feet, without prejudice to his putting on a sloping roof higher, so long as the angle of incidence of light over it did not exceed forty-five degrees. *Id.*

An ancient light of the plaintiff, a sculptor, had a north aspect, in a street thirty-one feet wide. The defendant's buildings, on the opposite side of the street, were, as to part, exactly thirty-one feet high, and as to other part, a little less than that height. He claimed to have a statutory right to raise his buildings to a height which would subtend an angle of forty-five degrees measured from a base line level with the center of the plaintiff's light:—Held, that the statutory regulation as to the height of buildings in streets is not to be taken as limiting the right by prescription to ancient lights, but that such right dependr

upon the degree and amount of obscuration in each particular case. *Theed v. Debenham*, 2 L. R., Ch. Div. 165; 24 W. R. 775—V. C. B.

If there is no interference with the access of light and air, the fact that a shop window is obstructed in such a way that it cannot be seen from so great a distance down the street as formerly, affords no ground for the interference of a court of equity. *Smith v. Owen*, 14 W. R. 422—V. C. W.

Mandatory injunction refused, and nominal damages, without costs on either side, granted in a case where the plaintiff had only a life interest, subject to an existing lease, and where, though there was a substantial interference with present comfort in respect of light, there was no prospective injury or diminution in the salable value of the property. There being no case as to air, the plaintiff's case as to light was made less strong by its being addressed conjointly to air and light. *Perkins v. Slater*, 35 L. T., N. S. 356—V. C. II.

B. alleged that in 1864 he had obtained the consent of a company, the owners of an adjoining tenement, to open two windows in a party-wall separating the two tenements. B. had previously opened three other windows in the party-wall. In 1875 the company served B. with notice, under the Metropolitan Building Act, that they intended blocking up all five windows. The three windows in 1875 had been opened up eighteen years. Evidence of consent upon the company's part to B.'s opening the two windows was admitted by Malins, V. C., who held that such consent was fully proved as to the two windows, and that as to the other three after eighteen years a previous consent to open them must be implied:—Held, that the evidence of consent was inadmissible, and that as the other three windows were not ancient lights the plaintiff's case as to the five windows failed, and that part of his bill must be dismissed with costs. *Bourke v. Alexandra Hotel Company*, 25 W. R. 782—C. A.; reversing the decision of Malins, V. C., 25 W. R. 893.

The Vice-Chancellor (Malins) had also granted an injunction as to eight other windows as to which there was no appeal:—Held, that as the plaintiff had succeeded as to part of his suit and failed as to the rest, the costs of the part as to which he had failed must be taxed and set off against those of the part as to which he had succeeded, and the balance of such costs only paid to the party entitled to most costs. *Id.*

Since the Judicature Act, as before it, a plaintiff in an action to restrain an alleged obstruction to ancient lights cannot obtain an injunction unless he proves substantial damage. *Kino v. Rudkin*, 6 L. R., Ch. Div. 100; 46 L. J., Chanc. Div. 807—Fry, J.

An inquiry as to damages will not be directed where the plaintiff has opened a case of substantial damage and has failed to prove it. *Id.*

A bill was filed by a seed merchant, carrying on business in Dublin, to restrain the defendants, who occupied adjacent offices, from erecting a new building then in progress, which he alleged would obstruct the access of light to an ancient window of the room in which he had sifted his seeds for the previous seventeen years; the plaintiff's interlocutory motion for an injunction was ordered to stand till the hearing, the defendants being at liberty in the meantime to complete their works, on their undertaking to abide any order to be eventually made by the court as to the removal of the new building; on the hearing the vice-chancellor dismissed the bill with costs, and the plaintiff having appealed:—Held, that the defendants, having caused such a diminution of light as, notwithstanding certain compensative illumination afforded by them, prevented the plaintiff from carrying on the delicate operation of sifting seeds in the room, he was entitled to relief, although he had so used the room for less than twenty years, and sufficient light remained in it for the ordinary purposes of a dwelling-house; and that the defendants should be restrained from erecting, or (on account of their undertaking) permitting to remain erected, any building obstructing the access of light as previously enjoyed by the plaintiff, and be directed to remove such portions of the newly-erected edifice as would constitute a breach of the foregoing injunction. *Mackey v. Scottish Widows' Fund Life Assurance Society*, 11 Ir. R., Eq. 541—Ch. App. And see *S. C.*, 10 Ir. R., Eq. 114—V. C.

As to what interruption or interference constitutes ground for action for damages,—see this title, II., 3.

**Effect of alterations or other acts of plaintiff.**—A party who, in an insignificant degree, obscured the light and air to his own dwelling:—Held, not thereby disentitled to an injunction to restrain another person from erecting a building so as seriously to diminish the supply of light and air. *Arceleckne v. Kell*, 2 Giff. 683; 5 Jur., N. S. 114.

If ancient windows which look over the land or upon the premises of another are enlarged, and are complained of; the court, upon their being restored to their original dimensions, will restrain the owner of the adjoining property from obscuring such restored windows. *Cooper v. Hubback*, 30 Bear. 160; 31 L. J., Chanc. 123; 7 Jur., N. S. 457.

When ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light, will not in itself preclude him from obtaining an injunction against the person causing the obstruction. *Staight or Straight v. Burn*, 5 L. R., Ch. 102; 39 L. J., Chanc. 289; 18 W. R. 243; 23 L. T., N. S. 831; overruling *Heath v. Bucknall*, 8 L. R., Eq. 1; 38 L. J., Chanc. 372; 20 L. T., N. S. 549; 17 W. R. 755.



The defendant built a wall to the north of the windows of the plaintiff's house, by which his ancient lights were interfered with. The plaintiff was at the same time enlarging his own premises, whereby he diminished the light coming to his own windows by shutting off some of the light from the south and south-west:—Held, that he was entitled to an injunction. *Ib.*

The doctrine of *Tapling v. Jones* (11 H. L. Cas. 290; 20 C. B., N. S. 166; 11 Jur., N. S. 309; 34 L. J., C. P. 342; 12 L. T., N. S. 555; 13 W. R. 617; cited *supra*, column 8491), applies to the equitable as well as to the legal remedy. *Ib.*

When an owner of a building having ancient lights enlarges or adds to the number of windows, he does not thereby preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights. *Aynsley v. Glover*, 8 L. R., Eq. 544; 43 L. J., Chanc. 777; 31 L. T., N. S. 219; 23 W. R. 147; affirming *S. C.*, 8 L. R., Eq. 544; 43 L. J., Chanc. 777; 31 L. T., N. S. 219; 23 W. R. 147.

A partial interference with lights by the owner is no bar to a suit to prevent a subsequent interference by other persons. *Baxter v. Bower*, 44 L. J., Chanc. 625; 33 L. T., N. S. 41; 23 W. R. 805; affirming the decision of Bacon, V. C., 23 W. R. 334.

As to effect of alterations, generally,—see this title, I.; right to obstruct alterations,—see this title, II., 1.

**Who entitled to injunction.**—A lessee of a dwelling-house in which he carries on business as a diamond merchant, is entitled to an injunction restraining the owners of premises adjacent (who afterwards purchased the reversion of the lessee's house) from constructing the party-wall which they were about to rebuild, so as to occasion such an obstruction of the lessee's ancient lights, however slight, as would injure him in his business. *Herz v. Union Bank of London*, 2 Giff. 686; 1 Jur., N. S. 127.

A lessee of a dwelling-house in which he has for nearly eight years carried on business as a repairer of jewelry and watches, is entitled to damages against the owner of adjacent premises who is in the process of constructing a building which would occasion such an obstruction of his light as to injure him in his business. *Lyon v. Dillimore*, 14 W. R. 511; 14 L. T., N. S. 183—V. C. S.

The court will restrain the interference with ancient lights, although the plaintiff is not the occupier of the house interfered with, and may have no intention of occupying it. *Wilson v. Townend*, 6 Jur., N. S. 1109; 30 L. J., Chanc. 25; 1 Drew. & Sm. 324; 3 L. T., N. S. 352; 9 W. R. 30.

A tenant from year to year may file a bill for an injunction to protect the right to the access and use of light; but the injunction will be limited to the period of the continuance of his tenancy. *Simper v. Foley*, 2 Johns. & H. 555; 5 L. T., N. S. 609.

Where the owner of an ancient light was a lessee whose lease had expired during the obstruction, but who had agreed for a renewal:—Held, that he could still maintain his suit. *Gale v. Abbott*, 8 Jur., N. S. 987; 10 W. R. 748; 6 L. T., N. S. 852—V. C. K.

Assuming that cases exist wherein a tenant from year to year under notice to quit is entitled to an injunction to restrain the erection of buildings which prejudice the access of light and air to which he is entitled, still the nature of his interest, especially when he can obtain damages at law, renders it imperative upon him to make out a very strong case for the intervention of a court of equity. *Jacomb v. Knight*, 3 De G., J. & S. 533.

**Time of application.**—A party coming to the court to prevent an obstruction of ancient lights, must take proceedings before the obstruction complained of is completed, otherwise his remedy is by action; and it is immaterial whether he knew of the obstruction before it was completed. *Lawrence v. Austin*, 11 Jur., N. S. 576; 34 L. J., Chanc. 598; 13 W. R. 981; 12 L. T., N. S. 757—R.

The mere fact that the damage created by obstruction of light is completed before bill filed, is not of itself a sufficient ground for refusing a mandatory injunction. *Darrell v. Pritchard*, 1 L. R., Ch. 244; 12 Jur., N. S. 16; 35 L. J., Chanc. 233; 14 W. R. 212; 13 L. T., N. S. 545.

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken:—Held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy. *Gale v. Abbot*, 8 Jur., N. S. 987; 10 W. R. 748; 6 L. T., N. S. 852—V. C. K.

**Inspection or survey of buildings obstructed.**—A judge of the Court of Chancery ought not to make a personal inspection of buildings in order to ascertain whether a material diminution of light and air is caused in any case. *Leech v. Schweder*, 43 L. J., Chanc. 232; 22 W. R. 292—R.

The court ought not, under 15 & 16 Vict. c. 80, s. 42, to make an order before the trial, appointing a scientific person to report upon the question of fact. *Baltic Company v. Simpson*, 24 W. R. 390—R.

Therefore, in a light and air suit, in which an interlocutory injunction had been granted, a motion by the defendant for the appointment of a surveyor to view the premises and plans and report thereon as to the injury to the plaintiffs, was refused with costs. *Ib.*

As to inspection of real property, generally.—see INSPECTION.

**Restraining at law.**—In an action for obstructing ancient lights, with a claim for an injunction, after verdict for the plaintiff, the court granted an injunction to restrain

the defendant from continuing the wrongful acts complained of, and from committing any injury of the like kind relating to the property and rights of the plaintiff, and from erecting, keeping erected, and continuing the erection of so much of the wall and buildings as was opposite his premises, so or in such manner as to darken or obstruct any of the ancient lights or windows of the premises, and from erecting any other building and doing any other act whereby the light and air coming to and entering his premises by means of the windows might be obstructed, or such premises might be in any way darkened, and from the repetition or continuance of any act whereby an injury of a like kind might happen to the plaintiff; the writ of injunction to lie in the office till next term, the defendant undertaking to pull down as much of the wall and building as should be sufficient to restore to the plaintiff the full enjoyment of the light and air he had previously, and to do the same to the satisfaction of a surveyor to be agreed on or nominated by one of the judges of the court, the defendant to pay the costs of the rule and of the surveyor. *Jessel v. Chaplin*, 2 Jur., N. S. 981—Exch.

### 3. Recovery of Damages.

**Instead of injunction, in suit in equity.]—**Wherever a plaintiff would recover substantial damages at law he has a right to sue in a court of equity, but there may be cases where the court of equity will exercise the power conferred on it by 21 & 22 Vict. c. 27, and give damages instead of an injunction. But the court will not let the defendant gain an advantage in this respect by refusing an interlocutory injunction, and merely putting him on an undertaking to pull down if ordered at the hearing. *Aynsley v. Glover*, 43 L. J., Chanc. 777; 8 L. R., Eq. 544; 31 L. T., N. S. 219—R.; affirmed, 10 L. R., Ch. 283; 44 L. J., Chanc. 523; 32 L. T., N. S. 345; 23 W. R. 459. See also *Yates v. Jack*, 1 L. R., Chanc. 295; 12 Jur., N. S. 805; 14 L. T., N. S. 151; overruling *Jackson v. Newcastle*, 3 De G., J. & S. 275; 10 Jur., N. S. 688, 810; 33 L. J., Chanc. 698; 10 L. T., N. S. 635, 802; 12 W. R. 1066.

In considering the amount of injury caused to a party by the obstruction of ancient lights, the court will have regard, not merely to the present, but also to the possible future use of the property. *Id.*

When an unlawful obstruction of an ancient light had existed for nearly six years, the court being of opinion that before the passing of the 21 & 22 Vict. c. 27, a bill for an injunction would have been dismissed, refused to direct an inquiry as to damages under that act. *Gauzel v. Fynney*, 42 L. J., Chanc. 122—C.

It is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the bill is filed, the court is unable to give damages unless the injury is such as would jus-

tify a mandatory injunction. *City of London Brewery Company v. Tennant*, 9 L. R., Ch. 212; 43 L. J., Chanc. 457; 22 W. R. 172; 29 L. T., N. S. 753.

The fact that the height of a building above an ancient light is not greater than its distance is not conclusive evidence that the light is not injuriously affected, but is *prima facie* evidence of there being no such interference with the light as the court will restrain, and requires to be rebutted by special evidence of injury. *Id.*

When the walls of a building which interfered with ancient lights were complete at the filing of the bill, and the roof was on at the hearing of the cause, the court did not grant a mandatory injunction to pull down any part of the building, but ordered an inquiry as to the damage sustained in respect of the loss of light. *Mott v. Shoobred*, 23 W. R. 545; 20 L. R., Eq. 23; 44 L. J., Chanc. 384.

On a bill for an injunction to restrain the completion and continuance of a building seriously obstructing ancient lights, it appeared that the building was almost completed before the bill was filed; that the plaintiff had, before the commencement of the works, information that some building was proposed, and that she was abroad during the actual building, and had done nothing amounting to acquiescence:—Held, that a mandatory injunction could not be granted, and an inquiry as to damages was directed, though not prayed by the bill. *Stanley v. Shrewsbury*, 19 L. R., Eq. 616; 44 L. J., Chanc. 389; 23 W. R. 678; 32 L. T., N. S. 248—V. C. H.

The distinction explained between an obstruction to ancient lights and an interference with the water rights of a riparian proprietor, with reference to the question whether damages should be awarded in lieu of an injunction. *Pennington v. Brinsop Hall Coal Company*, 5 L. R., Ch. Div. 769; 46 L. J., Chanc. Div. 778; 37 L. T., N. S. 194—Fry, J.

**When actions for damages may be maintained.]—**An action on the case lies for darkening the plaintiff's windows by a wall erected by the defendant partly on his own land and partly on the plaintiff's land. *Wells v. Ody*, 1 M. & W. 452; 2 Gale, 12; 5 D. P. C. 45.

In an action for obstructing the plaintiff's lights, a clerk who superintended the erection of the building by which they were darkened, and who alone directed the workmen, may be joined as a co-defendant with the original contractor. *Wilson v. Peto*, 6 Moore, 47.

The occupier of one of two houses built nearly at the same time and purchased of the same proprietor, may maintain an action against the tenant of the other, for obstructing his window lights, by adding to his own building, however short the previous period of enjoyment by the plaintiff. *Compton v. Richards*, 1 Price, 27.

The owner of a house divided it into two

tenements, and demised one of them to the defendant:—Held, that he was liable to an action for obstructing windows existing in the house at the time of the demise, although of recent construction, and though there was no stipulation against the obstruction. *Riviere v. Bower*, R. & M. 24—Abbott.

To give a cause of action for the obstruction of light, the diminution of light must be sensible; but the plaintiff is entitled substantially to all the light which he enjoyed before the obstruction, and evidence that enough of light remains to enable him to carry on his business is not sufficient to give the defendant a verdict. *Manning v. Gresham Hotel Company*, 1 Ir. R., C. L. 115.

A reversioner recovered in an action for obstructing an ancient light, to the injury of his reversionary interest. The obstruction was not removed:—Held, that he might maintain a second action for the continuation of the injury to his reversionary interest. *Shadwell v. Hutchinson*, 2 B. & Ad. 97; 4 C. & P. 833; M. & M. 350.

By an act it was provided that nothing in the act contained should authorize a railway company to take, injure or damage, for the purposes of the act, any house or building which was erected on or before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake. A subsequent clause contained provisions for settling all differences which might arise between the company and the owners or occupiers of any lands which should be taken, used, damaged or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation, as well for damages already sustained as for future, temporary or perpetual, or any recurring damages:—Held, that the company was liable to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a station erected by the company, and by the dust drifted from the station and embankment into the house; and that the reversioner was not bound to come in under the compensation clause. *Turner v. Sheffield and Rotherham Railway Company*, 10 M. & W. 425.

**Pleadings in actions.]**—A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient if it shows an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right. *Metropolitan Association for Improving Dwellings of Industrious Classes v. Petch*, 5 C. B., N. S. 504; 27 L. J., C. P. 830.

A plaintiff complained of an obstruction of the light and air to his ancient windows; of the raising and erecting of walls and buildings, whereby the smoke and vapor

from his chimneys were prevented from being carried off; and that the defendant had deprived his house of the support to which he was entitled. He pleaded, that the grievances were occasioned by the pulling down and rebuilding of his own house; that the plaintiff had notice, and that the old building was pulled down, and the new one erected, and large sums of money were expended thereon by the defendant, with the knowledge, acquiescence and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the so pulling down and rebuilding. The plaintiff replied that the defendant acquiesced and consented upon the faith of false representations made to him by the defendant and her agents, that the grievances would not result from or be produced by the pulling down and rebuilding:—Held, that the plea afforded a good defense on equitable grounds. *Davies v. Marshall*, 10 C. B., N. S. 697; 31 L. J., C. P. 61; 7 Jur., N. S. 1247; 9 W. R. 866; 4 L. T., N. S. 581.

Held, also, that the replication was a good equitable answer to the plea. *Id.*

**Evidence, and damages.]**—In an action for the obstruction of light to the windows of an hotel, the summons and plaint containing no allegation of special damage, witnesses deposed that guests coming to the hotel had refused to take the rooms which were alleged to be darkened, and had stated the darkness of the rooms as a ground for their refusal:—Held, that this evidence of the statements made by the guests was not admissible. *Gresham Hotel Company v. Manning*, 1 Ir. R., C. L. 125.

In an action for the obstruction of light and air by a boarding erected before the defendant's house, next door to that of the plaintiff, it was further alleged in the declaration that the defendant caused divers persons to commit nuisances, and place rubbish against the boarding, from which nuisances the plaintiff was injured:—Held, that evidence of these nuisances was not admissible, as the defendant could not be liable for their existence. *Steele v. Warne*, 28 L. T., N. S. 894—C. P.

In an action for removing boards, under a plea of justification that they obstructed an ancient window through which the light ought to pass, it is sufficient to show that the window was one through which the light ought to be allowed to pass, though the window is proved to have been erected within living memory. *Penwarden v. Ching*, M. & M. 400—Tindal.

## Lighting and Watching.

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### I. GENERAL OPERATION AND EFFECT OF STATUTES OF LIMITATION.

**When a bar to the right, or merely to the remedy.]**—The old English Statutes of Limitation barred the remedy only, not the right; but the modern statutes cut off the right as well as the remedy. *Dundee Harbor (Trustees) v. Dougall*, 1 Macq. H. L. Cas. 317; *De Beauvoir v. Owen*, 5 Exch. 166; 19 L. J., Exch. 177.

In actions for debts, the statute bars the remedy only, not the debt. *Higgins v. Scott*, 2 B. & Ad. 413. And see *Harris v. Quine*, 4 L. R., Q. B. 653; 38 L. J., Q. B. 331; 20 L. T., N. S. 947; 17 W. R. 967.

**Effect upon liens.]**—The lien of an attorney remains, although his claim against his client is barred by the statute. *Broomhead, In re*, 5 D. & L. 52; 10 L. J., Q. B. 355—B. C.—Wightman.

— **upon summary proceedings.]**—Where a client had a claim upon an attorney for moneys recovered for the client in an action brought on his behalf:—Held, that the statute was no bar to the recovery of the money by an application to the summary jurisdiction of the court. *Sharpe, Ex parte*, W., W. & D. 354; 1 Jur. 405.

— **upon petitions of right.]**—The Statute of Limitations cannot be pleaded to a petition of right. *Kustomjee v. Reg.*, 45 L. J., Q. B. Div. 249; 1 L. R., Q. B. Div. 487; 24 W. R. 428; 34 L. T., N. S. 278.

— **upon criminal prosecutions.]**—There is no limitation at common law to criminal prosecutions by indictment. *Dover v. Maestaer*, 5 Esp. 92—Ellenborough.

As to limitation of proceedings by certiorari,—see CERTIORARI.

As to limitation of complaints and informations before justices,—see JUSTICE OF THE PEACE; of appeals to the sessions,—see SESSIONS.

**Lex loci; what limitation or prescription applies to remedies in different countries.]**—The law of the country where a contract is made, or is to be performed, furnishes the rules for expounding the nature and extent of its obligation; but the law of the country where it is sought to enforce performance of a contract, governs all questions as to the remedy and mode of proceeding, including lapse of time. *Fergusson v. Fyffe*, 8 C. & F. 121.

The time of limitation for bringing an action is governed by the law of the country where the action is brought, and not by the *lex loci contractus*. *Huber v. Steiner*, 2 Scott, 304; 2 Bing. N. C. 202; 1 Hodges, 206. See *Harris v. Quine*, 4 L. R., Q. B. 653; 38 L. J., Q. B. 331; 20 L. T., N. S. 947; 17 W. R. 967.

The law of prescription, or of limitation, is a law relating to procedure, having reference only to the *lex fori*; and when a court

entertains a cause of action which originated in a foreign country, the rule is to adjudicate according to the law of that country, yet the court proceeds according to the prescription of the country in which it exercises jurisdiction. *Ruckmahoye v. Lulloobhoy Motichund*, 5 Moore Ind. App. 234; 8 Moore P. C. C. 4.

Where bills were drawn and accepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to Scotland, and there continued till his death:—Held, that more than six years having elapsed between the time of the bills becoming due and the action being brought, the Scotch law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France, during the absence of the debtor, and had obtained judgment against him. *Don v. Lippmann*, 5 C. & F. 1.

— when law of England applies to other countries, or to foreigners or foreign contracts. ]—A foreigner who always resides beyond sea is not bound by the Statute of Limitations. *Strithorst v. Grame*, 2 W. Bl. 723; 3 Wils. 145.

The 21 Jac. 1, c. 16, extends to India. *East India Company v. Paul*, 7 Moore P. C. C. 85; 14 Jur. 253.

And applies to Hindoos and Mohammedans as well as Europeans, in civil actions in the supreme court. *Ruckmahoye v. Lulloobhoy Motichund*, 5 Moore Ind. App. 234; 8 Moore P. C. C. 4.

The Statute of Limitations extends to persons in Scotland. *Rez v. Walker*, 1 W. Bl. 286. And see *Campbell v. Stein*, 6 Dow, 116; *Surtees v. Allen*, 2 Dow, 254.

In an action for a debt, it was averred, that before making the instrument and obligation thereinafter mentioned, the plaintiffs carried on business in Scotland, and that A. and the defendant were domiciled therein; and that by an instrument and obligation in writing, A. and the defendant became bound, and obliged themselves conjointly and severally, to pay to the plaintiff 400*l.*, and that, by the law of Scotland, at the time of making such instrument, and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed; that is to say, by virtue of the said law, the plaintiffs had the right and privilege of suing and bringing any action thereon, at any time within forty years from the time of making and signing the bond:—Held, that a plea, that the cause of action did not accrue within six years, was an answer to the action. *British Linen Company v. Drummond*, 10 B. & C. 903.

Where a foreign statute of limitations requires proceedings to be taken within a shorter period than that prescribed by the English statute, but like the English statute does not affect causes of action, but only the remedy in

respect of them, a foreign judgment declaring that a claim is barred by the local statute of limitations is no bar to an action in England for that same claim, within the period prescribed by the English law. *Harris v. Quine*, 38 L. J., Q. B. 331; 20 L. T., N. S. 947; 4 L. R., Q. B. 653; 17 W. R. 967.

A firm of attorneys in the Isle of Man was retained by the defendant, in 1858, to conduct a suit in one of the Manx courts in which he was defendant. The suit was dismissed in April, 1861; in September, 1861, the plaintiff in the suit appealed to a superior court, and the attorneys continued to act for the defendant, and conducted the appeal on his behalf up to the 1st of October, 1862. By the Manx statute law an action on a simple contract brought in the temporal courts of the island must be commenced within three years of the accrual of the cause of action. The attorneys brought an action in one of the Manx courts more than three years after October, 1862, and the court decided that the action was barred by the statute. They afterward commenced an action in England in January, 1868, to which the defendant pleaded, first, the judgment of the Manx court, and, secondly, the English Statute of Limitations:—Held, first, that, as the Manx statute barred the remedy only, and did not extinguish the debt, the judgment of the Manx court was no bar; and, secondly, that under the circumstances, there was a continuous employment of the attorneys, and that therefore none of the items were barred by the statute. *Id.*

Legal proceedings in England to recover a debt contracted in India are not barred by the Indian Statute of Limitations, Art. XIV., 1850. *Finch v. Finch*, 45 L. J., Ch. Div. 816; 35 L. T., N. S. 235—V. C. B.

The English Statute of Limitations binds every one who comes to sue in the court of Chancery. *Pardo v. Bingham*, 17 W. R. 419; 20 L. T., N. S. 464; 4 L. R., Ch. 735.

Agreements to waive the statute. ]—Semble, there may be an agreement, that in consideration of an inquiry into the merits of a disputed claim, no advantage shall be taken of the statute, in respect of the time employed in the inquiry, and an action may be brought for a breach of such agreement. *East India Company v. Paul*, 7 Moore P. C. C. 85; 14 Jur. 253.

A parol agreement was entered into between the executors of L. and T., that various old accounts between their testators should be settled without reference to the time that they had been running, and that a balance should be struck. The accounts were accordingly settled, and the executors of L. were allowed the value of a promissory note, which, but for the agreement, would have been barred by the statute. The executors of T. afterwards discovered a note from L. to T., which, but for the same reason, would have been barred by the statute:—Held, that the agreement was one for valuable consideration on both sides, to waive the benefit of the statute,

and ought to be enforced. *Lade v. Trill*, 6 Jur. 272—V. C. K. B.

A., being indebted to B. on two overdue bills of exchange, gave a written undertaking as follows:—"In consideration of your not proceeding on the bills, I hereby debar myself of the plea of the Statute of Limitations in case of my being sued for the recovery of the amounts of the bills, and I promise to pay them whenever my circumstances enable me to do so, and I may be called upon for that purpose."—Held, that the statute began to run as soon as A. became of ability to pay, although B. had had no notice or knowledge of such ability, and had made no demand of payment. *Waters v. Thanet*, 2 G. & D. 166; 2 Q. B. 757; 6 Jur. 708.

As to effect of acknowledgment, new promise, or part payment to avoid the bar of the statute,—see this title, II., 4; III., 4.

## II. LIMITATIONS OF RIGHTS OF ENTRY AND OF ACTIONS IN RESPECT OF REAL ESTATE; AND ACTIONS FOR RENTS, MORTGAGES, AND OTHER LIENS AND CHARGES ON LAND.

### 1. Periods of Prescription or Limitation.

**Under the Statute of Limitations, 3 & 4 Will. 4, c. 27.**—[By 3 & 4 Will. 4, c. 27, s. 2, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.]

**Interpretation of the statute, in respect of claimants.**—[By 3 & 4 Will. 4, c. 27, s. 1, the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue to issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; And the word person extends to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual, and every word importing the singular number only extends and applies to several persons or things as well as one person or thing, and every word importing the masculine gender only extends and applies to a female as well as a male.]

The poor of a parish is a class of persons within the meaning of this section. *St. Mary Magdalen, Oxford, v. Att. Gen.*, 6 H. L. Cas. 189; 8 Jur., N. S. 675; 26 L. J., Chanc. 620.

— in respect of lands. ]—[By 3 & 4 Will. 4, c. 27, s. 1, the word land extends to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure.]

Turnpike tolls are not land within the meaning of this enactment. *Mellish v. Brook*, 3 Beav. 32.

A lord of the manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years. *Whitton v. Peacock*, 3 Mylne & K. 325.

When the lord had seized copyholds quousque, and had held them for nearly forty years:—Held, that a bill by the heir of the former tenant to compel admittance by the lord was a suit to recover land within 3 & 4 Will. 4, c. 27, ss. 2, 3, and that the right of the heir was barred by that statute. *Walters v. Webb*, 5 L. R., Ch. 531; 39 L. J., Chanc. 677; 18 W. R. 587.

— in respect of rents. ]—[By 3 & 4 Will. 4, c. 27, s. 1, the word rent extends to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.)]

Where the overseers of a township claimed lands which they had allowed a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish, the enjoyment of this privilege by the parishioners, for upwards of twenty years, while the lands were occupied by persons paying no rent, does not defeat the title of such persons under 3 & 4 Will. 4, c. 27. *Doe d. Robinson v. Hinde*, 2 M. & Rob. 441—Parke.

In ejectment for two cottages by churchwardens and overseers, it appeared that the defendant had within twenty years swept the church and tolled the church bell:—Held, that the sweeping of the church and tolling of the church bell were services for which a distress might be made, and that the action was, therefore, brought within the time limited by 3 & 4 Will. 4, c. 27, s. 8. *Doe d. Edney v. Benham*, 7 Q. B. 976; 9 Jur. 662; 14 L. J., Q. B. 342.

The limitation prescribed by section 2, is not applicable to the case of rent reserved on an indenture of lease. *Grant v. Ellis*, 9 M. & W. 113.

Semble, that the statute would not apply to the case of a contract to re-purchase an estate in twenty-five years, or at any time during the life of another. *Alderson v. White*, 4 Jur., N. S. 125; 2 De G. & J. 97.

As to the application of the statute to various estates, rights and interests in lands, rents, &c.,—see this title, II., 2.

**Tithes.**—[By 53 Geo. 3, c. 127, s. 5, actions *for not setting out tithes, and suits in equity or the ecclesiastical courts, are to be commenced within six years from the time when the tithes became due.*]

The 3 & 4 Will. 4, c. 27, s. 2, enacts that no person shall bring an action to recover any land (which by s. 1 includes tithes) but within twenty years next after the right to bring such action has accrued to him or some person through whom he claims.—Held, that this statute does not operate to prevent a title-owner from recovering tithes as chattels from an occupier, although none had been set out for twenty years, but that it is confined to cases where there are two parties, each claiming an adverse estate in the tithes. *Ely (Dean and Chapter) v. Cast*, 15 M. & W. 617; 15 L. J., Exch. 841.

The right to tithes, as against an ecclesiastical corporation aggregate, is barred under 3 & 4 Will. 4, c. 27, s. 2, by non-payment for twenty years. *Ely (Dean and Chapter) v. Bliss*, 5 Beav. 574.

**Advowsons.**—[See 3 & 4 Will. 4, c. 27, ss. 30-34, and 6 & 7 Vict. c. 54, s. 3.]

**Time of limitations against the crown and the duchy of Cornwall.**—[By 24 & 25 Vict. c. 62, s. 1, the crown is not to sue after sixty years, by reason of land having been in charge to her Majesty, or stood insuper of record.

23 & 34 Vict. c. 53, extends the provisions of 9 Geo. 3, c. 16, as to the time of limitations of actions and suits to the Duke of Cornwall, in relation to real property belonging to the Duchy.]

The crown not being mentioned in the 21 Jac. 1, c. 16, s. 3, is not within its operation. *Lambert v. Taylor*, 4 B. & C. 138; 6 D. & R. 188.

The title of the crown to lands, of which it has been out of possession for twenty years, may be tried in an information of intrusion itself, and need not be first found by inquest of office, the only effect of the 21 Jac. 1, c. 14, being to throw the onus of proving title in the first instance, in such case, upon the crown. *Att. Gen. v. Parsons*, 2 M. & W. 23.

A conveyance of a manor by the commissioners of woods and forests on the part of the crown, does not entitle the purchaser to maintain ejectment against the possessor of land inclosed from the waste of the manor, more than twenty years before the conveyance, without leave of the crown. *Doe d. Wall or Watt v. Morris*, 2 Scott, 276; 2 Bing. N. C. 189; 1 Hodges, 215.

As to limitations of personal actions on behalf of the crown,—see this title, III., 1, b.

**The Real Property Limitation Act, 1874.**—[By 37 & 38 Vict. c. 57, the Real Property Limitation Act, 1874, which commences and comes into operation on the 1st of January, 1879, actions or suits brought for the recovery of land or rent, and of charges thereon, are further limited.]

2. **When Right of Entry or of Action Accrues; and when Time begins to run, and how computed, in Respect of Various Estates, Interests, Rents, Liens, and Parties.**

**General provisions of statute.**—[By 3 & 4 Will. 4, c. 27, s. 3, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued, 1st, when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance, or at the last time at which the profits or rent were or was so received;

2d, when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt in respect of the same estate or interest until his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, at the time of such death;

3d, when the person claims in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in possession or receipt at the time the party became entitled by virtue of such instrument;

4th, where the estate or interest claimed shall be in reversion or remainder, or other future estate or interest, and no person shall have obtained possession or receipt of the profits of such land, or receipt of such rent in respect of such estate or interest, at the time when it became an estate or interest in possession;

And lastly, when the claim shall be by reason of forfeiture or breach of condition, when such forfeiture was incurred, or such condition was broken.

By s. 4, when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession as if no such forfeiture or breach of condition had happened.

By s. 5, a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or

interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

By s. 6, for the purposes of the act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of letters of administration.]

When the statute begins to run against reversioners and remainder-men, in general.]—[By 8 & 4 Will. 4, c. 27, s. 3, when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have accrued at the time at which such estate or interest became an estate or interest in possession. (See also, as to estates or interests in reversion, the provisions of section 5 of the same statute, supra.)]

When a lessor permits his lessee, during the continuance of the lease, to pay no rent either to himself or any other person for twenty years, the lessor is not then barred by this statute from recovering the premises in ejectment. The case falls within the latter branch of section 3, which, in the case of an estate or an interest in reversion, provides that the right of action shall be deemed to have first accrued when it became an estate or interest in possession. The lessor, therefore, may recover in ejectment at any time within twenty years after the lease has expired. *Doe d. Davy v. Orendlen*, 7 M. & W. 131; 1 H. & W. 4; 4 Jur. 1016.

That branch of the 3 & 4 Will. 4, c. 27, which relates to estates in reversion expectant on the determination of a particular estate, applies only where another person than the reversioner is entitled to the particular estate. *Doe d. Hall v. Mouldsedale*, 16 M. & W. 689; 16 L. J., Exch. 169.

In 1784 premises were leased to H. J., for three lives. He, by will, devised all his estates and interest in the premises to his wife, A., her heirs and assigns. She, in 1793, conveyed the estates so devised to her son, J., and the heirs of his body, with a proviso, that if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A., her heirs and assigns. In 1811, J. purchased the reversion in fee in the premises expectant on the lease for lives, which was conveyed to him, and at the same time an old satisfied term of 5,000 years affecting the premises was assigned to a trustee for him to attend the

inheritance. J. died in 1812, without issue, leaving his nephew, L., his heir-at-law and the heir-at-law of A. The lease for lives determined in 1835. For upwards of twenty years from the death of J. the premises were held adversely to L.:—Held, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the leases for lives in 1835. *Ib.*

Action for breaking and entering the plaintiff's closes, and digging minerals therein. A plea justified the trespasses by the defendant as assignee of a lease of the minerals for ninety-nine years, granted by the owner in 1821. Replication, that the right to make an entry did not first accrue within twenty-one years. It appeared that from 1816 B. was in possession of the close under a lease, in which there was no reservation of the mines. In 1821 the owner granted a separate lease of the minerals to B. and P. for ninety-nine years, under whom the defendant claimed. In 1847 the mines were first worked:—Held, that B. was in possession of the mines before 1821, by reason of his being in possession of the surface as lessee under a lease, without reservation of the mines; and that such possession inured for the benefit of himself and P. on the granting of the lease of 1821, so as to make himself and P. possessed of the mines from 1821 under that lease, and not to leave the effect of that lease to be the granting of a mere *interesse termini*. *Keyse v. Powell*, 2 El. & Bl. 132; 17 Jur. 1052; 22 L. J., Q. B. 305.

Held also, that although the plea confessed the possession to be in the plaintiff at the time of the trespass in 1847, yet that the defendant was not confined to rely upon the right of entry which accrued to him in 1821, but might rely on a supposed dispossession within twenty-one years before 1847, and his right of immediate entry thereupon. *Ib.*

Copyhold land was surrendered, in 1798, to a husband and wife for their joint lives, with remainder to the heirs of the husband. In 1805 the husband absconded and went abroad, and was never afterwards heard of. In 1807 a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the estate until her death in 1841, whereupon the assignee was admitted:—Held, that an ejectment by the assignee brought after her death was in time, for that the husband's reversion in fee was a future estate within 3 & 4 Will. 4, c. 27, s. 3. *Doe d. Johnson v. Liveredge*, 11 M. & W. 517; 13 L. J., Exch. 61.

Where a copyhold estate was granted to A. for her own life and the life of B., with a grant of the reversion to C. for other lives, and A. devised the estate to B., who kept possession for more than twenty years:—Held, that C.'s right of possession attached on the death of A., and as no claim had been made within twenty years, an ejectment for the premises was barred by the statute. *Doe*



*d. Forster v. Scott*, 7 D. & R. 190; 4 B. & C. 706.

In 1788, estates were settled by a marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor (whose heiress at law she was), in fee. In 1818, by deeds to which the husband and wife, and their only son, were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the son, for life, remainder to his issue in tail, and remainder to his sister, for life, with other remainders over. The husband died in 1819, the wife in 1822, and the son in 1828:—Held, that, inasmuch as the estate of the sister was carved out of the estate of the son, she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds, as he would have had if he had continued alive, viz., twenty years from 1822, when his remainder came into possession. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

A. being tenant for life of a copyhold estate, and B., his daughter, being tenant in tail in remainder, joined in a recovery in 1778, and A. surrendered to the use of himself for life, remainder to the use of B. for life, remainder to the right heirs of the survivor. A. and B. shortly afterwards surrendered the fee to a bona fide purchaser, the contingent remainder to A. being void:—Held, that as the surrender passed B.'s life estate, the claim to the fee by B.'s son did not accrue till her death. *Doe d. Hinton v. Role*, 3 N. & P. 648; 8 A. & E. 530.

Ejectment brought by a remainder-man more than twenty but less than twenty-seven years since the tenant for life was last heard of, cannot be supported without other evidence, from which the jury may infer that the tenant for life was alive within twenty years. *Slade v. Nepean*, 2 N. & M. 219.

An estate was settled on a tenant for life and remainder-men in tail, with a name and arms clause, providing that in case any person should fail to comply with it for twelve calendar months after becoming entitled in possession the estate should go over as if he were dead. C. entered into possession as tenant in tail, and did not comply with the condition; he remained in possession for more than twenty years after he had forfeited the estate:—Held, that he did not acquire a title by adverse possession, but that under 3 & 4 Will. 4, c. 27, s. 4, the right of the remainder-men to enter commenced on his death. *Astley v. Essex*, 43 L. J., Chanc. 817; 18 L. R., Eq. 290; 30 L. T., N. S. 485—It.

At the death of the tenant for life the next remainder-man was in India and was ignorant of the clause until after the twelve months expired:—Held, that his ignorance did not prevent the forfeiture operating as to his interest. *Id.*

The 3 & 4 Will. 4, c. 27, s. 4, extends to forfeitures which operate to accelerate an estate under a conditional limitation, as well as

to forfeitures of which the heir-at-law only can take advantage. *Id.*

As to when future estates in land are barred by the running of the statute against party entitled to possession,—see this title, II., 6.

— in cases of tenancies at will. —[By 3 & 4 Will. 4, c. 27, s. 7, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.]

Section 7 of the statute is not retrospective, and applies only to tenancies at will, created after the passing of the act, or, at most, to such tenancies at will as existed when it passed. *Doe d. Evans v. Page*, 5 Q. B. 787; D. & M. 601; 8 Jur. 999; 13 L. J., Q. B. 153.

Under this enactment, no title accrues to a party who is tenant at will, and holds without interruption for twenty years after the expiration of the first year, but who has quitted possession before the act passed. *Doe d. Thompson v. Thompson*, 2 N. & P. 656; 6 A. & E. 721; W., W. & D. 236.

A tenancy at will, commencing in 1824, and determined in 1831, is no bar, under ss. 2 and 7, to an ejectment commenced in 1847. *Doe d. Birmingham Canal Company v. Bold*, 11 Q. B. 127; 13 Jur. 871.

It is only on the determination of a tenancy at will that there is such a vested right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2. *Id.*

A. in 1817 let B. into possession of a farm as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom:—Held, this entry amounted to a determination of the estate at will. *Turner v. Doe d. Bennett (in error)*, 9 M. & W. 643—Exch. Cham; affirming judgment of Exchequer, 7 M. & W. 226.

The granting a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2. *Hogin v. Hand*, 9 W. R. 673; 4 L. T., N. S. 465; 14 Moore P. C. C. 310.

If a person who has agreed to purchase real property is let into possession, he is a tenant at will, and such tenancy at will is determined by his death; and if after his death his widow, who is also devisee of his real estate, continues in possession, this is not a continuance of his tenancy at will, so as to prevent the operation of the statute. *Doe d. Stanway v. Rock*, 4 M. & G. 20; Car.

& M. 549; 6 Jur. 266. See *Drummond v. Sant*, 41 L. J., Q. B. 21, 25; 25 L. T., N. S. 419, 423.

On the death of A. intestate, his widow and son, a minor, resided in a dwelling-house till her marriage with the defendant in 1798, after which the defendant held and occupied the premises in his own name. C., the son, continued to reside there till 1805, when he left the premises, but between that year and 1841 he resided there occasionally, two or three weeks at a time, with the defendant and his wife. In 1842, the defendant having applied to the plaintiff for an advance of money upon a mortgage of the premises, in an interview with the solicitor of the plaintiff, produced the title-deeds, and, upon its being stated that C. was heir-at-law, and was the proper party to grant a mortgage, he said that C. would execute the mortgage, and on a subsequent day he brought C., who executed the mortgage deed in his presence, whereupon he received the mortgage money. In ejectment:—Held, that the defendant was tenant at will to C., and was estopped from alleging that he had acquired an estate by virtue of 3 & 4 Will. 4, c. 27, and that the tenancy at will had been determined by C. coming upon the premises. *Doe d. Groves v. Groves*, 10 Q. B. 486; 11 Jur. 558; 16 L. J., Q. B. 297. See *Care v. Mackenzie*, 46 L. J., Chanc. Div. 564, 565; 37 L. T., N. S. 218, 219.

A., purchaser of land, was let into possession before execution of a conveyance. He let in his son as tenant at will; the son occupied and built a cottage on the land; afterwards A. took a conveyance from the vendor, and some time after he mortgaged the land. The son continued to occupy the premises in all respects as at first, till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry:—Held, that an ejectment afterwards brought against her was barred by 3 & 4 Will. 4, c. 27, ss. 2 and 7; for that the tenancy at will was not determined by the father's taking a conveyance, and that, if it had, in point of law, been so determined by that event or by the mortgage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will; and the tenancy altogether had continued more than twenty years from the end of the first year. *Doe d. Goody v. Carter*, 9 Q. B. 863; 18 L. J., Q. B. 805.

In 1830, A. inclosed about six acres of waste land, and built a cottage thereon, and was allowed to remain in possession, without acknowledgment or payment of rent, to 1845, when the steward of the owner of the fee served him with a declaration and notice in ejectment; whereupon A. consented to give up four acres of the land, on his being allowed to continue in possession of the cottage and the other two acres until his death. A. died in 1861:—Held, that that which took place in

1845 amounted to an actual entry, and operated as a determination of the original tenancy at will, and the creation of a new tenancy; and consequently that the period of limitation prescribed by 3 & 4 Will. 4, c. 27, was to be reckoned from that time. *Locke v. Matthews*, 13 C. B., N. S. 753; 9 Jur., N. S. 874; 32 L. J., C. P. 98; 11 W. R. 343; 7 L. T., N. S. 824.

The lessee of premises for a term of ninety-nine years, dependent on four lives, inclosed, with the assent of the lessor, given by word of mouth, a piece of adjoining waste which belonged to the lessor, as lord of the manor, on the understanding that the piece so inclosed should be treated as if comprised in the lease. Upon the determination of the lease, which was more than twenty-one years from the date of the inclosure, the reversioners brought an ejectment to recover the land so inclosed from the tenant:—Held, that the assent of the landlord to the inclosure of the additional piece of land did not create such a tenancy of the land as to bring the case within 3 & 4 Will. 4, c. 27, s. 7, or prevent such inclosure from being an encroachment within the ordinary rule of law that an encroachment made by a tenant must be taken to be made for the benefit of the landlord, and treated as part of the demised premises; and that consequently the Statute of Limitations did not begin to run till the determination of the lease, and the reversioners were entitled to recover the land. *Whitmore v. Humphries*, 7 L. R., C. P. 4; 41 L. J., C. P. 43.

— in cases of tenancies from year to year, or for other periods. ]—[By 3 & 4 Will. c. 27, s. 8, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year, or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or a distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).]

The 8th section has a retrospective effect, and applies to a tenancy from year to year, created previously to the passing of the act. *Doe d. Jukes v. Sumner*, 14 M. & W. 39; 9 Jur. 413; 14 L. J., Exch. 337.

In 1824, B. was let into possession of a cottage under an agreement purporting to be a demise by the churchwardens and overseers of the poor of a parish, at the rent of 1s. 6d. per week, B. to quit on one month's notice being given. This agreement was signed only by one of the overseers. The churchwardens did not sign, nor was there any evidence to show that they had assented to the agreement. B. never paid any rent or made any acknowledgment. B. afterwards sold the premises to the defendant:—Held, in an ejectment, brought after twenty years, by the churchwardens and overseers for the

time being, against the defendant, that as the agreement did not pass an interest it did not amount to a lease in writing within the 3 & 4 Will. 4. c. 27, s. 8. and that consequently the claim of the churchwardens and overseers was barred by twenty years' adverse possession. *Doe d. Lansdell v. Gower*, 16 Jur. 100; 21 L. J., Q. B. 57; 17 Q. B. 589.

In ejectment by a landlord to recover land held under a tenancy from year to year, a statement made by the tenant in 1835 (since deceased), when speaking to an agent of the landlord about the property, "I have no property in W. but what I hold of Lord S., for which I pay 100*l.* a year," is evidence of payment of rent for the land at that time, under 3 & 4 Will. 4. c. 27, s. 8, so as to prevent an adverse right running against the landlord from the period of the determination of the first year of such tenancy. *Doe d. Spencer v. Beckett*, 4 Q. B. 601; 12 L. J., Q. B. 236; 7 Jur. 532.

Where a person makes a payment expressly or impliedly on account of something else than the rent of land of which he is tenant, such a payment is not a payment of rent within the 3 & 4 Will. 4. c. 27, s. 8; and under such circumstances a defense founded on that statute is a complete bar. *Att. Gen. v. Stephens*, 6 De G., M. & G. 111; 2 Jur., N. S. 51; 25 L. J., Chanc. 888.

A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in 1846; rent again became due in November, but was not paid. A. died in December of the same year, and B. retained possession. In ejectment by A.'s heir:—Held, that the time under 3 & 4 Will. 4. c. 27, ran from the last payment of rent, and not from the death of A., as the case fell within s. 8, and not within s. 3. *Baines v. Lumley*, 16 W. R. 674—C. P.

To bring a person rightfully entitled to a rent within s. 3 of the Statute of Limitations, 3 & 4 Will. 4. c. 27, so as to divest him of his rights, there must be a discontinuance of the receipt by him, either by not applying for payment, or omitting to enforce his remedies, with knowledge that the payment has not been made. *Adnam v. Sandwich*, 46 L. J., Q. B. Div. 612; 2 L. R., Q. B. Div. 485.

In 1812 lands, subject to a fee farm rent, were sold by C. to E., and subsequently became vested in the plaintiff. From 1812 to 1872 C. and his successors in title continued regularly to pay the fee farm rent, notwithstanding that they had ceased to hold any of the lands out of which the rent issued. During this time neither the defendant nor his predecessors had any notice that C. had parted with his interest in the lands by the sale in 1812. In 1872 the successors of C. declined to continue payment of the rent in question, and the defendant, in 1874, applied to the plaintiff, the then owner, for the two years' arrears. The plaintiff declined to pay the rent, and denied her liability to do so. Accordingly a distress was levied, whereupon

the plaintiff replevied and brought an action, alleging that the receipt of the rent having been discontinued for more than twenty years, the defendant's title to the rent was barred by 3 & 4 Will. 4. c. 26, ss. 2, 3:—Held, that the defendant was entitled to judgment, on the ground that there had been no discontinuance of the receipt of the rent within the meaning of the statute. Also, because, on the above facts, the fair presumption was that the continual payment had been made by C. and his successors under some arrangement entered into at the time of the purchase by E. in 1812, to which the latter was a party, and by which his successors were bound. *Ib.*

—in cases of adverse receipt of rent reserved.]—[By 3 & 4 Will. 4. c. 27, s. 9, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.]

Section 9 of the statute is retrospective. *Doe d. Angell v. Angell*, 9 Q. B. 328; 10 Jur. 705; 15 L. J., Q. B. 193.

A., in 1776, demised lands for sixty-one years. Upon his death, in 1786, the defendant's father, and subsequently the defendant, received the rent under the lease until its expiration in 1837. An ejectment was brought in 1837, after the expiration of the lease, by the plaintiff claiming under the will:—Held, that as section 9 was retrospective in its operation, the action would be barred by lapse of time, but was saved by section 15. *Ib.*

Semble, that the provisions of section 9 are applicable to a case where rent is reserved, and no rent paid, but not to a case where no rent is reserved. *Jones, Ex parte*, 4 Y. & C. 466.

A person claiming, without any real title, to be entitled to land, is a person wrongfully claiming within the meaning of 3 & 4 Will. 4. c. 27, s. 9; and that section applies, although the claim may be put forward under a mistake and without any improper intention to deprive others of their property. *Williams v. Pott*, 12 L. R., Eq. 149; 40 L. J., Chanc. 775—R.

As to what constitutes adverse possession or adverse receipt of rents,—see this title, II., 8, 4.

When the statute begins to run, against rights of mortgagors or mortgagees in respect of mortgaged premises.]—[By 3 & 4 Will. 4, c. 27, s. 28, when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

It was doubted whether this section comprehended the case of a mortgagee, so as to render it necessary for him to bring an ejectment within twenty years from the day of default made in the payment of the mortgage money. *Doe d. Jones v. Williams*, 5 A. & E. 301.

Therefore, by 7 Will. 4 & 1 Vict. c. 28, it is declared and enacted, that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in section 1 of the 3 & 4 Will. 4, c. 27, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the 3 & 4 Will. 4, c. 27, notwithstanding.]

A. mortgaged his premises in fee to B., with a proviso for redemption on payment of the mortgage money on a given day; but A. continued in possession until his death, after which C., his son and heir, and his widow, continued in possession until the death of the latter, when C. conveyed the premises in fee to D., who levied a fine with proclamations, and entered into possession. On an ejectment being brought by E., the heir-at-law of B., the original mortgagee, and a special verdict found as a fact, the non-payment of the mortgage debt on the given day, without finding either an adverse possession by A. or his heir, or that interest had been paid upon the mortgage money by the mortgagor:—Held, before the above enactment, that though there had been a lapse of thirty-seven years since default in payment of the principal, the statute was no bar to the ejectment, and, consequently, that the mortgagee was not precluded thereby. *Hall*

*v. Doe d. Surtees*, 1 D. & R. 340; 5 B. & A. 687.

By deeds of lease and release, of 7th and 8th September, 1819, lands were mortgaged in fee, subject to a proviso, that if the mortgagor should pay the principal and interest on the 25th of March then next, the mortgagee, his heirs and assigns, should and would re-convey and re-assure the premises to the mortgagor, his heirs and assigns. There was also a covenant that it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after default should be made in payment of the principal and interest, peaceably and quietly to enter into, have, hold, occupy, possess and enjoy the premises; and also a covenant by the mortgagor for further assurance in case of such default:—Held, that the mortgagee had the right of possession under this deed from the time of its execution, and not merely from the 25th March, 1820, and, therefore, that an ejectment for the recovery of the premises by the heir-at-law of the mortgagee, within twenty years of the latter but not of the former date (no interest having been paid in the meantime), was too late. *Doe d. Roylance v. Lightfoot*, 8 M. & W. 553; 5 Jur. 966.

The 7 Will. 4 & 1 Vict. c. 28, is not confined to cases where a mortgagor has been in possession of the mortgaged premises, but its object was to protect mortgages generally, and to make mortgages an available security, wherever they are valid in their inception; and the mortgagee having received payment of his interest, cannot be charged with any laches. *Doe d. Palmer v. Eyre*, 17 Q. B. 366; 15 Jur. 1081; 20 L. J. Q. B. 431.

A., in 1821, became entitled to the possession in fee simple of premises, of which he had never been in actual possession, but which had been occupied by the defendant, as tenant at will to him, for more than twenty years before action brought. In 1823, A. mortgaged the property to B., who afterwards assigned the mortgage to the plaintiff. A. had paid interest upon this mortgage within twenty years before the action was commenced, but had done so without the knowledge of the defendant:—Held, that 7 Will. 4 & 1 Vict. c. 28, applied, and that the plaintiff, having brought his action within twenty years next after the last payment of interest upon the mortgage, was not barred, although more than twenty years had elapsed since the time at which the right to bring such action had first accrued. *Id.*

A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer:—Held, that such possession was not adverse during the existence of the life estate so purchased, and that 3 & 4 Will. 4, c. 27, s. 28, was not, therefore, a bar to any suit for redemption by the ro-

remainder-man or reversioner. *Hyde v. Dalway*, 2 Hare, 528.

In 1821, N. being seized in fee of land, leased it to W. In 1822, W. mortgaged it for a term of years. In 1834, the mortgage was paid off, and the mortgagee and the owner of the equity of redemption conveyed all their interest to the person under whom the plaintiff claimed:—Held, that the plaintiff was a person claiming under a mortgage within 7 Will. 4 & 1 Vict. c. 28, and therefore might bring ejectment within twenty years after the mortgage was paid off, though after the expiration of twenty years from the payment of rent to the mortgagor, or acknowledgment of title in him by the tenant in possession. *Doe d. Badeley v. Massey*, 17 Q. B. 373; 15 Jur. 1031; 20 L. J., Q. B. 434.

An owner in fee of land, prior to mortgaging it for a term of years, put A. into possession. A. occupied for twenty-five years without payment of rent or written acknowledgment of the mortgagor's title. A. then conveyed in fee to D., and after attorning to him as his tenant, gave up possession for a sum of money to B., the representative of the mortgagor, and C., the executor of the mortgagee (whose mortgage had been kept alive by payment of interest). B. and C. afterwards joined in a conveyance of the premises to the defendants:—Held, in an action of ejectment, first, that the defendants were not estopped from setting up their title to the premises; and, secondly, that they were persons claiming under a mortgage within the meaning of the 7 Will. 4 and 1 Vict. c. 28, and consequently that the 3 & 4 Will. 4, c. 27, did not operate to bar their title. *Ford v. Ager*, 2 H. & C. 279; 9 Jur., N. S. 804; 32 L. J., Exch. 269; 11 W. R. 1073; 8 L. T., N. S. 546.

In ejectment by a mortgagee to recover possession of land mortgaged, it is sufficient to prove part payment of interest by a surety, without giving any evidence that the mortgagor was in default, or that the surety was compelled to pay, or that the payment was made at the request of the mortgagor. *Cann v. Taylor*, 1 F. & F. 651—Pollock.

In ejectment by a mortgagee, the mortgage being above twenty years old, and the interest upon it having been paid by the mortgagor, the plaintiff was allowed to recover upon proof of an agreement between them, and the defendant showing that he had held under him on terms which gave him a right of re-entry. *Pols v. Davies*, 1 F. & F. 284—Martin.

In 1836 certain property was mortgaged; in 1847 a portion of it was taken possession of by the mortgagee, who commenced an ejectment to recover possession; in the present action no proof of the service of the proceedings in ejectment in 1847 was given, but it was shown that a paper was served on the mortgagor:—Held, that the representative of the mortgagee was not entitled to recover, as there was no proof of possession by him or his predecessors in title within twenty years. *Thorp v. Facey*, 12 Jur., N. S. 741; 35 L. J., C. P. 349; 1 H. & R. 678.

As to what constitutes acknowledgment of title or right, within the above section, and its effect,—see this title, II., 4.

When the statute begins to run against claims for money secured by mortgages, judgments, liens, or other charges upon land or rent, legacies, &c.]—[By 3 & 4 Will. 4, c. 27, s. 40, after the 31st day of December, 1833, no action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.]

Money due upon a bond, in which the heirs of the obligor are bound, is not money charged upon or payable out of land within 3 & 4 Will. 4, c. 27, s. 40. *Wodden v. Morley*, 1 De G. & J. 1; 3 Jur., N. S. 449; 26 L. J., Chanc. 438. See *Pears v. Laing*, 12 L. R., Eq. 41, 55, 56; 40 L. J., Chanc. 225, 229; 24 L. T., N. S. 19, 21, 22; 19 W. R. 653—V. C. B.

Freeholds and leaseholds were mortgaged in 1822. The mortgagor devised and bequeathed his residuary estate upon trust to pay his debts, including mortgage debts, and afterwards on trust for H. A beneficial tenant for life under the will of the mortgagor in a moiety of a freehold not comprised in the mortgage, and also interested in the residue under the will of H., paid interest on the mortgage down to her death in 1859:—Held, that such payment prevented the Statutes of Limitation being a bar to the mortgagee's proceeding, either against the property comprised in the mortgage or on the covenant for repayment against the estate of the mortgagor. *Pears v. Laing*, 40 L. J., Chanc. 225; 12 L. R., Eq. 41; 24 L. T., N. S. 19; 19 W. R. 653—V. C. B.

In 1806, bonds for payment of money were given by B., with warrants of attorney to confess judgment. The conditions were, to pay the principal upon the death of B., with interest on the first bond from the day of its date, and on the latter from the day of the death of the obligor. The obligees were T., a son of the obligor, and C., in whom the bonds were vested as trustees of the marriage settlement of G., upon trusts for the benefit of the children of the marriage. In 1807 the real estates of B. were settled upon T., one of the obligees, subject to a term of 300 years, for raising 5,000*l.*, which was to be applied in satisfying a debt, and the remainder was

to go towards payment of "judgment and specialty debts then owing by B." The obligor died in 1816, leaving his son T. his executor, who survived his co-trustee C., and died in 1830. On the death of T., B. came into possession of the estates. On a bill filed by the children of G. against B. and his children, who were entitled to the estates subject to the term, and also against the owners of the term, praying for an account, and payment of the amount due on the bonds, and that the same might be decreed to be well charged on the lands included in the term:—Held, that the bonds did not come within the description of "judgment and specialty debts now due and owing," and therefore were not a charge upon the estate subject to the term, but that the children of G. were entitled to be paid out of the general assets of the obligor, of which the money to be raised by the term formed part. *Burrows v. Gore*, 6 H. L. Cas. 907; 4 Jur., N. S. 1245.

Held, also, that the statute was no bar to the right of the cestuis que trust, the children of G., to sue upon the bonds, although the obligees were barred, inasmuch as B. was their trustee, and his was the hand to pay and the hand to receive. *Id.*

T. being the trustee of the bonds and the personal representative of B., the right of the cestuis que trust did not accrue until the death of G. in 1846, and therefore the statute did not apply. *Id.*

As to what acknowledgment of title or right is within the above section, and its effect,—see this title, II., 4.

—claims for arrears of dower.]—[By 3 & 4 Will. 4, c. 41, s. 41, after the 31<sup>st</sup> day of December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.]

A widow's right to sue in equity for dower is barred when she has not, for upwards of thirty years, taken any proceedings, either at law or in equity, to have it assigned to her. *Marshall v. Smith*, 34 L. J., Chanc. 189; 10 Jur., N. S. 1174; 13 W. R. 198; 11 L. T., N. S. 443—V. C. S.

—claims for arrears of rent, interest, annuities, rent-charges, and other charges upon land or rent, in general.]—[By 3 & 4 Will. 4, c. 27, s. 42, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof within one year next

before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years.]

The 3 & 4 Will. 4, c. 27, s. 42, does not apply to any case in which there is not strictly a suit or an action for the recovery of interest. *Edmund v. Waugh*, 1 L. R., Eq. 418; 12 Jur., N. S. 326; 35 L. J., Chanc. 234; 14 W. R. 257; 13 L. T., N. S. 739—V. C. K.

Therefore where, under a power of sale in a mortgage deed, the property mortgaged was sold, and the proceeds paid into court to the general credit of an account in an administration suit of the estate of the mortgagees upon a partition by trustees of the parties beneficially entitled to the fund in court:—Held, that they were entitled to the full arrears of interest on the mortgage, the fund after sale, having been in their possession, and no recovery by distress, suit, or action being requisite. *Id.*

The 3 & 4 Will. 4, c. 27, s. 42, has reference only to the land on which a demand is secured, the object being to relieve land from arrears of charges beyond six years; and this object is not affected by the terms of the 3 & 4 Will. 4, c. 42, s. 3, which relates to a different subject, namely, to personal actions only. *Hunter v. Nockolds*, 1 Mac. & G. 640; 1 H. & T. 644; 14 Jur. 256; 19 L. J., Chanc. 177.

The 3 & 4 Will. 4, c. 42, s. 3, is to be treated as an exception out of the 42<sup>d</sup> section of 3 & 4 Will. 4, c. 27, and the construction of the two acts, taken together, is, that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of land or rent, shall be recovered by any distress, action or suit, other than and except in actions upon covenant or debt upon specialty, in which case the limitation is twenty years. *Id.*

The 42<sup>d</sup> section of the 3 & 4 Will. 4, c. 27, is not repealed by 3 & 4 Will. 4, c. 42. *Humfrey v. Gery*, 7 C. B. 567.

Debts secured by judgments are sums of money charged upon or payable out of land within the 3 & 4 Will. 4, c. 27, s. 42, and only six years' arrears of interest can be recovered in respect of such debts. *Henry v. Smith*, 2 Dru. & W. 381; 1 Con. & L. 506 (Irish).

—claims for arrears of interest on mortgages.]—A mortgagee, notwithstanding the interest mortgaged in reversion, can only recover six years' arrears of interest as against the land mortgaged, although he may recover twenty years' arrears on the covenant to pay. *Sinclair v. Jackson*, 17 Beav. 405.

A mortgagee in a suit to foreclose can only recover arrears of interest for six years next preceding the suit, though the principal and

interest are secured by the covenant and bond of the mortgagor. *Round v. Bell*, 31 L. J., Chanc. 127; 30 Beav. 121.

After the sale of an estate by a trustee for a mortgagee, under a power of sale, in a suit by the mortgagor to recover the surplus money, the mortgagee cannot, under 3 & 4 Will. 4, c. 27, retain more than six years' arrears of interest out of the purchase money. *Mason v. Broadbent*, 33 Beav. 298; 12 W. R. 1118; 9 L. T., N. S. 565.

Under 3 & 4 Will. 4, c. 27, s. 42, a mortgagee, irrespective of a covenant to pay or a term to secure the payment, is entitled to six years' arrears of interest. *Shaw v. Johnson*, 1 Drew. & Sm. 412; 9 W. R. 629; 4 L. T., N. S. 460; 30 L. J., Chanc. 646.

So far as a covenant to pay affects the land, it is limited to six years. *Id.*

When a term is created on an express trust to secure principal and interest, the 3 & 4 Will. 4, c. 27, s. 42, does not operate as a bar, and a mortgagee's right is not confined to six years. *Id.*

Where a married woman, entitled, after the death of a tenant for life, to a share of a fund arising from moneys the proceeds of lands devised upon trust for sale, joined with her husband in a mortgage by deed acknowledged of her reversionary estate, such mortgage containing a covenant by husband and wife to pay full interest:—Held, that the wife's estate was money payable out of land within 3 & 4 Will. 4, c. 27, s. 42; and that the mortgagee could not recover more than six years' arrears of interest on the mortgage of such an estate. *Dwyer v. Woodman*, 3 L. R., Eq. 313—V. C. W.

Turnpike tolls are not within the 3 & 4 Will. 4, c. 27; and consequently, more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls, notwithstanding s. 42. *Mellish v. Brook*, 3 Beav. 22.

A canal company conveyed, under seal, the canal works and rates to a mortgagee, to hold, until repayment of certain money borrowed, and interest. There was no covenant to repay:—Held, that, although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. *Hodges v. Crofton Canal Company*, 3 Beav. 86.

Where a debt is secured by a bond and a covenant of the debtor, as well as by a mortgage of his lands, the mortgagee will be entitled, under 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, to carry back the interest account in a suit to foreclose the mortgage for a period of twenty years. *Du Vigier v. Lee*, 2 Hare, 326; 7 Jur. 290; 12 L. J., Chanc. 345.

A corporation agreed to purchase freehold premises subject to an equitable mortgage, with an agreement to give a legal mortgage, and paid the money into court. The equitable mortgagee petitioned that out of the fund there might be paid to him the principal money then due and nineteen years' interest:—Held, that the petition must be treated as

a suit within 3 & 4 Will. 4, c. 27, s. 42, and that the mortgagee was entitled only to his principal money and six years' interest. *Stead, In re*, 35 L. T., N. S. 465; 24 W. R. 698; 45 L. J., Chanc. Div. 634; 2 L. R., Ch. Div. 713—V. C. M.

—claims for arrears of rent.]—A. was, from the 2d of July, 1805, till the 10th of July, 1841 (when he was found a lunatic), and B., his committee, had ever since been, seized as of fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* per annum, payable on the 29th of September and 25th of March, created by letters patent of Hen. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto:—Held, that the case was governed by 3 & 4 Will. 4, c. 27, s. 42, and consequently, that neither the lunatic, nor his committee, was entitled to recover any arrears of the rent after the expiration of six years from the 29th of September, 1831. *Humfrey v. Gery*, 7 C. B. 567.

A defendant in replevin avowed the taking of the goods for arrears of an ancient quit-rent issuing out of a tenement held of him as lord of a manor by fealty and rent. The last payment was made on the 25th of January, 1823, for rent due on the 4th of October, 1824. The distress was made on the 13th of May, 1845:—Held, that by the operation of 2 & 3 Will. 4, c. 27, ss. 2, 3, and 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made, and that the limitation need not be pleaded specially, but was available under a plea of non tenuit. *De Beauvoir v. Owen*, 5 Exch. 166; 19 L. J., Exch. 177—Exch. Cham.

The limitation prescribed by 3 & 4 Will. 4, c. 27, s. 42, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent charge is barred. *Manning v. Phelps*, 10 Exch. 59; 24 L. J., Exch. 62.

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by non-payment, except that under the 3 & 4 Will. 4, c. 27, s. 42, the amount to be recovered is limited to six years. *Archbold v. Scully*, 9 H. L. Cas. 369; 7 Jur., N. S. 1169; 4 L. T., N. S. 160.

Where the rents of mines are reserved by means of payment of produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it; and, therefore the statute will run from the time of such receipt, and not from the time of such sale. *Denys v. Shuckburgh*, 4 Y. & C. 42.

The statute is a good defense to an action by a landlord for rent against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although

the tenancy had not been determined by a notice to quit. *Leigh v. Thornton*, 1 B. & A. 625. And see *Hughes v. Thomas*, 18 East, 474.

In 1850, a suit for administration was instituted by a tenant for life under a will of leaseholds, who subsequently mortgaged her life interest. The mortgagee obtained, under an order made in 1860, liberty to enter, and did enter, into possession of the rents, for the purpose of keeping down the interest on her mortgage, and paying the balance to the tenant for life. In March, 1866, the tenant for life left her home, and was never heard of afterwards. On a petition presented in 1875 by the persons entitled in remainder, it was held that, under the circumstances, the tenant for life must be taken to have died soon after June, 1866. On a petition presented by the same parties for an account of arrears of rent received by the mortgagee:—Held, that the petitioners had been guilty of no laches in not filing their petition till the expiration of seven years after the disappearance of the tenant for life, and that they were, therefore, entitled to an account of rents; but that there was no fiduciary relation between the mortgagee and the petitioners, and, therefore, they were only entitled to arrears for six years before the filing of the petition. *Hickman v. Upsall*, 4 L. R., Ch. Div. 144; 46 L. J., Chanc. Div. 245; 25 W. R. 175; 35 L. T., N. S. 919—C. A. See S. C., 2 L. R., Ch. Div. 617; 24 W. R. 694—V. C. H.

—claims for arrears of annuities and rent-charges.]-An annuitant claiming under a will, who has never received the annuity, is barred from his remedy of distress or action by 3 & 4 Will. 4, c. 27, when more than twenty years have elapsed since the right to the annuity first accrued to him. *James v. Salter*, 4 Scott, 168; 3 Bing. N. C. 544; 5 D. P. C. 496; 3 Hodges, 70; 1 Jur. 135.

An action upon a covenant in an indenture, granting an annuity or a rent-charge issuing out of land, may be brought within the period of twenty years, limited by 3 & 4 Will. 4, c. 42, s. 3, and is not barred by 3 & 4 Will. 4, c. 27, s. 42, which limits the recovery of arrears of rent within six years. *Strachan v. Thomas*, 4 P. & D. 229; 12 A. & E. 536; 4 Jur. 1183.

A devisee, claiming an annuity granted by will, is not barred under 3 & 4 Will. 4, c. 27, ss. 2, 3, by the lapse of twenty years, if he has never received any payment in respect of the annuity. *James v. Salter*, 2 Scott, 750; 2 Bing. N. C. 505; 1 Hodges, 405.

The 3 & 4 Will. 4, c. 27, s. 42, limiting the period within which an action may be brought "to recover any land or rent," does not apply to an action on a covenant to pay a rent charged on land. *Manning v. Phelps*, 10 Exch. 59; 24 L. J., Exch. 62.

Arrears of an annuity are recoverable for more than six years if there is a term to secure it. *Snow v. Booth*, 8 De G., M. & G. 69; 2 Jur., N. S. 244; 25 L. J., Chanc. 417.

Three annuities, charged upon an estate, were granted in 1814. No payment had been made in respect of them since March, 1815. In January, 1855, a bill was filed for an account of the rents and profits of the estate, and payment of the arrears of the annuities:—Held, that the 3 & 4 Will. 4, c. 27, s. 42, did not operate as a bar. *Knight v. Bowyer*, 8 Jur., N. S. 968; 26 L. J., Chanc. 796; affirmed on appeal, 4 Jur., N. S. 569; 27 L. J., Chanc. 521.

Arrears of an annuity charged on a reversionary interest in land, are recoverable more than six years after the same became payable, the 3 & 4 Will. 4, c. 27, s. 42, having no application so long as the interest is reversionary. *Wheeler v. Howell*, 3 Kay & J. 198.

But an annuity bequeathed out of personality is not within the 3 & 4 Will. 4, c. 27, s. 42. *Ashwell, In re*, 1 Johnson, 112.

Where a rent-charge had been received from the occupier of one part of the premises charged down to the present time, and then, for the first time, had been levied by distress on the occupier of another part, which, for more than twenty years had been in a separate ownership, and the owner or occupier of which had never paid the rent before:—Held, that the right to distrain for the rent on that portion of the premises charged was not barred by 3 & 4 Will. 4, c. 27. *Woodcock v. Titterton*, 12 W. R. 865—Q. B.

By will, in 1810, B. devised to trustees his estate in Jamaica to hold to the use that H. should, out of the rents and profits, receive for life an annuity payable quarterly for her separate use, with powers of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives. B. gave other annuities out of the rents and profits of the estate, and gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment, and arrears were due to her and her appointees. The estate was for some years a waste, and no rents and profits were received till 1870, and when received they were paid into court:—Held, that the Statute of Limitations, 3 & 4 Will. 4, c. 27, did not apply to Jamaica, and that the legal personal representative of H. was entitled to be paid the arrears due to her. *Pitt v. Dacre*, 3 L. R., Ch. Div. 295; 45 L. J., Chanc. Div. 796; 24 W. R. 943—V. C. H.

As to what acknowledgment of right is within the above section, and its effect,—see this title, II., 4.

### 3. Adverse Possession, in General.

What adverse possession constituted a bar, before the Statute of Limitations.]-A wrongful continuation of possession for twenty years after the expiration of a title, under



which the tenant lawfully entered, constituted such an adverse possession as created a bar to an entry, or to an ejectment. *Doe d. Parker v. Gregory*, 4 N. & M. 308; 2 A. & E. 14.

As, where the husband of a tenant for life held over twenty years after her decease. *Id.*

L. R. died seized of freehold premises, leaving a widow and a son (by her), R. R., his heir-at-law, twelve years old. The widow entered into receipt of the rents, and two years afterwards married again, and went to reside on the premises, which she occupied with her second husband during his life, and from his death until her own, the whole period of such occupation by her being more than fifty years. During her occupation she frequently said that the premises after her death belonged to R. R., but she left a will devising the property to H., her son by her second husband, and describing it as having descended to her from her mother. After her death, H., then in possession, promised that he would sign an agreement to rent the premises under R. R., but he never did sign it:—Held, that a jury was bound to find an adverse possession of the widow during the fifty years. *Doe d. Roffey v. Harbrow*, 3 A. & E. 67, n.; 1 N. & M. 423.

Land was devised in 1774 by a man to his wife in fee; and, after having married again, she lived on the property with her second husband for nine or ten years, and then went to reside elsewhere, and they were never afterwards in possession, but under what circumstances they left was never explained. The wife died in 1828, before the husband, who survived until 1832:—Held, that the heir of the wife was barred by the adverse possession of above forty years; though the wife was always under the disability of coverture, and her husband had a tenancy by the curtesy during his life, and it was admitted that no fine had been levied. *Doe d. Corbyn v. Branston*, 4 N. & M. 664; 3 A. & E. 63; 1 H. & W. 162.

A lease for years was granted to a married woman living apart from her husband, under the supposition that she was a feme sole:—Held, on a question whether there had been an adverse possession, that it was not a misdirection to put it as a question, whether the possession had been adverse as against the wife, instead of as against the husband. *Doe d. Wilkins v. Wilkins*, 5 N. & M. 434; 1 H. & W. 574; 4 A. & E. 80.

E. being in occupation of land attorned to L., who claimed the fee, and had entered in the name of taking possession. The land was copyhold. After the attornment, L. was not admitted, nor did he receive rent, or occupy, or in any way interfere with the land, the fee in which was several times sold, with proper formalities, in the copyhold court, within the twenty years following:—Held, that L. was absolutely barred from bringing ejectment at the end of the twenty years, though E. continued in occupation till within twenty years of the ejectment being

brought. *Doe d. Linsey v. Edwards*, 5 A. & E. 95; 6 N. & M. 633.

A., in 1819, agreed to purchase lands of B. for 670*l.*, and paid a deposit of 10*l.* The agreement did not contain any stipulation that A. should be let into possession, but in fact he was so, at Michaelmas, in 1819. A. continued in possession, and neither paid any more of the purchase-money, nor any rent or interest; and in 1822, A. cut down timber, and in 5 Geo. 4, levied a fine with proclamations, and mortgaged the property, and after that died, leaving the property, subject to the mortgage, to his daughters:—Held, that these facts were no bar to B. in ejectment, brought within twenty years after Michaelmas, 1839; as A., coming in under an intended purchase, was, in equity, the owner of the land, with a liability to pay the purchase-money; and his cutting trees was consistent with his holding in that character, and not adversely to the rights of the vendor, to whom at law he was tenant at will. *Doe d. Counsell v. Caperton*, 9 C. & P. 112—Alderson.

When a widow continued to reside in a freehold house of which she was seized, for more than twenty years after her husband's death:—Held, that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. *Doe d. Hickman v. Haslewood*, 1 N. & P. 352; 6 A. & E. 167; 1 Jur. 1138; W., W. & D. 116.

S. devised his estate to his wife in fee, and died seized, leaving his widow and two sons him surviving. After his death the widow and the younger son, by deed, conveyed the estate in fee to H., without the privity of the eldest son and heir-at-law of the testator; H. continued in undisturbed possession of the estate for twenty-two years, and died possessed, bequeathing it to his children; six years after H. entered into possession, the eldest son and heir-at-law of S. devised all his real estate to his wife and to his younger brother, in trust for the life of the wife, and then to his children, and died three years afterwards, without ever disturbing H.'s possession:—Held, that the trustees might maintain ejectment to recover the possession of the estate, notwithstanding the quiet enjoyment of H. for twenty-two years. *Doe d. Souter v. Hall*, 2 D. & R. 38.

Possession of the cestui que trust was not adverse to the title of the trustee. *Smith d. Dennison v. King*, 16 East. 283.

S. demised lands to a rector for forty years, at a certain rent; in the lease, the rector, after covenanting for payment of the rent, further granted to S. the title of oats of the parish; the lease also contained a proviso for re-entry, in case the rent should be in arrear, or S., his heirs, &c., should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of S. that the rector should quietly enjoy the lands, under the covenants, grants, and agreements contained in the lease. After the expiration of the lease, the rector continued to hold the

land, but withheld the rent for more than twenty years; the heirs of S. at the same time continuing to take the tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of S., the latter being portionists of the tithes of the parish:—Held, that the possession of the land by the rector was not adverse, so as to let in the operation of the statute. *Doe d. Pellatt v. Ferrara*, 2 B. & P. 542.

Declarations made by a widow in the possession of premises for more than twenty years, that she held them for her life only, and that after her death they would go to the heirs of her husband, are admissible to negative the fact of her having had twenty years' adverse possession. *Doe d. Human v. Pe tet*, 5 B. & A. 223.

In ejectment for lands, it appeared that, in 1788, G. purchased the estate in fee, of which he died seized and intestate in 1790, leaving two sons, J. and E., and in 1812, J. died intestate, leaving a son, J. In 1788, C. was tenant in possession, and so continued until the time of the trial. From the death of the purchaser, C. paid his rent (with the exception hereinafter mentioned) to E., the younger son, until 1817, when he died, leaving two sons, J. G. (who received the rent from 1817 until the time of his death in 1835), and the defendant. The eldest son of the purchaser received in 1804 a half-year's rent from C., and in 1805 sold and cut down timber on the estate. In June, 1813, J. employed an agent to demand of C. the rent in arrear, when he answered that his connection as tenant with J. G. had ceased for several years. In 1820, an action of ejectment was commenced:—Held, that there was no adverse possession to bar the recovery of the lessor of the plaintiff in ejectment. *Doe d. Grubb v. Grubb*, 10 B. & C. 816.

G., under whom the defendant claimed, was let into possession twenty-two years before action, by virtue of a contract with P. for the purchase of an allotment accruing to P. under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase-money for some years, but never completed the purchase:—Held, that even after a lapse of twenty years his possession was not adverse to P.'s title; held, also, that it did not lie in the mouth of G., or any claiming under him, to raise as an objection to P.'s title, that the commissioners of inclosure had made no formal award. *Doe d. Milburn v. Edgar*, 2 Scott, 732; 2 Bing. N. C. 496; 1 Hodges, 437.

Where a lease for years, determinable on lives, was granted in 1732, and in 1784 the same lessor granted a similar lease of the same premises to another lessee, who always afterwards paid rent; and another person who was in possession at the granting of the second lease claimed to be entitled to the estate, on the ground that one of the lives in the first lease was in existence, and continued to hold

it until his death in 1811:—Held, that he had no adverse possession to give him the freehold. *Rex v. Ashbridge*, 4 N. & M. 477; 2 A. & E. 520; 1 H. & W. 74.

A., thirty years before suit brought, died seized of a cottage, leaving a son, B., and a daughter, C. At his death, C., his daughter, then unmarried, took possession of it, and afterwards married D., and after his death W. After her death W. remained in possession sixteen years:—Held, that the son of B., who was the heir of C. as well as being the heir of A. and B., might recover in ejectment, although W., including the term he had occupied the cottage with his wife, had had more than twenty years' possession of it. *Doe d. Tranter v. Wing*, 6 C. & P. 538—Williams.

Where an entire manor or other district has been in charge to the crown within sixty years, acts done in different parts of it by different persons, such as the erection and occupation of lime-kilns for burning limestone found within the district, and of cottages for the purpose of such occupation, and the sale of the lime so produced, do not amount to such an adverse possession as to displace the title of the crown to the district, although they may have been continued for above sixty years. *Doe d. Williams v. Roberts*, 13 M. & W. 520; 14 L. J., Exch. 274.

What possession constitutes a bar, under the Statute of Limitations, in general.]—By 3 & 4 Will. 4, c. 27, ss. 2, 3, the doctrine of non-adverse possession is done away with, except in cases provided for by section 15; and an ejectment must be brought within twenty years after the original right of entry of the plaintiff (or of the party under whom he claims) accrued, whatever is the nature of the defendant's possession. *Nepean v. Doe d. Knight*, 2 M. & W. 894; M. & H. 291.

Though by 3 & 4 Will. 4, c. 27, s. 34, the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers, for a period exceeding twenty years, confers no right on any one of them who has not himself had twenty years' uninterrupted possession, except as furnishing a defense to a trespasser in possession against an action by the rightful owner. *Dixon v. Gayfere*, 17 Beav. 421; 23 L. J., Chanc. 60.

The 3 & 4 Will. 4, c. 27, s. 8, does not apply to cases of want of actual possession, but to those cases only where the owner has been out of it and another party has been in possession for the prescribed time; for there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. *Smith v. Lloyd*, 9 Exch. 562; 2 C. L. R. 1008; 23 L. J., Exch. 104.

In ejectment, it appeared that the plaintiff's husband had been in possession as a tenant at will for eighteen years, ending in 1834, when he died, leaving a son (not a party to the action), and that she became possessed and

remained in possession for thirteen years:—Held, that the plaintiff could not rely on the husband's possession except as *prima facie* evidence of a seizure in fee, on which supposition it was also evidence of title in his heir, which defeated the title of the plaintiff, and that she could not insist on her own possession for thirteen years, as it was not derived from the husband's possession, although the possession by herself and her husband for more than twenty years consecutively would have entitled her to a verdict if she had been defendant in an ejectment brought by the real owner. *Doe d. Carter v. Burnard*, 13 Q. B. 945; 18 L. J., Q. B. 800.

In 1820, W. leased land to the defendant for twenty-one years. The defendant applied to W. for leave to take in a piece of ground adjoining, but W. declined to give such leave, stating that other persons, to whom he had sold adjoining houses, had a right of way over it. The defendant, notwithstanding, inclosed and occupied it for twenty years, without payment of rent or acknowledgment of title:—Held, that the piece of ground could not be considered as having been occupied by the defendant as part of the demised premises in respect of which rent was paid, and therefore an action by W. was barred by 3 & 4 Will. 4, c. 27, ss. 2, 3. *Doe d. Budeley v. Massey*, 17 Q. B. 373; 15 Jur. 1031; 20 L. J., Q. B. 434.

One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land so occupied, does not thereby change the character of his possession, but can, while he remains tenant, acquire, as against his landlord, a prescriptive title to the land first occupied by him. *Dixon v. Baty*, 1 L. R., Exch. 259; 12 Jur., N. S. 1024; 14 W. R. 830.

A father seized of land made a will, invalid as to real estate, whereby he appointed his brother, to whom he was indebted, executor, and died, leaving two infant daughters. The uncle entered upon the real estate and kept down the interest on a mortgage, and laid out considerable sums on improvements:—Held, that the possession of the uncle could not be treated as having been adverse to his nieces. *Pelley v. Buscombe*, 11 Jur., N. S. 52; 34 L. J., Chanc. 233; 13 W. R. 306—L. J.

A field adjoining a public road was separated from it only by a hedge and bank. The trustees, who, under an act of parliament, constructed the road upwards of fifty years before the commencement of the suit, made the hedge and bank, and also made on the field side of the fence a ditch of three feet in breadth. This ditch had become filled up and obliterated, and had never been re-opened by the trustees; but a ditch about a foot wide had been subsequently made by the occupier of the field, and that also had become obliterated. The owners of the land had always included the hedge in their leases, and the tenants had held and used the strip within the hedge as part of their field for much more than twenty

years, and had at their own expense trimmed the hedge on both sides. During the same time the trustees had not interfered in any way with the site of the ditch:—Held, that these circumstances were not sufficient to constitute an adverse possession, and to give the owners of the land a title under the Statute of Limitations to the site of the three-foot ditch. *Scurby v. Tottenham Railway Company*, 5 L. R., Eq. 409.

A gravel pit and a road leading to it were allotted by commissioners under an inclosure act to the surveyors of highways. From 1837 the surveyors ceased to take gravel from the pit or to use the road, and took no steps whatever to assert their right to the pit or road, but procured gravel from another pit by purchase from the plaintiff and his father. The pit and road were entirely surrounded by old inclosures belonging to land allotted to the plaintiff's predecessors in title, and in 1837 the tenant of the greater part of the land in which the pit was situated filled it up and took it into cultivation. In 1839 another tenant of the plaintiff's father plowed up the remaining portion of the pit, which abutted upon land in his occupation, and also the allotted road, which passed through other land in his occupation:—Held, that since 1837 the gravel pit having been treated as practically exhausted, and the acts of the tenants in 1837 and 1839 amounting to an actual taking possession of the pit and road, the time of limitation began from those years respectively, and the right of the surveyors had been extinguished by the adverse possession of the plaintiff for more than twenty years. *Smith v. Stocks*, 17 W. R. 1135; 38 L. J., Q. B. 306; 20 L. T., N. S. 740; 10 B. & S. 701.

The purchaser of a house in London having taken various objections to the title, the vendor filed a bill for specific performance, and obtained a reference as to title. The objections were overruled; but before the certificate had been signed the purchaser discovered in a long blank wall, which formed one side of the house and fronted on a street, a stone with an inscription, dated in 1776, stating that the wall had been built by and belonged to the East India Company, who had thrown the adjoining ground into the street. It turned out that the wall had been rebuilt in 1831 by the tenant of the house, and the stone set up again; but under what circumstances did not appear. No rent had from that time been paid to the company, nor any acknowledgment of their title given; but their successors in title, on being applied to, claimed the wall as theirs, and the vendor obtained a release from them:—Held, that the vendor had not a good title when the bill was filed, for that there was no ground for holding a title to have been gained by possession adversely to the East India Company. *Phillipson v. Gibbon*, 6 L. R., Ch. 428.

Held, that the vendor was to blame, as he might, with reasonable diligence, have informed himself of this defect before selling, and that therefore, although he had been

right on all points which arose before the bill was filed, he ought not to receive costs. *Id.*

By an inclosure act it was provided that it should be lawful for the lord of the manor for the time being from time to time to come upon the commons and waste lands intended to be inclosed, to search for and raise any coal and ironstone being in or under the commons and waste lands. The commissioners allotted certain plots of land to S. and E., which afterwards vested in the defendant, who in 1845 worked the coal under one of the plots of land, in 1847 under a second, in 1848 under a third, in 1849 under a fourth, and in 1855 under a fifth. The plaintiffs, who claimed the coal under the lord of the manor at the time of the inclosure act, commenced, in 1867, an action for working the coal:—Held, that the action was maintainable, for that the acts of trespass committed more than twenty years before suit could not be relied upon as constituting a possession adverse to the plaintiffs, there being no sufficient evidence that the then owner of the mines was aware that the acts of trespass were being committed. *Dartmouth v. Spittle*, 19 W. R. 444; 24 L. T., N. S. 67—Exch.

Possession is adverse for the purpose of limitation when an actual possession is found to exist under circumstances which evince its incompatibility with a freehold in the claimant. *Des Barres v. Shoy*, 29 L. T., N. S. 592; 22 W. R. 273—P. C.

A husband, by a will in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his death, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death, his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value:—Held, that the tenant for life had acquired a good title by adverse possession against the remainder-man. *Paine v. Jones*, 18 L. R., Eq. 320; 30 L. T., N. S. 779; 22 W. R. 837—V. C. M.

By a lease dated in 1783, the governing body of a charitable corporation granted a lease of hereditaments, belonging to the charity, for ninety-nine years, at a peppercorn rent, to G. Subsequently, the then governing body brought an action to have it declared that the lease was void under 13 Eliz. c. 10, and for possession. The successors in title of G. and their under-tenants, demurred to the action, on the ground that it was barred by the Statute of Limitations:—Held, that the lease was not void, but voidable by the plaintiffs; that adverse possession began to run at the time the plaintiffs brought their action

and not at the commencement of the lease, and that the demurrer must be overruled. *Muglalen Hospital v. Knott*, 36 L. T., N. S. 139—R.

The defendant, who shared with others a right of way over a piece of land, the property in which was in the lord of the manor, used a portion of the same, amounting to about three-quarters of the whole, in all respects as if it was properly part of his farm, plowing it up from time to time and raising produce thereon. Such user was uninterrupted, and was continued for twenty years and more. As to the remaining quarter, which was not in any way fenced off from the above, it remained in its original condition, and was used for the purposes and in the manner that the whole was originally intended to be used:—Held, that a good title, as against the lord of the manor, to the soil and minerals underlying the soil of three-quarters of the strip of land, had been thus acquired; but that nothing had been done to disturb the original rights in the soil, and minerals underlying the soil, of the remaining one quarter of the piece of land. *Seddon v. Smith*, 36 L. T., N. S. 168—C. A.

**Operation and effect of mere entry, or continual claim.**—[By 3 & 4 Will. 4, c. 27, s. 10, no person shall be deemed to have been in possession of any land within the meaning of the act merely by reason of having made an entry thereon.

By s. 11, no continual claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.]

A. more than twenty years before action brought, without the permission of the lord, inclosed a small portion of the waste of a manor, on which he built himself a hut. In 1835, the encroachment having been presented at the lord's court, the then lord of the manor, accompanied by his steward, went to the premises, A.'s family being there, and, stating that he took possession, directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done in the absence of A. The lord and his steward then retired, and nothing more was done:—Held, that the acts so done by the lord did not amount to a dispossession of A., and a resumption of possession by the lord, so as to entitle the latter to maintain ejectment within twenty years from that time. *Doe d. Baker v. Coombes* or *Combes*, 9 C. B. 714; 19 L. J., C. P. 906.

Before the passing of 3 & 4 Will. 4, c. 27, A. was let into possession of land as tenant at will to B. He never paid rent after that statute passed, and before twenty-one years B. entered and turned A. out. A. immediately afterwards resumed possession, but no fresh tenancy at will commenced, and he paid no rent:—Held, that B. might enter at any time before the lapse of twenty years from such resumption of possession by A., though after the lapse of twenty-one years from the first letting him into possession, and was not

barred by ss. 2, 7 & 10. *Randall v. Stevens*, 2 El. & Bl. 641; 1 L. R., Q. B. 642; 18 Jur. 128; 23 L. J., Q. B. 68.

**Possession of one or more of several parceners, joint tenants, or tenants in common.**—[By 3 & 4 Will. 4, c. 27, s. 13, when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.]

This provision applies not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands; and the words "or more than his or their undivided share or shares of such land," apply as well to the case where one of several joint tenants has been in possession of more than his undivided share in any portion of the lands held jointly, as to the case where he has been in possession of more than his undivided share in the whole of such lands. *Murphy v. Murphy*, 15 Ir. C. L. R. 205—C. P.

The statute operates to make the possession of tenants in common a separate possession from the time they first became tenants in common, and not merely from the time of the passing of the statute. *Doe d. Holt v. Horrocks*, 1 C. & K. 566—Cresswell.

Three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for a partition by deed of the lands held in coparcenary, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery within twenty years after her death, and before 3 & 4 Will. 4, c. 27, to recover her share, which had been held by the husband of one of the other coparceners:—Held, that the possession was under the agreement, and not adverse. *Doe d. Millett v. Millett*, 11 Q. B. 1036; 12 Jur. 649; 17 L. J., Q. B. 202.

Held also, that nothing could be presumed beyond what was contemplated by the agreement, which provided for a deed, and not for a recovery. *Id.*

Where one tenant in common has been out of possession for twenty years prior to the passing of the 3 & 4 Will. 4, c. 27, he is barred by ss. 2 and 12 from bringing his action, but might maintain it under s. 15, within five years of the passing of the act, if the other tenant in common had not been in

possession adversely to him at the time of passing the act. *Culley v. Doe d. Taylerson*, 3 P. & D. 539; 11 A. & E. 1008.

In ejectment, by the heir of T., for two acres of land, it appeared that the father of T., more than fifty years before, had devised four acres (comprising the two in question) to his widow, for life, and then to T. and his sister S. in remainder in fee. For more than twenty years T., by arrangement between his mother and S., occupied the two acres, and devised them to his widow for life, and on her death or marriage to his daughter; and then there was a demise in similar terms, on the same event, to his son the heir. The daughter occupied with her husband until her death, and he, without giving any notice as tenant in common, claimed to defend the action:—Held, that although there was no deed of partition, the long occupation inevitably barred the title of S. as tenant in common, under 3 & 4 Will. 4, c. 27, s. 12. *Tidball v. James*, 29 L. J., Exch. 91. But see *Murphy v. Murphy*, 15 Ir. C. L. R. 205, 214, 215.

**Possession of younger brother or other relation of heir.**—[By 3 & 4 Will. 4, c. 27, s. 13, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.]

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time till her death in 1838. B. was the eldest son of A. and his wife:—Held, that, though B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B., as his heir, on her death, in 1838. *Doe d. Bennett v. Long*, 9 C. & P. 773—Coleridge.

Where a daughter entered into occupation of premises on the death of her mother, to whom they had belonged till then, and held them without interruption for twenty years, but the mother had left a son, who was living during the whole time of the daughter's occupation:—Held (in an ejectment brought before 3 & 4 Will. 4, c. 27, came into operation), that it could not be presumed from this circumstance alone that the sister's occupation was virtually that of the brother. *Doe d. Draper v. Lawley*, 13 Q. B. 954.

**Receipt of rent generally.**—[By 3 & 4 Will. 4, s. 35, the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or other person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of the act.]

**Effect of payment or receipt of rent by agents.**—When the plaintiff in ejectment

purchased the reversion subject to a lease for years, at a rent of 4*l.*, and to an annuity of 4*l.*, and the tenant in possession under the lease paid the sum of 4*l.* yearly for upwards of twenty years to the annuitant, until his death, in 1830; and, subsequently, to his widow:—Held, that it was for the jury to consider in what character the tenant made such annual payment, and if as agent for his landlord, the possession was not adverse; and the right of the person entitled to the reversion was not barred by 3 & 4 Will. 4, c. 27. *Doe d. Newman v. Godsill*, 5 Jur. 170—Q. B.

The possession of an agent is the possession of the principal; and the principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. *Williams v. Pott*, 12 L. R., Eq. 149; 40 L. J., Chanc. 775—R.

So long as an agent is in receipt of the rent of land, the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 3, will not run against his employer; and if a person commences to receive rents as the agent for another, and afterwards continues to receive such rents, without paying them over, he must be presumed to receive as agent till the contrary is shown. *Smith v. Bennett*, 30 L. T., N. S. 100—Exch.

As to when adverse receipt of rent prevents the running of the statute,—see this title, II., 2.

As to when adverse possession begins, in general,—see this title, II., 2; effect, upon character of possession, of acknowledgment of title or right,—see this title, II., 4; suspension by disabilities, interruption of possession, &c.,—see this title, II., 5; operation of adverse possession as a bar,—see this title, II., 6.

#### 4. Acknowledgment of Title or Right by Party in Possession.

**Effect of acknowledgment of title to land or rent, upon character of possession, generally.**—[By 3 & 4 Will. 4, c. 27, s. 14, *when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person to whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make any entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.*]

Whether a writing amounts to an acknowledgment of title is a question for the court, and not for the jury, to decide. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although, if matters were contested, I am of opinion that I should establish a legal right to the premises; yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, on an agreement for twenty-one years." The bargain subsequently went off, and no rent was paid, or lease executed:—Held, that this letter was not an acknowledgment of title. *Id.*

Construction of a document given in evidence as an acknowledgment of title. See *Furdon v. Clogg*, 10 M. & W. 572.

A mortgage deed was dated the 27th of October, 1927, but was not executed until the 23d August, 1834, and it contained a covenant by the mortgagor admitting the title to be in the mortgagee, his heirs and assigns:—Held, that this was a sufficient acknowledgment of title to enable the mortgagee to recover within twenty years of the execution of the deed. *Jayne or Jaynes v. Hughes*, 10 Exch. 430; 24 L. J., Exch. 113.

An answer in Chancery put in within twenty years, by the person through whom a defendant in ejectment claims in the course of a Chancery suit between him and the plaintiff with reference to the same property, and containing an admission by him of the then plaintiff's title, is a sufficient acknowledgment of the plaintiff's title to prevent the action being barred. *Goode v. Job*, 1 El. & El. 6; 5 Jur., N. S. 145; 28 L. J., Q. B. 1.

In 1818, the plaintiff's and the defendant's grandfathers became seized as tenants in common of a meadow. The meadow was then in the possession of the defendant's grandfather, who had previously held it under a lease. The plaintiff's father became possessed in 1826, and so continued till his death, in 1836. In 1837, Newton, who was proved to be a land agent, who received the defendant's rents and managed his property, wrote the following letter to the plaintiff's agent:—"Sir, Mr. P. (the defendant) is now in possession of his two-thirds of the meadow, who will, no doubt, accept a lease (three lives) for Ley's (the plaintiff's) one third, at a fair rack rent. You must be aware Mr. P. is bound to pay rent for Ley's one-third during the time his father held the meadow, but no doubt he will do so in case you agree for a lease. (Signed) J. Newton. Will you favor me with the terms of a lease for the one-third of the meadow, that I may lay it before Mr. P." No answer was shown to have been given to this letter, but the defendant continued in possession of the land down to 1857, when an ejectment was commenced:—Held, that the letter was not a sufficient acknowledgment of the plaintiff's title. *Ley v. Peter*, 3 H. & N. 101; 27 L. J., Exch. 230.



— where the possession was not adverse at the passing of the act.]—[By 3 & 4 Will. 4, c. 27, s. 15, when no such acknowledgment of title as afore-said (see section 14, supra, column 8553) shall have been given before the passing of the act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of the act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of the act.]

The word interest, which is in the parliament roll, appears to be a mistake for rent. *Doe d. Angell v. Angell*, 8 Q. B. 360—Denman, C. J.

W. permitted J. to occupy land, of which he was seized in fee, for twenty years previously to J.'s death in 1831; W. died in September, 1833, and the defendant, who was his son and heir-at-law of J., occupied till 1836. On ejectment brought by the devisees of W., it was found by the jury that the possession of J. was not adverse to W.:—Held, that the right of action in the devisees was not barred by 3 & 4 Will. 4, c. 27, ss. 2 and 7, but was saved by s. 15, being brought within five years from the passing of the act. *Doe d. Burgess v. Thompson*, 1 N. & P. 215; 5 A. & E. 532; 2 H. & W. 451.

D. mortgaged land in fee to J., subject to a proviso of cesser, upon payment of the money secured, upon a day more than twenty years before the passing of the 3 & 4 Will. 4, c. 27. Within twenty years before the passing of the statute, D. acknowledged that the mortgage money was unpaid. On ejectment by the heir of J., within five years after the passing of the statute, the jury found that the mortgage money was unpaid:—Held, that the ejectment was not barred by s. 2, D.'s possession not being adverse at the time of passing the statute; and, therefore, the heir of J. had, by s. 15, five years from that time to bring the action, though no proof was given that he had been in possession, or received rent or interest. *Doe d. Jones v. Williams*, 6 N. & M. 816; 5 A. & E. 291; 2 H. & W. 214.

By a marriage settlement a husband became entitled to the moiety of an estate in fee, which moiety originally belonged to his wife. During the coverture, the other moiety descended to the wife, as heiress at law to her brother. The wife afterwards died in the husband's lifetime without issue; and the husband, from the time of her death, in 1815, till a sale of the estate in 1828, remained in uninterrupted possession of the entire property, without making any acknowledgment of the title of any other person:—Held, that this was a case falling within 3 & 4 Will. 4, c. 27, s. 15, and that, notwithstanding the husband's possession of the moiety which descended to the wife might not be adverse,

the heir-at-law of the wife, not having made his claim within five years after the passing of the act, was barred by the statute. *Hasell, Ex parte*, 3 Y. & C. 617; 3 Jur. 1101.

In 1781, a lord of a manor, with the consent of the tenants of the manor, granted to certain persons license to inclose a piece of the waste, and that they and their heirs should hold the same in trust for the purpose of building a workhouse, rendering to the lord of the manor the yearly rent of 5s. for the same forever. The churchwardens and overseers entered into possession, and built a workhouse, and used it as such until 1836. The yearly rent was paid from 1781 to 1791, and from 1825 to 1836. In 1835, the persons to whom the license was granted in 1781 being dead, notice was given to the officers of the parish, by the steward of the manor, to nominate other persons for the purpose of admission, to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a fine on their admission. In 1840, the parish officers, in conformity with a resolution of the inhabitants in vestry assembled, surrendered the premises into the hands of the lord of the manor, and the latter took possession, and afterwards conveyed the premises to the defendant. In an action by the churchwardens and overseers to recover the premises:—Held, that the grant of the license in 1817 did not manifest an intention to convey a freehold estate, and that the admission of fresh trustees in 1840, and the payment of the 5s., were acknowledgments that the freehold was in the lord of the manor, and that the land was held by his permission; and therefore the possession was not adverse at the time of the passing of 3 & 4 Will. 4, c. 27. *Hodgson v. Hooper*, 6 Jur., N. S. 911; 20 L. J., Q. B. 222; 8 W. R. 637; 3 El. & Bl. 140.

Held, also, that the first tenancy being a tenancy at will, the admission in 1835, being inoperative to convey a copyhold estate, operated to create a fresh tenancy at will; and, therefore, the right of entry of the lord was not barred until twenty years after. *Id.*

D. permitted the defendant and his wife, the daughter of D., to be in the occupation of premises without paying rent for more than thirty years, and they were so in the occupation in 1833. D. died in 1837, having devised the premises to the defendant's wife for life, and after her death to the plaintiff. By his will an annuity was given to the defendant's wife, which the defendant received continually. The ejectment was brought upon the death of the wife in 1844:—Held, first, that, assuming that the defendant was tenant at will to D., the right of D. was barred by s. 7, and not saved by s. 15 of 3 & 4 Will. 4, c. 27. *Doe d. Dayman v. Moore*, 9 Q. B. 555; 10 Jur. 815; 15 L. J., Q. B. 324.

Held, secondly, that defendant was not precluded from insisting on the statute, either by the receipt of the annuity under the will, or by the estate for life which the testator professed to give to his wife. *Id.*

Effect, as between mortgagor and mortgagee, of acknowledgment of title, right to redeem, &c., or of payment of interest.]—[By 3 & 4 Will. 4, c. 27, s. 28, when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given;]

And when there shall be more than one mortgagor or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee or more than one person claiming the estate, or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effected only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent;

And where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.]

In 1816, a mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises; and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee, who then entered into possession. The mortgagor was not a party to either transfer, and had not, from the time the original

mortgagee entered into possession, received any acknowledgment in writing of his equity of redemption. In 1833, 3 & 4 Will. 4, c. 27, passed. In 1845, the representative of the mortgagor filed a bill for redemption against the representatives of the second transferee:—Held, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of the mortgage made in 1827 and 1828; and that the suit (as to that estate) was therefore barred. *Batchelor v. Middleton*, 6 Hare, 75.

On the death of the mortgagor in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of the co-heirs, and she paid interest on the mortgage. In 1858, the mortgagee instituted a suit to realize his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval:—Held, that the payment of the interest by the widow prevented the statute running, for either such co-heir was himself barred, or the payment of interest had been made on his behalf. *Ames v. Mannering*, 26 Beav. 583.

A mortgagee in fee in possession for more than twenty years, having devised the estate to his son in tail, with limitations over:—Held, that an acknowledgment by the tenant in tail of the mortgage title restored the right of redemption, so as to bind the remainder-man; and that a purchase of the equity of redemption by him, and conveyance of it to him in fee, gave him an absolute right to the estate, to the exclusion of the devisees in remainder under the will of the mortgagee, who had, as mortgagee, been more than twenty years in possession. *Pendleton v. Rooth*, 1 Giff. 35; 5 Jur., N. S. 840; 29 L. J., Chanc. 265; affirmed on appeal, 1 De G., F. & J. 81; 6 Jur., N. S. 182; 29 L. J., Chanc. 265; 8 W. R. 101.

A first mortgagee, in possession for more than twenty years, was applied to by the solicitor of a subsequent incumbrancer for an account of the rent and profits. He replied, as follows: "In answer to your letter, I beg to say that I deny the claim of your client. I need only add, that if he were entitled to the account it would be of no use, as the rents and profits of the estate have never been sufficient to pay the interest of the first charge."—Held, that this was not an acknowledgment, within 3 & 4 Will. 4, c. 27, s. 28, of the second incumbrancer's right to redeem. *Thompson v. Bowyer*, 9 Jur., N. S. 863; 11 W. R. 975—R.

An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the 3 & 4 Will. 4, c. 27. *Biddling v. Lane*, 1 De G., J. & S. 122; 9 Jur., N. S. 506; 33 L. J., Chanc. 219.

When an owner of an estate contracts for valuable consideration with his mortgagee



to put a man in possession, and directs him to apply the rents in payment of the interest on the first mortgage, and then the interest on the second, the mortgagor cannot afterwards urge that the Statute of Limitations excludes the second mortgagee, because the rents were no more than sufficient to pay the first, and the second mortgagees had for more than twenty years received nothing. *Knight v. Bowyer*, 23 Beav. 609; 8 Jur., N. S. 968.

If estates A., B. and C. are included in one mortgage, and the owner of A. pays the interest, the mortgagee is not barred by 7 Will. 4 & 1 Vict. c. 28, or by 3 & 4 Will. 4, c. 27, s. 40, from his remedy against B. and C. *Chinnery v. Evans*, 10 Jur., N. S. 855; 13 W. R. 20; 11 L. T., N. S. 68; 11 H. L. Cas. 115.

An acknowledgment of the title of a mortgagor given by one only of two joint mortgagees, who, on the face of the mortgage deed, are shown to advance the money on a joint account as trustees, does not keep alive the right of redemption either as against the whole property or against a moiety of it, but is wholly inoperative. *Richardson v. Younge*, 6 L. R., Ch. 478; 40 L. J., Chanc. 838; 25 L. T., N. S. 230; 19 W. R. 612; affirming *S. C.*, 10 L. R., Eq. 275; 39 L. J., Chanc. 475; 18 W. R. 800—V. C. M.

When a demise for a term of 1,000 years by way of mortgage is created in land, and no payment of principal or of interest or acknowledgment is made for more than twenty years, and the mortgagor and those claiming under him remain in possession of the premises without interruption, the title of the mortgagee under the mortgage is thenceforth barred. *Hemming v. Blanton*, 42 L. J., C. P. 158; 21 W. R. 636.

Therefore a payment of arrears of interest and the principal to the mortgagee under a decree in a foreclosure suit, after that time has elapsed, does not revive the title in the mortgagee, and an ejectment does not then lie to recover the possession. *Ib.*

**Effect of acknowledgment of claims secured by mortgages or other charges on lands or rents; claims for arrears of rent, interest, annuities, and other charges.**—[By 3 & 4 Will. 4, c. 27, s. 40, after the 31st day of December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable, out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit or proceeding shall be brought but within twenty years after

such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given.

By s. 42, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agents: Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years.]

The payment of interest on an Irish mortgage made by a receiver appointed over the estates mortgaged, is, within the terms of the 3 & 4 Will. 4, c. 27, s. 40, payment by an agent of the party liable. *Chinnery v. Evans*, 11 H. L. Cas. 115; 10 Jur., N. S. 855; 18 W. R. 20; 11 L. T., N. S. 68.

The words in s. 40, "by the person by whom the same shall be payable, or his agent," apply equally to the making of a payment, and the signing of an acknowledgment. *Ib.*

The payment of money to a mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its integrity and force with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent. *Ib.*

A receiver of the rents of a mortgaged estate is the receiver of the mortgagor, and any payment made by such receiver, by order of the court, is a payment in law by the legal agent of the person liable to pay within 3 & 4 Will. 4, c. 27, s. 40. *Ib.*

The assignment by a mortgagor of outstanding terms to a trustee for the purchaser is not a possession of a prior incumbrancer within the 3 & 4 Will. 4, c. 27, s. 42, so as to entitle the mortgagee to more than six years' arrears of interest. *Ib.*

But the payment of interest on a mortgage by a mere stranger would not be a payment within 3 & 4 Will. 4, c. 27, ss. 40, 42. *Ib.*

S., being indebted to his bankers in 1826, assigned to them an annuity of 20l. a year, payable during three lives and the lives and life of the survivors and survivor, for securing 200l., part of his balance. S., in 1826, mortgaged to them the equity of redemption

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An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the 3 & 4 Will. 4, c. 27. *Balding v. Lane*, 1 De G., J. & S. 122; 9 Jur., N. S. 506; 33 L. J., Chanc. 219.

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to put a man in possession, and directs him to apply the rents in payment of the interest on the first mortgage, and then the interest on the second, the mortgagor cannot afterwards urge that the Statute of Limitations excludes the second mortgagee, because the rents were no more than sufficient to pay the first, and the second mortgagee had for more than twenty years received nothing. *Knight v. Bowyer*, 23 Beav. 609; 3 Jur., N. S. 968.

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By s. 42, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agents: *Provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years.*]

The payment of interest on an Irish mortgage made by a receiver appointed over the estates mortgaged, is, within the terms of the 3 & 4 Will. 4, c. 27, s. 40, payment by an agent of the party liable. *Chinnery v. Evans*, 11 H. L. Cas. 115; 10 Jur., N. S. 855; 13 W. R. 20; 11 L. T., N. S. 68.

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The payment of money to a mortgagee by the person liable to pay, in respect of the interest on the mortgage, continues the mortgage in all its integrity and force with respect to all the estates properly comprised in the mortgage, and which had not been aliened or conveyed away by the mortgagee, or with his assent. *Id.*

A receiver of the rents of a mortgaged estate is the receiver of the mortgagor, and any payment made by such receiver, by order of the court, is a payment in law by the legal agent of the person liable to pay within 3 & 4 Will. 4, c. 27, s. 40. *Id.*

The assignment by a mortgagor of outstanding terms to a trustee for the purchaser is not a possession of a prior incumbrancer within the 3 & 4 Will. 4, c. 27, s. 42, so as to entitle the mortgagee to more than six years' arrears of interest. *Id.*

But the payment of interest on a mortgage by a mere stranger would not be a payment within 3 & 4 Will. 4, c. 27, ss. 40, 42. *Id.*

S., being indebted to his bankers in 1826, assigned to them an annuity of 20l. a year, payable during three lives and the lives and life of the survivors and survivor, for securing 200l. part of his balance. S., in 1828, mortgaged to them the equity of redemption

of a leasehold estate for securing his general balance of 1,500*l*. Interest was paid on the mortgage up to 1832, first, to the bankers (who became bankrupt in 1828), and afterwards to their assignees; and they received the annuity until 1847, when the annuity expired, and the money thus received was more than enough to pay the 200*l*. In 1834, the first mortgagee of the leasehold estate entered into possession of the property and remained in possession. In 1853, S. filed a bill against the mortgagee for redemption:—Held, that the payments of the annuity having exceeded the 200*l*., must be taken to have been made in reduction of the general balance due on the mortgage, and having been made within twenty years, the same took the case out of the operation of the 3 & 4 Will. 4, c. 27, ss. 40, 42. *Staley v. Barrett*, 26 L. J., Chanc. 821—L. J.

A., who had a life interest in certain estates, gave a bond to a creditor, and a warrant of attorney to confess judgment for its amount. No judgment was entered up. A. died within three years of the date of the bond, leaving no assets, real or personal. B., his son, the first tenant in tail of the estates, entered into possession, and expressed, in letters to the creditor, a wish to pay his father's debts, but would not give any security for them. B. made a will, in which, reciting his own wish, and a promise in conformity with it, made by him to his father and mother, he said, "And in case I should not be able to fulfill my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts of my late father A., which remain unpaid at the time of my decease, upon all my real estates wheresoever." He then directed his trustees to stand seized of all his estates, "subject, in manner aforesaid, to the payment of all my just debts, and to the debts of my father." B. survived his father many years. The obligee of the bond filed a charge thereof against the trustees under the son's will:—Held, that the debts of the father which were not barred by the statute at the death of the father, were charges on the real estates of the son. *O'Connor v. Haslam*, 5 H. L. Cas. 170.

A contract for the sale of an estate made in March, 1811, stipulated that the purchase-money should be paid in on the 13th of May following. The purchase-money was not paid, but the purchaser entered into possession, and he and persons claiming under him continued in such possession. In 1834, their agent signed a written acknowledgment of the vendor's title, sufficient to take his lien for the principal of the purchase-money out of the 3 & 4 Will. 4, c. 27, s. 40. In 1849, the assignees of the vendor filed a bill in equity, seeking to enforce the vendor's lien on the estate for the purchase-money:—Held, that the 42d section did not apply to the arrears of interest, but that the whole was recoverable from the 13th of May, 1811. *Taft v. Stevenson*, 5 De G., M. & G. 735.

As to effect of acknowledgment of claim upon limitation of personal actions and proceedings,—see this title, III., 4.

As to pleading and proof of acknowledgment of title or right,—see this title, IV.

#### 5. Suspension; Disabilities; Interruption of Possession.

**What disabilities suspend the running of the statute; and to what extent.**—[By 3 & 4 Will. 4, c. 27, s. 16, if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid (see sections 2 & 14), such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiocy, lunacy, unsoundness of mind (or absence beyond seas, now no longer a disability, by virtue of 19 & 20 Vict. c. 97, s. 10), then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).]

In 1832, an infant became entitled to real estate in fee, and his father entered into possession. In 1836, he attained his majority. In 1852, the father died, having continued in possession of the property down to the time of his death. In 1854, he filed a bill against the devisees of his father for an account of the rents and profits:—Held, that the entry of his father in 1832 must be taken to have been as his guardian and not as a trespasser; and the statute, therefore, could not be set up successfully. *Thomas v. Thomas*, 25 L. J., Chanc. 159; 2 Kay & J. 79; 1 Jur., N. S. 1160.

A testator (whose will was not discovered for fifteen years after his death) died in 1847, leaving his devisee an infant, who attained full age in 1852:—Held, in an ejectment brought in 1869 by the devisee against the grantees of the heir-at-law, that by the lapse of twenty years from the death of the testator, and of ten years from the time of the devisee's attaining full age, his right was barred by the statute. *Lambert v. Brown*, 5 Ir. R., C. L. 218—Exch.

[By 3 & 4 Will. 4, c. 27, s. 17, no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinafter mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole



of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any disability, or have died, shall not have expired.]

**Effect of succession of disabilities.**—[By 3 & 4 Will. 4, c. 27, s. 18, when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.]

This section is so far retrospective as to extend to a case where the first person under disability died before the passing of the act. *Devine v. Holloway*, 9 W. R. 642; 4 L. T., N. S. 190; 14 Moore P. C. C. 290.

A claimant to land in the colony of New South Wales, whose ancestor died under disability in 1835, and who himself continued under disability till he brought an ejectment to recover the land in 1856, was barred by a Colonial Ordinance of 1837, which applied the 3 & 4 Will. 4, c. 27, to the colony of New South Wales. *Id.*

Before this enactment, when the ancestor died, leaving a son and a daughter infants; and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad within age:—Held, that the daughter was not entitled to twenty years to make her entry after the death of her brother, but only to ten years; more than twenty years having, in the whole, elapsed since the death of the person last seized. *Doe d. George v. Jesson*, 6 East, 80; 2 Smith, 266.

A. was tenant for life, with a power of appointment, by will attested by three witnesses; he appointed the land to B. for life, and after her death to C. in fee. B. was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B. entered, and held the land till his death, which was three years after the death of B.:—Held, that the statute did not begin to run against C. till the death of B. *Doe d. Allen v. Blakey*, 5 C. & P. 583—Taunton. And see *Fausett v. Carpenter*, 5 Bligh, N. S. 75.

If an estate descends to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability of the one does not preserve the title of the other after the twenty years have elapsed. *Roe d. Langdon v. Rowleston*, 2 Taunt. 441.

When the person to whom the right to make an entry or to bring an action for the

recovery of land accrues is under a disability, and before the removal of that disability the same person falls under another disability, the 3 & 4 Will. 4, c. 27, s. 16, preserves his right to bring an action until ten years after the removal of the latter disability. *Borrows v. Ellison*, 6 L. R., Exch. 128; 40 L. J., Exch. 181; 19 W. R. 830; 24 L. T., N. S. 865.

In 1833, the plaintiff became entitled to land, which the defendant then entered into possession of, and continued to occupy until action brought. At the time when the plaintiff's title accrued she was an infant; she married under age, and continued under coverture until the time of bringing her action in 1870. In an action by herself and her husband in her right to recover the land:—Held, that the action was maintainable, notwithstanding that more than twenty years had elapsed since the title accrued, and more than ten years since the removal of the disability of infancy. *Id.*

**Countries not beyond seas within the meaning of the act.**—[By 3 & 4 Will. 4, c. 27, s. 19, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of the act.]

This section is applicable to cases of residence in Ireland before the passing of the statute, if the controversy has not arisen till after the passing of it. *Hasell, Ex parte*, 3 Y. & C. 617; 3 Jur. 1101.

**Interruption or discontinuance of adverse possession.**—[If there is an adverse possession of land, that adverse possession will be interrupted (so as to cause the statute to cease to run as against the true owner) by the true owner entering upon the land, asserting his rights, and entirely removing that which constituted the possession of the tortious possessor. And as a matter of law it is unnecessary for the true owner to go on and show that he continued in possession. *Worsam v. Vandenbrande*, 17 W. R. 53—C. P.]

Action for entering the plaintiff's garden. The plaintiff was tenant to W. L. of the garden, and the defendant was owner of premises comprising a cottage and yard, which had formerly been part of the estates of the L. family, with a privy in the yard abutting upon the garden, which privy had stood there sixty years. L., who died in 1811, was owner of the garden and the premises belonging to the defendant, and devised certain of his estates, including those premises, to H. L. in trust to sell. H. L. sold various lots, and in 1812, W. became the purchaser of a lot which included those premises. In 1821, W. built the cottage, and on his death, in 1840, the premises devolved upon the defendant in right of his wife, who was heiress of W. In 1823, S. became tenant of the garden, and continued so until 1857. In 1830 he walled up stones against the opening of the privy into the garden, and W. knocked them down. S. complained

of that act to H. L., who went with his agent to look at the place, and met there S. and W. Declarations of W. and H. L. on that occasion were admitted in evidence at the trial. A low wall was accordingly built round, and a loose flagstone put at the top so as to form a cesspool, and the privy was cleaned out through the garden until about 1852. Under the will of L., the garden came to W. L. on his attaining twenty-one, in 1817. After the declarations were given in evidence, it appeared that H. L. was trustee of W. L. during his minority, and subsequently by his request received his rents. In October, 1861, the tenant of the garden, by direction of W. L., built a wall to prevent the defendant going through it. A correspondence between the attorneys for the defendant and W. L., in which there was negotiation as to a reference of the matter to arbitration, began on the 28th of December of that year, and continued until the 13th of February, 1862. The trespass for which the action was brought was committed on the 3d of February, 1863, and the writ issued on the following day. The judge left to the jury the question whether the defendant had submitted to or acquiesced in the interruption for one year within 2 & 3 Will. 4, c. 71, s. 4, and they said he had not, and found for him a verdict:—Held, first, that the question was properly left to the jury, as an interruption might be shown to have been not submitted to or acquiesced in within 2 & 3 Will. 4, c. 71, s. 4, though no suit or action had been brought. *Bennison v. Cartwright*, 5 B. & S. 1.

Held, secondly, that the declaration of W. was admissible as explanatory of acts about to be done by him, showing the nature of the enjoyment of the way. *Id.*

Semble, that even taking H. L. as a stranger to the estate at the time of the conversation between him and S. and W., his declaration was admissible as part of the conversation. *Id.*

A gravel pit and a road to it were allotted by commissioners under an inclosure act to the surveyors of highways of a hamlet, for the repair of its roads and ways. From 1837 to 1863 the surveyors ceased to take gravel from the pit or to use the road, and took no steps to assert their right to the pit or road, but got gravel for the repair of the highways from another pit two miles off, which they purchased from time to time from the plaintiff's father and from the plaintiff. The land allotted for the road and gravel pit was entirely surrounded by old inclosures belonging and land allotted to the plaintiff's predecessors in title. In 1837 the tenant of the greater part of the land in which the pit was situated filled up part of the pit, and from that time cultivated the surface as arable land, together with the adjacent parts of the field. In 1839 another tenant plowed up the remaining portion of the pit, which abutted upon land in his occupation, and also the allotted road, which passed through other land in his occupation; and both continued

to be cultivated by the plaintiff's tenants as arable land from that time till 1863. In 1844 the tenant of the plaintiff, who was in occupation of the surface of the greater part of the pit, was elected one of the surveyors of the highways, and held that office for one year:—Held, that actual possession of the gravel pit and road was taken by the tenant of the adjoining lands in 1837 and 1839, and therefore the title of surveyors of highways to the gravel pit and road had, by the operation of 3 & 4 Will. 4, c. 27, ss. 2, 3, 34, become extinguished; and that the circumstance of the tenant occupying part of the pit being elected surveyor of highways after possession had been taken of it, did not interrupt the running of the period of limitation, as the character of his possession as tenant under the plaintiff was not altered during his year of office. *Smith v. Stocks*, 10 B. & S. 701.

The merely ceasing to work a mine is not such an abandonment as amounts to a discontinuance of possession within 3 & 4 Will. 4, c. 27, s. 3. *Low Moor Company v. Stanley Coal Company*, 33 L. T., N. S. 436—Exch.

As to suspension of running of statute in respect of personal actions,—see this title, III., 2.

#### 6. Effect of Bar by Adverse Possession or Limitation.

**Effect of adverse possession, generally before the Statute of Limitations.**—If no other title appears, a clear possession of twenty years is strong presumptive evidence of a fee. *Doct. d. Barnwell v. Barnard*, Cowp. 595.

But possession of land for any term less than twenty years by a feoffee, is not presumptive evidence of livery of seisin. *Doct. d. Wilkins v. Cleveland*, 9 B. & C. 864; *S. C. nom. Doct. v. Cleveland*, 4 M. & R. 660.

An adverse possession for twenty years is no bar to the church, except as against the same incumbent who submits to it. *Runcorn v. Doct. d. Cooper*, 8 D. & R. 450; 5 B. & C. 696.

Though a lessee sets up an adverse claim to the property in the premises which he holds under the lease, yet that does not incapacitate him from maintaining possession under the lease. *Rees d. Powell v. King*, Forrest, 19; 9 B. & B. 514.

M., seized in fee of an undivided moiety of an estate, by her will, made many years before her death, devised the same to her nephew and two nieces as tenants in common. One of her nieces having died in her lifetime, leaving an infant daughter, she, by another will, but which she never executed, devised the estate to her nephew, her surviving niece, and that infant. Upon the death of M., her nephew and surviving niece covenanted to carry her unexecuted will into effect, and to convey one-third of the estate to a trustee, to convey to the infant when she attained twenty-one, or to her issue, if she died before twenty-one leaving any, or otherwise to themselves again; but no conveyance was ever executed in pur-

suance of the deed. The infant died under age and without issue, but the rents were received by her trustee for her use during her life. In ejectment by the devisee of the nephew, brought above twenty years after the death of the nephew, but within twenty years after the death of the infant:—Held, that the adverse possession began only after the latter event, and, therefore, that the action was maintainable. *Doe d. Colclough v. Hulso*, 5 D. & R. 650; 8 B. & C. 757.

Twenty years' adverse possession of a waste inclosed is a bar to the entry of a commoner. *Hawke v. Bacon*, 2 Taunt. 156.

A., forty-five years before suit, inclosed a piece of ground from the waste, and built a cottage on part of it; he died twenty-nine years before the suit; and, after that, his widow and daughter lived on the premises till the death of the former, a month before the trial:—Held, in ejectment by A.'s eldest son, that his claim was barred unless the jury was satisfied that his mother held the premises by his permission, and not adversely. *Doe d. Pritchard v. Janney*, 8 C. & P. 99—Coleridge.

The plaintiff proved twenty years' possession; the defendant ten years following the twenty:—Held, that the plaintiff was entitled to recover, as his earlier possession must prevail. *Doe d. Harding v. Cooke*, 7 Bing. 345; 5 M. & P. 181.

**Operation of bar by 21 Jac. 1, c. 16, s. 1, in respect of estates in tail and remainder.**—The twenty years within which a formedon in descender must have been brought under 21 Jac. 1, c. 16, s. 1, began to run when the title descended to the first heir in tail; and there was no distinction between the heir of a tenant in fee taking by descent and the heir of a tenant in tail. *Tolson v. Kaye*, 6 Moore, 542; 3 B. & B. 217; *S. C.* (in error), 6 M. & G. 536; 7 Scott, N. R. 222.

A tenant in tail died, leaving issue in tail, a granddaughter, a feme covert; the granddaughter died covert, leaving issue in tail two sons, infants; the elder attained the age of twenty-one and died; the younger attained his age of twenty-one, and fourteen years after sued out a writ of formedon in the descender:—Held, that he was barred by 21 Jac. 1, c. 16, s. 1. *Cotterell v. Dutton*, 4 Taunt. 826.

An estate being limited to the use of A. and his wife, and the heirs of their bodies, with remainder to A. in fee, and A. having died, leaving his widow and G., an only son, and L. and H., only daughters, the widow, in 1735, by a deed poll, in consideration of an annuity granted to her by G., and of natural affection, granted, surrendered and yielded up the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G. died without issue in 1779, having devised the estate to trustees, to secure an annuity to B., only son of his sister L. (then dead), and subject thereto to W., eldest son of B., for his life, with remainder to B.'s second son. In 1790, W., on his father's death, entered into possession of

the whole estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety to mortgagees in fee. In 1818, M., the descendant of H., the other coparcener, suffered a recovery of the other moiety, which, it was declared, should inure (subject to the trusts of a term) to the use of W.'s mortgagees:—Held, first, that the deed poll of 1735 operated as a covenant to stand seized, and created a base fee, determinable by the entry of the issue in tail; secondly, that the base fee did not, on the widow's death, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; thirdly, that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was to be calculated from his death, and not from the death of his mother, and consequently W.'s entry (in 1790) was not barred by lapse of time; fourthly, that although W. entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted as to his moiety to the original estate tail which was barred by the recovery in 1814; and fifthly, that the entry and remitter of W. did not operate to remit his coparcener M. to the other moiety of the estate. *Doe d. Daniel v. Woodroffe*, 2 H. L. Cas. 811; 13 Jur. 1013.

An heir in tail brought ejectment against a defendant who had been in receipt of the rent thirty years, during the life of the ancestor in tail, and seven years after his death. The ancestor had had seizin:—Held, that such possession by the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by showing that the ancestor had not conveyed by fine and recovery. *Doe d. Smith v. Pike*, 3 B. & Ad. 738; 1 N. & M. 385.

**Operation of bar by 3 & 4 Will. 4, c. 27, of estates or interests in possession, against right of parties barred to future estates, interests, &c.**—[By 3 & 4 Will. 4, c. 27, s. 20, when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or

rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.]

A father devised lands to his son A.; and, in case his son either married or took up with a Roman Catholic, or in case he died without a lawful heir, then he directed that all he had devised to A. should go to his, the testator's, son B. Both events happened:—A. took up with a Roman Catholic after the testator's death, and died without a lawful heir. A few months after the happening of the second event, but more than twenty years after the happening of the first event, B. brought an ejectment against the devisee of A.:—Held, that 3 & 4 Will. 4, c. 27, s. 20, deprived B. of the benefit of the new right of action which accrued on the happening of the second event; and that as more than twenty years had elapsed from the happening of the first event, when B. was bound to have asserted his title, he could not maintain the ejectment. *Clarke v. Clarke*, 2 Ir. R., C. L. 895.

**Operation of bar by 3 & 4 Will. 4, c. 26, of tenants in tail, against remainder men and others.**—[By 3 & 4 Will. 4, c. 57, s. 21, when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might have lawfully barred.

By s. 22, when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore mentioned, which shall be applicable in such case, for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate or interest or right which such tenant in tail might lawfully have barred, shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued alive, he might have made such entry or distress or brought such action.

By s. 23, when a tenant in tail of any land or rent shall have made an assurance thereof, which shall operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person

who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after and in defeasance of such estate tail.

These enactments are retrospective. *Goodell v. Skerratt*, 3 Drew. 216; 1 Jur., N. S. 57; 24 L. J., Chanc. 323.

If the statute has begun to run against a tenant in tail, it will continue to run against the remainder-man, though he may be under disabilities. *Id.*

In ejectment, the plaintiff proved that A., being seized in fee of the land in question, devised it to the father of the plaintiff in tail general, and died in 1799; the plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person of whom the defendant obtained possession:—Held, that under 3 & 4 Will. 4, c. 27, s. 21, since the tenant in tail was barred, the issue in tail was also barred. *Austin v. Llewellyn*, 9 Exch. 276; 23 L. J., Exch. 11; 2 C. L. R. 409.

An estate tail having been discontinued by a feoffment made by the tenant in tail more than twenty years before his death:—Held, that the issue in tail might bring his writ of formedon at any time within twenty years next after such death, the period of limitation prescribed by 3 & 4 Will. 4, c. 27, not running against him during the life of the tenant in tail. *Cannon v. Rimington*, 13 C. B. 1; 21 L. J., C. P. 137; affirmed in error. 12 C. B. 18; 23 L. J., C. P. 153—Exch. Chanc.

A tenant in tail in 1847 conveyed his lands by deed not enrolled, and possession was enjoyed for more than 20 years under that deed:—Held, that his issue in tail was not barred by 3 & 4 Will. 4, c. 27, s. 23, and that he was entitled to have the property delivered up to him with an account of rents from the filing of the bill. *Morgan v. Morgan*, 39 L. J., Chanc. 493; 10 L. R., Eq. 99; 18 W. R. 744; 23 L. T., N. S. 595—R.

Fraudulent sales had been made by a tenant for life; his son died in his life-time; the tenancy for life continued to exist for above thirty-five years after these fraudulent sales. On the tenant in remainder becoming entitled, he filed a bill to redeem:—Held, that he was not barred by the lapse of time. *Bandon v. Becher*, 3 C. & F. 479.

A tenant for life was executrix of a proceeding tenant for life, both being impeachable for waste, and both having committed waste by cutting timber:—Held, that the Statute of Limitations began to run against the remainder-men in fee from the time when the timber was cut, and not from the time of the death of the tenant for life. *Higginbotham v. Hawkins*, 7 L. R., Ch. 676; 27 L. T., N. S. 328; 20 W. R. 955; 41 L. J., Chanc. 828.

Held, that though an injunction and an



account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life. *Ib.*

A remainder-man paid with his own money, after he came into possession, interest which had accrued, during the preceding estate for life, upon charges affecting the inheritance:—Held, first, that his executor was entitled, in 1870 (as against the personal representative of the tenant for life), to be recouped out of a fund in court, the produce of rents of the life estate brought in, in 1815, by a receiver appointed in an incumbrancer's suit instituted against the tenant for life. *Houlin v. Sheppard*, 6 Ir. R., Eq. 38—V. C.

Held, secondly, that the fund having remained in court, during the whole period from 1815 to 1870, in usum jus habentium, the claim of H.'s executor was not barred. *Ib.*

By a private act of 2 & 3 Philip & Mary, lands were limited to N. and others successively in tail male, with limitations over, and an ultimate limitation to the crown; and it was provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered, or acknowledged of the premises, or any part or parcel thereof," by N., or the other persons named, "or by any of them, or by any of their heirs male of their several bodies, should bind or conclude, or put from entry," the crown, or any of the heirs in tail. A lease for three lives was made in 1781, by the heir in tail male of N., then in possession, of part of the lands so settled; the lease expired in 1832, and since that time the land had been held by the defendant, and those through whom he claimed, without payment of rent or acknowledgment of the title of the tenants in tail for the time being. In an action by the present heir in tail male of N. to recover the land:—Held (by Chaunnell and Cleasby, BB., Bramwell, B., dissentiente), that he was not barred by 3 & 4 Will. 4, c. 27. *Abergavenny v. Brace*, 7 L. R., Exch. 145; 41 L. J., Exch. 120; 26 L. T., N. S. 514; 20 W. R. 462.

Semble, that the section of 3 & 4 Will. 4, c. 27, which bars issue in tail, is s. 2, and not s. 21. *Ib.*

When a tenant for life with remainder (in the events which happen) to himself in tail executes an assurance which, for want of the protector's consent, creates only a base fee, time does not run under the Statute of Limitations, 3 & 4 Will. 4, c. 42, s. 23, to make such assurance effectual against the reversions, so long as any estates coming between his estate for life and estate in tail are in existence. *Mills v. Coppel*, 41 L. J., Chanc. 674; 20 L. R., Eq. 692—V. C. H.

Lands limited in equity to T., F., and F.'s wife E. successively for life, with remainder to the first and other sons of F. and E. successively in tail male, with remainder to F. in

tail general, with remainders over, were in 1835, without the consent of T., the protector of the settlement, by deed inrolled; reciting, contrary to the fact, the seizin in fee simple of F., conveyed by F., E. joining to transfer or bar her dower, to a purchaser in fee simple; and the purchaser then entered into possession. T. died in 1848, F. died without issue in 1859, and E. died in 1873:—Held, that until 1873 the possession of the purchaser was a possession by virtue of the subsisting life estates, and not of the estate tail in remainder of F., and, consequently, was not a possession the continuance of which for the period of twenty years would, under s. 23, bar the remainders over. *Ib.*

**Extinguishment of right and title under the statute, generally.**—[By 3 & 4 Will. 4, c. 27, s. 34, *at the determination of the period limited by the act to any person for making an entry or distress, or bringing any writ of quare impedit, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished.*]

Semble, that the effect of this section is to give title by possession for twenty years, but that such twenty years' possession must be either by the same person, or several persons claiming one from another. *Doe d. Carter v. Barnard*, 13 Q. B. 945; 18 L. J., Q. B. 306.

Under 3 & 4 Will. 4, c. 27, ss. 2, 3, and 34, the right to rent is extinguished by the lapse of twenty years from the time of the last payment of such rent, although twenty years have not expired since the rent became due. *De Beauvoir v. Owen*, 5 Exch. 166; 19 L. J., Exch. 177—Exch. Cham.

The effect of the 3 & 4 Will. 4, c. 27, ss. 2, 3, 4, as to land, is, that after twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or revested by a re-entry after that period, upon the doctrine of remitter, because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry; and the express provision in the statute, that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. *Brassington v. Llewellyn*, 27 L. J., Exch. 207; *S. C.* at Nisi Prius, 1 F. & F. 27.

N. died in 1830, in New South Wales, seized of real estate in that colony. E., his heir-at-law, lived in Ireland, and died there in 1837. J., the heir of E., and also of N., likewise lived in Ireland, and in 1856 went to New South Wales, and brought an ejectment there to recover the land of which N. died seized. The 3 & 4 Will. 4, c. 27, had been adopted in the colony:—Held, that J.'s right of action was barred by ss. 2 and 16. *Devine v. Holloway*, 14 Moore P. C. C. 290; 9 W. R. 642; 4 L. T., N. S. 190.

A party, being indebted by bond, devised real estate to his son for life, with remainder,

subject to a term for the payment of legacies to his grandson in tail, and died. Upwards of twenty years after the date of the latest of the bonds, the tenant for life and his assignee for value, filed a bill against the tenant in tail and the legatees, alleging that the tenant for life had paid off the bonds, and seeking to stand in the shoes of the obligees as against the inheritance. The tenant in tail pleaded the statute, the other legatees did not:—Held, that the payment of the bonds by the tenant for life did not constitute him an incumbrancer on the estate, and that the bonds themselves, being more than twenty years old, the presumption was that they had been satisfied. *Morley v. Morley*, 5 De G., M. & G. 610; 1 Jur., N. S. 1097; 25 L. J., Chanc. 1.

A testator devised a copyhold in 1700 to W. for life, with remainder to her children as tenants in common, without words of limitation. W., who had three children, let the property to her two sons, L. and B., and after the death of L. to his son R. and B., who occupied the estate together till the death of W. in 1841. On W.'s death the property—subject, as to one-third, to B.'s life estate—belonged in moieties to R. and X., as the co-heirs of the testator. R. and B. continued to occupy the whole property as owners, and farmed it at their equal expense, till the death of B. in 1862, after which it was similarly farmed by B.'s son and R. till 1869, when B.'s son died. The devisee of B.'s son afterwards filed a bill for a partition:—Held, that R. and B., as regarded that third share, of which their possession became wrongful on the death of W., must be considered as joint tenants; and that as B. had died first, his interest in the estate had determined, and the devisee of B.'s son had no title. *Ward v. Ward*, 6 L. R., Ch. 789.

A tenant at will without interruption for more than twenty years, during which period he had let and transferred portions of the land, with the knowledge and without the interference of the owner in fee, acquires an indefeasible title against the owner, whose right of entry after that period is barred by 3 & 4 Will. 4, c. 27, ss. 2, 7, 34. *Day v. Day*, 3 L. R., P. C. 751; 40 L. J., P. C. 35; 24 L. T., N. S. 850; 19 W. R. 1017.

In May, 1842, a father let his son into possession of land. The son continued to occupy the land as tenant-at-will until 1864. In 1852 the son, with the knowledge of his father, let portions of the land on weekly and yearly tenancies, and received rent for the same:—Held, that the right of entry accrued at the end of the first year from the creation of the tenancy, and that the right of entry in the father was barred by the uninterrupted occupation by the son for twenty years. *Ib.*

One whose title to real estate is barred by 3 & 4 Will. 4, c. 27, the Statute of Limitations, if he subsequently makes an entry, is not thereby remitted to his former title. *Bryan v. Coudal*, 21 W. R. 698—C.

The 3 & 4 Will. 4, c. 27, cannot give a person who has entered into a life estate

under an invalid will, a right against other devisees of the will. *Boord v. Boord*, 9 L. R., Q. B. 48; 43 L. J., Q. B. 4; 29 L. T., N. S. 459; 23 W. R. 206.

A tenant by the curtesy of premises, devised them to trustees for his daughter for life, with remainder to his grandson. Upon the death of the testator, the daughter entered into possession of the premises purported to be devised, and paid for some years the annuities charged by the will upon the premises, and was suffered by the heir-at-law to remain in possession undisturbedly for more than twenty years. The grandson conveyed his remainder to the plaintiff. The daughter, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon her death, took possession. The plaintiff, the assignee of the grandson, the remainder-man, having brought ejectment:—Held, that the daughter having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover. *Ib.*

#### 7. Exceptions by Statute; Equitable Claims, Trusts, Fraudulent Concealment, Acquiescence, &c.

**Equitable claims in general.**—[By 3 & 4 Will. 4, c. 27, s. 24, no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions contained in that statute, he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.]

**Express trusts.**—[By 3 & 4 Will. 4, c. 27, s. 25, when any land or rent shall be vested in a trustee upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued according to the meaning of the act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.]

By the Judicature Act, 1873 (36 & 37 Vict. c. 69), s. 25, sub-s. 2, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of trust, shall be held to be barred by the Statute of Limitations.]

This section only bars equitable rights, so far as they would have been barred if they had been legal rights. *Archbold v. Scully*, 9 H. L. Cas. 360; 7 Jur., N. S. 1169; 4 L. T., N. S. 160.

In cases of express trust, the statute is no bar to a demand of a cestui que trust, though

the other cestui que trust have for more than twenty years received from the trustee the whole of the rents to the exclusion of the claimant. *Knight v. Boyer*, 3 De G. & J. 421; 27 L. J., Chanc. 520.

The doctrine that where there is an express trust lapse of time is not material, does not apply where there has been gross laches on the part of the cestui que trust. *Bright v. Legerton*, 2 De G., F. & J. 606; 8 W. R. 678.

A cestui que trust of real estate under a will was discharged in 1825, under the Insolvent Debtors' Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the estate from the trustee, in trust for the creditors under the bankruptcy:—Held, that it thereby became vested in him upon an express trust, viz., that declared by the will, the benefit of which belonged to the creditors under the insolvency, and that on a bill being filed by the assignee in insolvency in 1853, the statute afforded no defense to the recovery of the estate or the mesne profits. *Sturgis v. Morse*, 3 De G. & J. 1.

Upon the grant of an annuity secured on real estate, a term was vested in trustees to raise and pay the arrears, and hold the surplus of the proceeds for the grantor:—Held, that the relation of trustee and cestui que trust being created, as between the trustee and the grantor and the grantee, the case came within 3 & 4 Will. 4, c. 27, s. 25, and that the annuitant's right to arrears was not limited to six years, under s. 42, as against the grantor and his subsequent incumbrancers. *Levis v. Duncombe*, 29 Beav. 175; 30 L. J., Chanc. 732, 867; 7 Jur., N. S. 695. But see *Birmingham, In re*, 4 Ir. R., Eq. 187, 195, 196.

Charities are trusts, and are, as such, within the operation of the above section. *St. Mary Magdalen, Oxford, v. Att. Gen.*, 6 H. L. Cas. 189; 8 Jur., N. S. 675; 26 L. J., Chanc. 620.

Where the attorney-general, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred. *Id.*

A testator charged all his real estate with payment of his debts, if his personal estate was insufficient to pay them, and directed his executors to raise sufficient for their payment by mortgage or otherwise:—Held, that this did not create an express trust within the exception contained in the 3 & 4 Will. 4, c. 27, s. 25. *Dickenson v. Teasdale*, 1 De G., J. & S. 52; 9 Jur., N. S. 237; 32 L. J., Chanc. 37; 7 L. T., N. S. 655.

B., in consideration of a sum of money, by indenture granted an annuity for lives, and by the same instrument demised the lands out of which the annuity issued to a trustee for a term of years upon trusts, for the better securing the annuity:—Held, that the creation of the term operated to create the relation of trustee and cestui que trust between the

trustee of the term and the owner of the lands, and to avoid the bar of the 3 & 4 Will. 4, c. 27, so long as the term had not determined by effluxion of time. *Bermingham, In re*, 4 Ir. R., Eq. 187.

By a post-nuptial settlement dated in 1814, made in pursuance of an ante-nuptial agreement, after reciting that the husband had agreed to settle 1,000*l.* in manner thereafter mentioned, and to enter into the covenants thereafter contained, and reciting that this sum had been paid to G., it was witnessed that G. covenanted with the settlor that he would hold that sum upon trust, with the approbation of the settlor, to invest it, in the joint names of the settlor and himself, either in the public funds or in government or real securities, and would hold the trust funds and securities upon trust for the settlor and his wife during their respective lives, and after their death upon trust for the benefit of their children; and the settlor covenanted that he would at the expiration of twelve months pay to G. another sum of 1,000*l.* to be held by him upon the same trusts as the first sum. G. died in 1821, and the settlor, having survived his wife, died in 1868. Neither of the sums was really paid to G., or invested in the joint names of G. and the settlor:—Held, first, that the settlor had constituted himself a trustee of the first sum, and that his estate was liable for his breach of trust in not seeing that it was invested, notwithstanding the Statute of Limitations. *Stone v. Stone*, 5 L. R., Ch. 74; 39 L. J., Chanc. 196; 22 L. T., N. S. 182.

Held, secondly, that as to the second sum, the settlor was in the position of a simple covenantor, and that the remedy of the claimants for his breach of the covenant was barred by the statute. *Id.*

A. entered into articles of agreement for leases of ninety nine years from Lady-day, 1768, of building land abutting on the Thames, with trustees who were tenants in fee. Soon afterwards, by a local act, A. and others were empowered to embank the Thames, and win part of the bed of it. It enacted that the ground and soil of the river to be inclosed and embanked in the front of each house should vest in the owner of the house according to his respective estate, trust, or interest. A portion of the bed of the river, fronting the land on which he had built houses under his leases, was reclaimed by him pursuant to the statute, and he occupied it more than twenty years before Lady-day, 1867. No lease of the reclaimed land was ever executed either by the trustees or by A. The leases, if they had been granted, would have expired at Lady-day, 1867. No rent was ever paid by A. in respect of the reclaimed land:—Held, that by the local statute, the fee simple of the reclaimed land was vested in the trustees; and that their representatives were not barred by 3 & 4 Will. 4, c. 27, and were entitled to the reclaimed land at Lady-day, 1867. *Drummond v. Sant*, 6 L. R., Q. B. 763; 41 L. J., Q. B. 21; 25 L. T.,

N. S. 419; 20 W. R. 18; distinguishing *Doe d. Stanway v. Rock*, Car. & M. 540; 4 M. & G. 30; 6 Jur. 266.

The proviso in section 7 of the 3 & 4 Will. 4, c. 27, applies to actual direct trusts, and is not limited to express trusts. *Ib.*

Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years:—Held, that the trust was an express trust within 3 & 4 Will. 4, c. 27, the Statute of Limitations, s. 25, and a decree for the execution of the trust of the unsold land was made at the suit of a residuary legatee. *Mulloy v. Bigg*, 18 L. R., Eq. 246; 22 W. R. 469.

A. devised his real estate to B., charged with the payment of 10,000*l.* each to K. and his nephew C. K. had no nephew C., but had a grand-nephew called C., who was unknown to A. A. died in 1831, and in 1832, C. claimed the legacy from B., who refused to pay it on the ground that C. was not the legatee intended. C. did not again claim. B.'s heir (on whom the estate descended) by his will created an express trust "for the payment of all charges or claims then existing" on the estate, and died before 1851. In 1869 the personal representative of C. (although previously for years in possession of the previous correspondence about the legacy) claimed the 10,000*l.*, from the person then in possession of the lands charged, subject to the last-mentioned trusts:—Held, that the claim was barred by lapse of time and C.'s knowledge or means of knowledge of his rights, notwithstanding the express trust. *Carey v. Cuthbert*, 22 W. R. 249—Ir. R.

An executor who has, under the terms of the will, active duties as a trustee to perform in respect to the raising and investment of a legacy bequeathed upon trust for a minor, by assenting to it becomes an express trustee, so as to save the bar of the 3 & 4 Will. 4, c. 27, s. 40. *O'Reilly v. Walsh*, 6 Ir. R., Eq. 555—Ir. R.

A testator having devised lands to R. and W., as trustees of his will, with power to grant leases of such duration as they should think advisable, directed that W. should receive the rent to be reserved, upon certain trusts. On the death of W., his heir-at-law, H., entered into possession of the whole of the lands:—Held, in a suit for an account by one of the cestuis que trust of the rent, that H. was an express trustee of the rent within s. 25 of the Statute of Limitations, 3 & 4 Will. 4, c. 27, and that the plaintiff was entitled to rely upon the section, although there was an absence of evidence that W. was the surviving trustee of the will. *Smith v. Smith*, 10 Ir. R., Eq. 273—V. C.

To prove a conveyance for value within s. 25, the defendant, who was the eldest son of H., offered in evidence, as proof of a lost deed, a memorial in the registry of deeds office of a deed, to which H., A., M. and G. were parties, whereby H. conveyed the lands to M. and G. upon certain trusts, which were not, however, disclosed by the memorial. It was

also proved that in the same year in which the deed bore date a marriage was solemnized between H. and A.; and that H., until his death in 1862, and thenceforward the defendant, had been continuously in possession and in receipt of the rent for their own use and benefit:—Held, that it might be inferred that the lost deed was a settlement executed on the marriage of H. and A., under which H. took a life estate, and the defendant an estate in remainder, and that under it the defendant was a purchaser for value. *Ib.*

Held, also, that the statute began to run in the defendant's favor from the time of the execution of the deed. *Ib.*

The Statute of Limitations does not apply to an express trust for a legacy, yet where the beneficiary or his representative has allowed a very long time to elapse without attempting to enforce the trust, equity will, when enforcing it, apply as to interest on the legacy, the principle of the statute. *Thompson v. Eastwood*, 2 L. R., App. Cas. 215—H. L.

A will, in 1807, began thus: "I appoint my after-named executor, Charles E., my youngest brother, to be trustee for the following legacies." Several were then named, and the will went on, "considering that money will be more essential to my dear brother, Samuel E., than a distant possession of land, I bequeath to Samuel E. during his natural life the interest of 3,000*l.*, and after his death, to his eldest son, James E., by his last wife, Margaret J., or M., or E., till he attains twenty-one, and then to obtain the principal. In order that my youngest brother, Charles E., shall be liable to all my lawful debts of every description, and pay them as soon as he can, and also pay my legacies when regularly due, and all expenses; and to enable him to do all this, I bequeath, unconditionally, to him all my estates and landed property, with all emoluments belonging to them, in the county of Armagh; I also bequeath to him, the said Charles, all my estates, &c., with all their emoluments, in the county of Louth, or elsewhere:"—Held, that the will constituted an express trust, so as to prevent the statute applying to it. *Ib.*

But, there having been no proceedings taken until 1872 with the direct purpose of enforcing payment of the legacy (though other proceedings connected with the will had been going on), and the estates having passed into the hands of the representatives of the original trustee; the interest on the legacy was directed to be calculated only from six years before filing the bill. *Ib.*

The word "unconditionally," as used in the will, did not mean without any condition annexed to the payment of the legacies, but that the trustee was made absolute owner of the fee simple for the purpose of doing what the testator had ordered. *Ib.*

Other cases of trusts.]—The proviso as to cestuis que trust contained in s. 7 of 3 & 4 Will. 4, c. 27, applies only to cases of declared and express trusts, and not to a person



holding under an agreement to purchase. *Doe d. Stanway v. Rock*, Car. & M. 549; 4 M. & G. 30; 6 Jur. 266. But see *Drummond v. Sent*, 6 L. R., Q. B. 703; 41 L. J., Q. B. 21, 25; 25 L. T., N. S. 419, 423; 20 W. R. 18.

The object of the statute was to settle the rights of persons adversely litigating with each other, not to deal with cases of trustee and cestui que trust, where there is but one single interest, viz., that of the person beneficially entitled. *Gurrard, dem., Tuck*, ten., 8 C. B. 231; 18 L. J., C. P. 338.

A cestui que trust who enters into possession of land becomes at law tenant at will to the trustee. *Ib.*

The 3 & 4 Will. 4, c. 27, s. 3, does not apply to a cestui que trust holding possession of land under the trustee. *Ib.*

In 1767, the residue of a satisfied term of 500 years (created in 1766) was assigned to a trustee for H. to attend the inheritance; in 1844, the administrator of the trustee brought ejectment on behalf of persons who claimed the beneficial interest through H., the defendants also claiming it under title derived through H. The owner of the legal interest in the term had never been in possession. No demand of possession had been made before action brought:—Held, that the action was not maintainable, for, if a tenancy at will existed as between the trustee and cestui que trust, it had not been determined by demand of possession; and if no tenancy existed such as to render necessary a demand of possession, then the action might have been brought twenty years before, and was consequently barred by 3 & 4 Will. 4, c. 27, ss. 2 and 3. *Doe d. Jacobs v. Phillips*, 10 Q. B. 130; 11 Jur. 692; 16 L. J., Q. B. 269.

The doctrine that a cestui que trust who is in possession of the estate by the consent or acquiescence of the trustee, must be regarded as his tenant-at-will, only applies where the cestui que trust is the actual occupant; where he is merely allowed to receive the rents, or otherwise deal with the estate in the hands of occupying tenants, he is merely the agent of the trustees. *Melling v. Leak*, 16 C. B. 652; 3 C. L. R. 1017; 1 Jur., N. S. 759; 24 L. J., C. P. 187.

The management of an estate was intrusted by the trustees in fee, to the cestui que trust for life, as beneficial owner, and the latter, having never been in actual occupation, let C. into possession, who occupied during the life of the cestui que trust for more than twenty years, without paying rent or acknowledging title:—Held, that a tenancy-at-will had not been created between the cestui que trust and C., and that C. had therefore acquired a good title by adverse possession under the 3 & 4 Will. 4, c. 27. *Ib.*

The possession of trustees cannot be adverse to their true cestuis que trust, and the fact that for upwards of twenty years they have treated the land as belonging to one cestui que trust, whereas in fact it belonged to another cestui que trust, does not operate as a bar under the Statute of Limitations. *Lister*

*v. Pickford*, 11 Jur., N. S. 649; 34 L. J., Chanc. 582; 13 W. R. 827; 12 L. T., N. S. 587—R.

A mortgagee of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion and out of the proceeds of sale to pay the mortgage debt, and to pay the surplus moneys to the mortgagor, does not constitute an express trust in favor of the mortgagor within 8 & 4 Will. 4, c. 27, s. 25. *Locking v. Parker*, 42 L. J., Chanc. 257; 8 L. R., Ch. 80; 27 L. T., N. S. 685; 21 W. R. 113; reversing *S. C.* 41 L. J., Chanc. 544; 27 L. T., N. S. 29; 20 W. R. 737—R.

Under such a mortgage the only right of the mortgagor is to redeem, and he cannot file a bill for a sale. The only right of the mortgagee is to have the property sold, and he is not entitled to foreclose. *Ib.*

The mortgagor's right to redeem under such a mortgage is barred under section 28 by twenty years' possession by the mortgagee without any acknowledgment of the mortgagor's title. *Ib.*

In 1824 an estate was conveyed to A. in fee by way of mortgage, the conveyance being upon trust to sell. A., by his will, executed in February, 1826, devised his real estates to trustees for sale, and to hold the proceeds as part of his personal estate; he then devised to the same trustees all estates vested in him by way of mortgage or in trust for any persons on payment to them of the mortgage moneys to convey the mortgaged hereditaments to the persons entitled to the equity of redemption in the same, and directed that the mortgage moneys when so paid to them should be held upon the same trusts as declared concerning his personal estate. Subsequently to the date of his will A. purchased the equity of redemption in the estate, and entered into possession, but no conveyance was ever made to him. A. died in October, 1826, leaving Y. and C. his co-heirs-at-law. In 1827 the trustees of A.'s will entered into possession of the estate, and administered and dealt with the net rents and profits in accordance with the trusts of the will for more than forty years. In 1869 the representatives of Y. set up a claim to three-fourths of the estate, on the grounds, first, that A. having died intestate as to the estate, one moiety descended on Y. as one of his heirs-at-law; secondly, that C. having by deed released all her right and interest in the estate to the trustees of the will, such release operated in favor of (in the events which happened) A.'s two residuary legatees, of whom Y. was one, and consequently that a moiety of the other moiety of the estate also belonged to them:—Held, that although A. died intestate as to the estate, and a moiety thereof descended on Y. as one of his co-heirs, yet that the claim of Y.'s representatives was barred by the Statute of Limitations, there being no trust, express or implied, on the face of the will, in favor of the testator's heirs. *Yardley v. Holland*, 33 L. T., N. S. 301; 20 L. R., Eq. 428—V. C. B.

A testator, by a will made in 1779, devised freeholds unto his son A., and the heirs of his body, "upon special trust and confidence" that in case he should leave no issue of his body, he would not do or suffer any act in law or otherwise to prevent the several following limitations of the estates from taking effect. And the testator devised (in case his son should die leaving no issue of his body) the freeholds to trustees in trust (subject to certain prior limitations) for B. (the plaintiff's grandfather) for life, with remainder to B.'s eldest son (the plaintiff's father) in tail. A. died, leaving no issue. The statement of claim alleged that, upon the death of B. in 1852, the plaintiff's father became entitled, as tenant in tail, to the possession of the property. The defendant demurred, on the ground that the alleged trust contained in the will did not operate to prevent A. from suffering a recovery; that the recovery suffered by A. was valid to defeat the estates limited over in case A. should die leaving no issue of his body; and "on other grounds sufficient in law to sustain this demurrer:"—Held, first, that the right to suffer a recovery was a necessary incident to a legal estate tail, not in the least interfered with by the expression of "trust and confidence" that the tenant in tail would not do so, and that the recovery, when suffered, defeated the limitations over contained in the will. *Dawkins v. Penrhyn*, 30 L. T., N. S. 680—V. C. M.: affirmed on appeal, 37 L. T., N. S. 80; 26 W. R. 6; 6 L. R., Ch. Div. 318—C. A.

Held, secondly (assuming the limitations over to have taken effect), that, as on the plaintiff's own statement his title accrued more than twenty years before, the Statute of Limitations was an absolute bar to his claim, and, as the demurrer stated "some ground of law," the defense of the statute was properly raised upon this demurrer. *Ib.*

**Cases of fraudulent concealment of rights.]**

—[By 3 & 4 Will. 4, c. 27, s. 26, in every case of a concealed fraud, the right of the person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered: Provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bona fide purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.]

To prove that a fraud was concealed, within the meaning of this section, it is not sufficient to show that the party was in such an imbecile or an uncultivated condition of mind that it was scarcely possible, though the alleged

fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the court cannot possibly estimate for this purpose the chance which the state of mind and education of a man may afford of his making such discovery, and is, therefore, compelled to assume that every one not actually a lunatic is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary. *Manby v. Benwick*, 3 Kay & J. 842.

In 1825, a debtor, on his insolvency omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853, his assignees filed a bill in equity against the assignees under a subsequent bankruptcy and others, for the recovery of the property:—Held, that the claim was not barred by the statute, there having been a concealed fraud. *Sturges v. Morse*, 24 Beav. 541; affirmed on appeal, 3 De G. & J. 1.

To a plea of the statute, in an action of trespass, or trespass on the case, the plaintiff will not be allowed to reply, as an equitable answer, that the trespasses were underground, and had been fraudulently concealed from the plaintiff till within six years before action. *Hunter v. Gibbons*, 1 H. & N. 459; 2 Jur., N. S. 1249; 26 L. J., Exch. 1.

A person whose legal title to lands is barred by 3 & 4 Will. 4, c. 27, may, if he has been deprived by a concealed fraud, recover by a suit in equity under s. 26, but he is bound to show with the utmost strictness that he is entitled to the privilege given by that section. *Chetham v. Houre*, 39 L. J., Chanc. 376; 9 L. R., Eq. 571; 22 L. T., N. S. 57—V. C. M.

Therefore, where a plaintiff sued to recover property to which his predecessor, as he alleged, became entitled in 1769, and insisted that a register book containing a certificate of marriage, forming the principal link in his title, had been fraudulently mutilated in order to prevent him or his ancestors from obtaining evidence of the marriage:—Held, that, by reasonable diligence, evidence of the marriage might have been ascertained within twenty years after the alleged fraud had been committed; and that he had not brought his case within that section. *Ib.*

In a case of concealed fraud a purchaser for value is not entitled to the protection of the proviso at the end of s. 26 of the 3 & 4 Will. 4, c. 27, if his agent who negotiated the purchase had in the course of the transaction actual knowledge of the fraud, or had reason to believe that a fraud had been committed. *Vane v. Vane*, 21 W. R. 252; 28 L. T., N. S. 320; 42 L. J., Chanc. 299; 8 L. R., Ch. 383. See *S. C.*, 27 L. T., N. S. 534; 21 W. R. 66—V. C. M.

By the words a "bona fide purchaser" in s. 26, is meant a person who has given full value for the property. *Ib.*

The section applies where the person who has been kept out of possession by a concealed fraud has had all along a legal right

to enter, as well as where he has had only an equitable right. *Ib.*

A plaintiff alleged in his bill that his father married A. in 1797. Three weeks before the marriage his mother A. had borne a son B., but the fact of his having been born before wedlock was carefully concealed, and he was brought up as a legitimate son and heir apparent to his father's title and estates, to which he eventually succeeded. B. married C. in 1823, before his father's death, and he died in 1842, leaving D. his eldest son and heir. In 1866 the plaintiff, who was the eldest son born after the marriage of his father to A., discovered the fact of B.'s illegitimacy, and also that that fact was known to B., and also to the father of C. upon the negotiation for the marriage of B. and C. He prayed a declaration of his title, and an account of rents and profits against D.:—Held, that the bill sufficiently alleged a concealed fraud, which the plaintiff could not with reasonable diligence have known sooner; that C. must be taken to have had notice of B.'s illegitimacy through the communication thereof to her father upon the negotiation for a settlement on her marriage with B.; and that her son D., claiming through the same marriage settlement, was equally affected with the same notice. *Ib.*

The plaintiffs, the owners of coal mines, discovered in 1872 that the defendant more than six years previously had, when working an adjoining colliery, worked a large quantity of the plaintiffs' coal by breaking their boundary. There had been no subsidence of the surface or anything to put the plaintiffs on inquiry, and the defendant, in plans which he kept of the workings in his own mine, had not marked the illegal workings:—Held, that the omission in the plans was not sufficient to constitute a case of concealed fraud so as to entitle the plaintiffs to an account and damages. *Daves v. Bagnall*, 23 W. R. 690—V. C. II.

**Effect of acquiescence, &c.**—[By 3 & 4 Will. 4, c. 27, s. 27. *nothing in the act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may be not barred by virtue of the act.*]

### III. LIMITATIONS OF PERSONAL ACTIONS AND PROCEEDINGS.

#### 1. Periods of Limitation; and when Time begins to run.

##### (a) In Respect of Particular Causes of Action and Subject-Matters.

**General provisions of statutes.**—[By 21 Jac. 1, c. 16, s. 3, *all actions of trespass quare clausum fregit, all actions of trespass, detinue, actions sur trover and replevin for taking away of goods and cattle, all actions of account and upon the case (other than such accounts as concern the trade of merchandise between merchant*

*and merchant, their factors, or servants)* (but by 19 & 20 Vict. c. 97, s. 9, this exception is repealed), *all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case (other than for slander), and the said actions of account, and the said actions for trespass, debt, detinue, and replevin, for goods or cattle, and the said action of trespass quare clausum fregit, within six years next after the cause of such actions or suits, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within four years next after the cause of such actions or suit, and not after; and the said action upon the case for words, within two years next after the words spoken, and not after.*

By 3 & 4 Will. 4, c. 42, s. 3, *all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for any escape (the action of debt for an escape is abolished by 5 & 6 Vict. c. 98, s. 31), or for money levied on any ft. fa., shall be commenced and sued within six years after the cause of such actions or suits.*]

**Contracts, in general.**—In an action on promises, the breach of a contract is the cause of action, and the statute runs from the time of the breach, and not from the time of the refusal to perform the contract. *East India Company v. Paul*, 7 Moore P. C. C. 85; 14 Jur. 253.

The Statute of Limitations in a case of contingency runs from the time when the contingency happens. *Fenton v. Imblers*, 1 W. Bl. 354; 3 Burr. 1278.

**Bonds; upon presumption of payment, independent of statute.**—Before the 3 & 4 Will. 4, c. 42, s. 3 (see *infra*), twenty years without any demand was of itself a presumption that a bond had been paid. *Oswald v. Leigh*, 1 T. R. 270. S. P., *Colwell v. Budd*, 1 Camp. 27; *Hillary v. Waller*, 12 Ves. 288.

Payment of money secured by a bond was not to be presumed, although more than twenty years had elapsed since an acknowledgment that any sum was due upon it, if the obligee, ever since that acknowledgment, had resided abroad. *Newman v. Newman*, 1 Stark. 101—Ellenborough.

Indorsements on a bond, acknowledging the receipt of interest, or payment of part of the principal, were not evidence against the obligor, to prove that the bond was on foot, without showing that they were on the bond recently after their dates, and at a time when their purport was contrary to the interest of the obligee. *Rose v. Bryant*, 2 Camp. 321—Ellenborough.

The producing a receipt for interest within twenty years, indorsed on a bond by the obligee, was sufficient to take off the presumption of payment, though no proof was



given when such receipt was written and signed. *Barrington v. Searle*, 3 Bro. P. C. 593.

Where, in an action on a bond more than twenty years old, to rebut the presumption of payment, the obligee gave evidence of payment of interest by the obligor to A., equal in amount to the interest that would become due on the bond:—Held, that an indorsement on the bond in the handwriting of the obligee, and which appeared to have been made at or about the time when the bond was executed, but which was not proved to have been ever seen by the obligor, stating that the bond was given to the obligor in trust for A., was admissible to connect the payment of interest with the bond. *Glendon v. Atkin*, 1 C. & M. 410; 3 Tyr. 289.

**Bonds and other specialties; under 3 & 4 Will. 4, c. 42, s. 3.**—[By 3 & 4 Will. 4, c. 42, s. 3, all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award, where the submission is not by specialty, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session of Parliament, or within twenty years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of the then session, or within six years after the cause of such actions or suits; provided that nothing therein contained is to extend to any action given by any statute where the time for bringing such actions by any statute is specially limited.]

This provision did not apply to actions commenced before 24th July, 1833, when it was passed. *Puldon v. Bartlett*, 5 N. & M. 383; 3 A. & E. 884; 1 H. & W. 477.

The limitation in actions for arrears of rent under an indenture is governed by the above statute. *Paget v. Foley*, 3 Scott, 120; 2 Bing. N. C. 679; 2 Hodges, 32.

An action for arrears, upon a covenant for payment of an annuity contained in a deed securing the annuity on land, is barred after twenty years by the above statute; but not after six years, under 3 & 4 Will. 4, c. 27, s. 42. *Sims v. Thomas*, 12 A. & E. 536; 4 P. & D. 229; 4 Jur. 1183.

To an action of covenant six years is not a good plea of limitation. *Hartshorne v. Watson*, 5 Scott, 506; 4 Bing. N. C. 178; 2 Jur. 155.

By a deed between D. and H., D. sold to H. beds of coal, and he covenanted to pay to D. a sum named for the purchase-money, "in manner and at the times following;" that is to say, part in cash on the day of the date of the deed, and the remainder by five promissory notes under his hand bearing even date with the deed, payable to D. or order on the

1st of July in every year till the whole purchase-money should be paid, with interest, until the notes should be paid. D. declared against H. on this deed, alleging that, though H. gave D. two notes, according to the language of the covenant, and afterwards paid a part of the principal and interest mentioned in those notes, yet he did not pay the residue of the principal and interest mentioned in those notes, but, except as to the part so paid, those notes and so much of the purchase-money and interest as was therein mentioned remained wholly unpaid to D.:—Held, a good breach, the covenant extending to the payment of the money named in the notes, and not being satisfied by the mere delivery of the notes; and that it was a bad plea, that the causes of action did not accrue within six years before action. *Dixon v. Holdroyd*, 7 El. & Bl. 903; 3 Jur., N. S. 213; 27 L. J., Q. B. 43.

The proper limitation to an action by an incorporated company against one of its members for calls under 8 & 9 Vict. c. 16, is twenty years, by 3 & 4 Will. 4, c. 42, s. 3, and not six years, under 21 Jac. 1, c. 16, s. 3. *Cork and Bandon Railway Company v. Goode*, 13 C. B. 827; 17 Jur. 555; 22 L. J., C. P. 198.

The 32 Geo. 3, c. 74, s. 8, imposes duties to be paid by the master or owner for every ship or vessel of a certain burden passing from, to, or by Ramsgate. By s. 16, if any master or owner shall elude or avoid payment of the duties, he shall stand charged to and be liable to payment of the same, and the same are to be recovered as penalties imposed by the act. By s. 72, penalties are recoverable by action. A party was sued for duties under this act which he had not paid:—Held, that the action being on a specialty, the period of limitation was twenty years, under 3 & 4 Will. 4, c. 42, s. 3. *Shepherd v. Hills*, 11 Exch. 55.

By a deed of settlement of a company it was provided, that whenever any shares should be transferred to a new holder, the responsibility of the previous holder in respect of such shares should cease, but that he should not be released from his proportion of losses (if any) sustained by the company up to the period of his ceasing to be such shareholder:—Held, that a transferrer of shares was liable in respect of losses that accrued prior to the date of the transfer, though, the liability being by way of specialty, a holder who transferred his shares more than twenty years before the date of the winding up was entitled to the benefit of the statute. *Horsley, Ex parte*, 2 L. R., Eq. 167; 14 W. R. 417; 14 L. T., N. S. 47—V. C. K.

The 3 & 4 Will. 4, c. 42, s. 3, constitutes a bar to an action on a writing obligatory, in those cases only where every breach of the condition has taken place more than twenty years previously to the commencement of the action. *Sanders v. Conard*, 3 D. & L. 281; 15 M. & W. 49; 10 Jur. 186; 15 L. J., Exch. 97.

In 1831 an obligee of a bond brought an



action against the obligor. After notice of trial the action abated by the death of the obligor in 1835. The obligor left a will, which was proved by the executor named therein. On the 18th of May, 1857, administration of the goods and effects of the obligor, with the will annexed, was granted to the defendant. In March, 1852, the obligee petitioned the Insolvent Debtor's Court, and his effects vested in the provisional assignee, who commenced an action on the bond against the defendant on the 17th of May, 1858:—Held, that the right of action was not barred by the 3 & 4 Will. 4, c. 42, s. 3. *Sturgis v. Drell*, 6 H. & N. 120; 6 Jur., N. S. 1851; 29 L. J., Exch. 472; 8 W. R. 653—Exch. Cham.

By a marriage settlement, personal estate belonging to the lady was vested in trustees for the husband for life, remainder to the wife for life, remainder to the children of the marriage, with remainders over. Part of the settled fund was a bond to secure a sum of money lent by the lady to her intended husband, conditioned for repayment by him, with 5l. per cent. interest, in six months, if he should be called upon to do so. There were no children of the marriage. Neither principal nor interest was ever paid by the husband, or by the wife, who was his executrix:—Held, that after more than twenty years from the date of the bond, the representative of the trustees was entitled to enforce payment of the sum secured by the bond. *Mills v. Borthwick*, 11 Jur., N. S. 558; 35 L. J., Chanc. 31; 18 W. R. 707; 12 L. T., N. S. 600—V. C. K.

Action, on the obligatory part only, upon two bonds dated in 1828 and 1829. Plea, that the causes of action did not accrue within twenty years. Replication, that the causes of action did accrue within twenty years. The first bond stated that M. and the defendant bound themselves, and each of them, to the plaintiff in 300l. The condition (after reciting that M. had agreed with the plaintiff for the sale to him, for 150l., of an annuity of 20l. to be paid to the plaintiff during the joint and several lives of the plaintiff and his wife, and the survivor; that M. had requested the defendant to join in and execute the bond, which he had agreed to do, for securing the regular payment of the annuity; and that the 150l. had been paid to M.) was for payment of the annuity by M. or the defendant, or either of them, by equal half-yearly payments, during the joint and several lives of the plaintiff and his wife, and of the survivor, and a proportionate part in case of the survivor dying between the days of payment. The second bond and condition were similarly framed for the payment, by and to the same parties, of an annuity of 10l. The plaintiff suggested that, in 1851, two-and-a-half years' arrears were due in respect of each annuity, and were still unpaid. At the trial, it appeared that M. had paid the annuities half-yearly down to 1848, but never till after the day of payment fixed by the condition,

so that there had been breaches of the condition twenty years before action, and that the arrears suggested were still due:—Held, that a new cause of action arose upon each successive breach of the condition; that, on the record as it stood, the plaintiff was entitled to prove at the trial breaches within twenty years; and that, on such proof, he was entitled to a verdict upon the issue on the Statute of Limitations. *Amott v. Holden or Holder*, 18 Q. B. 593; 17 Jur. 318; 23 L. J., Q. B. 14.

Action by an administrator of B. on a bond made by A. to B., dated 5th of December, 1812. The condition recited that B. had agreed to advance to A. the produce of the sale of stock in the funds without any other advantage than B. would have been entitled to if the stock had remained in his name; that B. had sold the stock and paid the produce to A., and that it had been agreed that the stock should be replaced and transferred to B., and the condition was, that if A., before the 5th of June following, purchased stock, and transferred it to B., and paid to B., in lieu of dividends, such sums as B. would have been entitled to receive for dividends if the stock had continued in his name, at such times and in such proportions, and in such manner as the dividends would have been payable to B. if the stock had not been sold, then the bond to be void. Breach, first, that A. did not on the 5th of June, or since, purchase the stock and transfer to B. or to his administrator; secondly, that the dividends, if the stock had remained in B.'s name, would have been payable half-yearly, and the first and only one of such dividends before the 5th of June would have been payable on the 5th of January, 1813; that on the 11th of September, 1824, B. died; that if the stock had continued in his name, or his administrator, the dividends would have been paid half-yearly, and that there was a large sum payable in lieu of such dividends, and due after B.'s death, and that the stock had not been transferred, and A. had failed to pay the sum due in lieu of dividends. Plea, that the causes of action did not accrue within twenty years next before action. Replication, as to the first breach, that while the stock remained untransferred, and the money was due in lieu of the dividends, on the 10th of September, 1824, A. made an acknowledgment to B. that the stock remained untransferred, by A. making satisfaction to B. on account, and that the action was brought within twenty years after such acknowledgment; and as to the other causes of action, that they did accrue within twenty years. Rejoinder, as to the first part of the replication, a traverse of the bringing of the action within twenty years after the acknowledgment, and issue thereon; and as to the second part of the replication, issue was joined. It was proved that B. had, since the advance, agreed to board and lodge with A., that the amount was to be deducted from the interest of the money which A. had borrowed, and that a settlement should be

made every six months. B. had boarded and lodged with A. till B.'s death, but no settlement had ever taken place, though frequently demanded by B.:—Held, first, that supposing the issue raised upon the rejoinder cast upon the plaintiff the burden of proving that the acknowledgment was made within twenty years before action, there was sufficient evidence to entitle the plaintiff to a verdict. *Blair v. Ormond*, 17 Q. B. 423; 15 Jur. 1054; 20 L. J., Q. B. 4.

Held, secondly, that the bond was not within the 3 & 4 Will. 4, c. 42, s. 5, and that the replication, therefore, was no answer to that part of the plea which related to the first breach. *Ib.*

But held, thirdly, that that part of the condition which stipulated for the payment from time to time of the sums payable in lieu of the dividends, still remained in force, as to so much as had accrued due within twenty years before action, the penalty of the bond not having been insisted upon in respect of sums accruing due earlier. *Ib.*

A bond was executed in favor of the Bank of England by B. in 1813. In 1823, B. made a voluntary settlement of his property, giving certain funds to trustees in trust to pay thereout the principal and interest due on the bond when and as B. should be required to pay the same. B. died in 1828, and the trust funds subsequently became the property of E. E., by her will, made in 1869, gave certain funds to trustees in trust to pay the principal and interest due on the bond, when, and if, the trustees of the deed of 1823 should be called on to pay the same, and subject thereto as herein mentioned. The bank was unaware of being entitled till 1870, and no claim was made by them under the bond:—Held, that no trust for the bank was created by the deed or will, and that the only person who could call on the trustees to pay was B.; the claim, therefore, was barred by the Statute of Limitations. *Henriques v. Bensusan*, 20 W. R. 350—V. C. M.

When two separate sums are secured by one bond, a payment in respect of one sum does not prevent the statute running in respect of the other. *Ashlin v. Lee*, 31 L. T., N. S. 721; 23 W. R. 287; 44 L. J., Chanc. 174—V. C. H.; affirmed on appeal, 32 L. T., N. S. 348; 23 W. R. 458; 44 L. J., Chanc. 376.

In 1827 an agreement was entered into between J. H. and M. H., by which the payment of 1,000*l.* was to be secured by the bond of H. M., the 1,000*l.* to be applied thus: 750*l.* of it was to be paid to certain parties in certain events, and 250*l.* of it to other parties in other events. The bond, with two obligees, was in the same year duly executed by M. H., and trusts were by a separate deed declared of the 1,000*l.* accordingly. The 750*l.* was paid by installments, and ultimately discharged in full in 1854. The 250*l.* was not paid. The obligor died. In 1872 the parties interested in the 250*l.* filed a creditors' bill to enforce its payment, and to administer the obligor's estate. They contended that the full

discharge of the 750*l.*, in 1854, was a satisfaction pro tanto of the 1,000*l.*, and that their claim to the balance, namely, the 250*l.* was not therefore barred by the statute:—Held, that the limits of the plaintiffs' legal and equitable rights were commensurate; that the causes of action in respect of the two sums of 750*l.* and 250*l.* were distinct; that the payment of the 750*l.* was not on account of the 250*l.*; that the claim to that sum was therefore barred by the statute; and that the bill must be dismissed with costs. *Ib.*

As to limitation of actions for moneys secured by mortgage or other lien or charge on land,—see this title, II., 2, 4.

**Bills, notes and checks.**—A promissory note payable on demand is payable immediately, and the Statute of Limitations runs from the date of the note, and not from the time of demand. *Christie v. Fossewick*, 1 Selw. N. P. 136, 361—Mansfield.

So, a note, payable on demand, with lawful interest, is payable immediately, and therefore the statute runs from the date of the note. *Norton v. Ellam*, 2 M. & W. 461; M. & H. 69; 1 Jur. 433.

But where a note is made payable "two years after demand," the statute does not begin to run until the two years after the demand have elapsed. *Thorpe v. Coombe*, 8 D. & R. 347; S. C. nom. *Thorpe v. Booth*, R. & M. 388.

The statute is no bar to an action on a note payable after sight, unless a presentation for payment six years before the action is proved. *Homes v. Kerrison*, 2 Taunt. 323.

Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money, although six years have elapsed since the time when the loan was advanced; the statute beginning to operate only from the time when the money was to be repaid, i. e., when the bill became due. *Wittersheim v. Carlisle*, 1 H. Bl. 631.

Where a note is made and deposited with a banker, to be delivered to the payee on his producing a certain other note canceled, the cause of action to the payee on the first note accrues on receiving it from the banker, and is not barred by the lapse of six years from the date. *Savage v. Aldren*, 2 Stark. 232—Ellenborough.

Where a note was payable after sight, with interest thereon, and the interest was duly paid for several years:—Held, that the note must be taken to have been acted upon, according to its form and tenor, and, therefore, that the presentment for sight must have been made before the interest was paid, and that the payment became due upon the note at the prescribed date after such presentment, and that the statute would begin to run from the time the payment so became due. *Way v. Bassett*, 5 Hare, 55; 10 Jur. 891; 15 L. J., Chanc. 1.

A holder of a bill of exchange, on non-

acceptance, and protest, and notice thereon, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the non-payment of the bill when due, and the statute, therefore, runs against him from the former, and not from the latter period. *Whitehead v. Walker*, 9 M. & W. 506.

A defendant, in 1840, gave A. for value his acceptance in blank on a 5s. stamp. A., in 1852, filled in his own name as drawer for 200l., at five months. The defendant being sued on the bill by an innocent indorsee for value, pleaded the statute:—Held, that the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank, and that the plaintiff was entitled to recover. *Montagu v. Perkins*, 17 Jur. 557; 22 L. J., C. P. 187.

K. being indebted to the plaintiff and to the defendant, and also to a banking company, it was agreed between all the parties that, to secure K.'s debt to the company, the defendant should draw upon K. three bills of exchange, payable to the plaintiff, and that the plaintiff should indorse them to the company. The bills became due in 1843, and were dishonored. In 1847 the company sued the plaintiff on the bills, and the plaintiff, in 1851, paid the amount:—Held, that the plaintiff was barred by the statute from suing the defendant as drawer. *Webster v. Kirk*, 17 Q. B. 944; 16 Jur. 247; 21 L. J., Q. B. 159.

The plaintiff, in pursuance of an agreement to lend money to the defendant, sent him a check on the 14th June, 1861, which was received by him on the following day, and presented for payment and paid on the 21st June, 1861. On the 21st June, 1867, an action was commenced to recover the amount of the check:—Held, that the check not having been given in payment of any pre-existing debt, the cause of action did not arise till it was actually paid, and that the action was not barred by the statute. *Garden v. Bruce*, 18 L. T., N. S. 544; 16 W. R. 366; 3 L. R., C. P. 300; 37 L. J., C. P. 112.

**Sales.**—On a sale of goods on credit the statute begins to run from the time of credit expired. *Illeps v. Winterbottom*, 2 B. & Ad. 431.

Where A., under a contract to deliver spring wheat to B., had delivered winter wheat, and B. having again sold the same as spring wheat, had in consequence been compelled to pay damages to the purchaser; and afterwards B. brought an action of assumpsit against A. for his breach of contract, alleging as special damage the damages so recovered:—Held, that although such special damage had occurred within six years before the commencement of the action by B. against A., yet that the breach of contract having occurred and become known to B. more than six years before that period, *actio non accrevit infra sex annos* was a good plea in bar to

the action. *Battley v. Faulkner*, 3 B. & A. 288.

**Work and labor.**—By a turnpike act the trustees were to pay first the expenses of obtaining the act, and next the expenses of erecting toll-houses; and an action for work and labor in erecting such toll-houses was brought by a builder, more than six years after the work done, but within six years of the time when the trustees had funds in hand by having paid off the expenses of the act:—Held, that he was too late, as the action was maintainable immediately after the work was done, though the execution would have been postponed. *Emery v. Day*, 1 C., M. & R. 245; 4 Tyr. 695.

[By 4 & 5 Anne, c. 10, s. 17, all actions and suits in the Court of Admiralty for seamen's wages shall be commenced and sued within six years after the cause of such suits or actions shall accrue, and not after.]

**Money lent or deposited paid, had and received.**—Money deposited with a banker in the usual way by a customer is money lent to the banker, with a superadded obligation that it is to be paid when called for; and consequently, if not noticed for six years, will be affected by the statute. *Pott v. Clog*, 16 M. & W. 321; 11 Jur. 289; 10 L. J., Exch. 210.

In an action to recover the consideration money of a void annuity, when the annuity was granted more than six years before action, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided at his instance:—Held, that the statute did not begin to run until the annuity had been avoided. *Couper v. Godmond*, 3 M. & Scott, 219; 9 Bing. 748.

In 1832 the defendant, being indebted to the plaintiff, gave a warrant of attorney for the amount of his debt, subject to a defeasance, stating that the warrant was given to secure payment of the debt by installments, the last of which was payable in 1835; and that, in case default should be made in payment of any of the installments, the plaintiff should be at liberty to enter up judgment and issue execution for all or so much of the debt as should be unpaid at the time, the same as if all the periods for payment had expired by effluxion of time. To an action brought to recover some of these installments, the defendant pleaded the statute, and, at the trial, it appeared that the first default in payment of an installment was made more than six years before the action:—Held, that the plaintiff might have sued on the first default for the whole amount remaining unpaid, and that, therefore, the statute was a bar as to all the installments. *Hemp v. Garland*, 3 G. & D. 402; 4 Q. B. 519; 7 Jur. 302; 12 L. J., Q. B. 134.

Action to recover the consideration money paid for an annuity in 1826, one of the securities given being a warrant of attorney on which judgment was entered up. The warrant and judgment were set aside in 1842;



it did not appear on what grounds:—Held, that the statute, inasmuch as the annuity might be voidable only and not void, was no bar, and would not begin to run until the annuity was avoided in 1842. *Huggins v. Coates*, D. & M. 433; 5 Q. B. 432; 8 Jur. 334; 13 L. J., Q. B. 46.

When money is advanced to a firm to be repaid on demand with compound interest, the statute runs from the date of the advance. *Jackson v. Ogg*, Johnson, 397; 5 Jur., N. S. 976.

Entries made in the books of the firm crediting the person who advanced the money with interest from time to time, on the footing of periodical rests, do not bar the statute. *Id.*

A. and B. expended moneys in procuring a railway act in 1850. The railway was not constructed. The company had no assets till 1872. In 1872, the company obtained assets, and A. and B. put in their claims:—Held, that these claims were not barred, as the statute did not begin to run in favor of the company until the company had assets to meet their claims. *Kensington Station Act, In re*, 23 W. R. 463; 20 L. R., Eq. 197—V. C. M.

**Accounts.**—[By 19 & 20 Vict. c. 97, s. 9, all actions of account, or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or, when such cause has already arisen, then within six years after the passing of that act (29th July, 1856); and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit, by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.]

The exception as to merchants' accounts in the 21 Jac. 1, c. 16, s. 3, was confined to cases where an action of account would lie, or an action upon the case for not accounting. *Cottam v. Partridge*, 4 Scott, N. R. 819; 4 M. & G. 271.

An open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, did not constitute such an account as concerned the trade of merchandise between merchant and merchant within the exception of the 21 Jac. 1, c. 16, s. 3. *Id.*

Since the 9 Geo. 4, c. 14, s. 1, the existence of items within six years in an open account will not operate to take the previous portion of the account out of the statute. *Id.*

As an action does not lie for not accounting till after a demand made of an account, the statute runs only from the time of a demand made. After a reasonable time has elapsed, a jury may presume that the consignor had made a demand, and that the factor had ac-

counted. And fourteen years would be a sufficient time for such a presumption, if not rebutted by circumstances. *Topham v. Brodick*, 1 Taunt. 572.

Where B. and C. were permitted by a mortgagee not in possession of the mortgaged property, consisting of coal mines, to enter upon the working of the mines, to sell the property, and to receive the value, in taking an account of the quantity and value of the coal wrought by B. and C. more than six years before the bill was filed, by the permission of the mortgagee, they being strangers to the mortgagor:—Held, that the Statute of Limitations did not apply. *Hood v. Easton*, 2 Jur., N. S. 729—V. C. S. This decision was afterwards questioned on appeal, but no judgment was given, 2 Jur., N. S. 917.

The exception of the 21 Jac. 1, c. 16, s. 3, as to merchants' accounts, did not apply to an action of indebitatus assumpsit, but only to the action of account, or to an action on the case for not accounting. *Inglis v. Haigh*, 8 M. & W. 760; 9 D. P. C. 817; 5 Jur. 704.

Mutual debts, there being no written accounts between the parties, were not within the exception. *Mills v. Fowkes*, 7 Scott, 444; 5 Bing., N. C. 455; 2 Arn. 62; 3 Jur. 406.

A sale of wine upon one side, and money on the other, do not constitute merchants' accounts. *Dutton v. Hutchinson*, 1 Jur. 772.

If there was a mutual account of any sort between plaintiff and defendant, for any item of which credit had been given within six years, that was evidence of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, so as to take the case out of the statute. *Catling v. Skoulding*, 6 T. R. 189.

A. occupied a house and land under B., at the rent of 16l. a year, and A., at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person who had been employed by A., and had been paid 12s. a week. A. continued in B.'s service for more than twelve years; but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A., to recover wages for twelve years, deducting the rent:—Held, that it was not such an open account as would take the case out of the statute since the 9 Geo. 4, c. 14; but there must be a part payment in cash, or what is equivalent to it, to have that effect. *Williams v. Griffiths*, 2 C. M. & R. 45; 1 Gale, 65; 5 Tyr. 748.

Merchants' accounts, after six years' total discontinuance, are within the statute. *Martin v. Henthwaite*, 2 Eden, 169.

The plaintiff, having lent the defendant a sum of money, took from him the following memorandum:—

"I O U 100l.—C. R. 30 July, 1821."

"August 17th, received 50l.—C. R."

The last item alone was *infra sex annos*:—Held, that it did not amount to an acknowledgment of the existence of the prior debt, so as to take it out of the statute. *Roberts v. Roberts*, 1 M. & P. 487; 3 C. & P. 296.

An account stated between a debtor, being part owner and ship's husband, and his co-owners, in which the items of the creditor's account for work done and money advanced are included, is not such an acknowledgment as will take the case out of the operation of the statute. *Nash v. Hill*, 1 F. & F. 198—Coleridge.

The circumstance of there being no ascertained or adjusted debt till within six years, will not delay the operation of the statute. *Id.*

The phrase "comprised in the same account" in the 10 & 20 Vict. c. 97, s. 9, means that "would have been comprehended in," *Knaz v. Gye*, 5 L. R., H. L. Cas. 650.

Real estate was devised to A. for life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail male, with remainder to B., C. and D., and their first and other sons in a similar way, with remainder to the testator's right heirs, with liberty to any tenant for life for the time being to fell and convert timber for the purpose of repairs. A. enjoyed the estate as tenant for life, the ultimate remainder in fee being vested in him, down to his death in 1859. B. enjoyed the estate in the same way down to his death in 1864. C. then entered into possession. A. and B. had each cut timber and sold it, but had expended money in repairs. In 1869 C. filed a bill to make their estates respectively account for such timber. The court refused an account against A.'s representative; first, because he had expended more than he had received; secondly, because the claim was barred by the statute. An account of what had been received and paid by B. during his life was directed. *Birch-Wolfe v. Birch*, 30 L. J., Chanc. 845—V. C. J.

An agent who stands in a fiduciary relation to his principal cannot set up the statute in bar of a suit for an account by his principal. *Burdick v. Garrick*, 5 L. R., Ch. 238; 89 L. J., Chanc. 369.

An agent who was a solicitor in London, held a power of attorney from his principal in America to sell his property and invest the proceeds in his name. The agent received certain moneys under the power and paid them into his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, and in 1868 she filed a bill against the agent for an account:—Held, that the agent held the money in trust for his principal, and, therefore, the statute was no bar to the suit. *Id.*

There being no proof that the agent had made any interest or profit by the money in his hands, he was charged with simple interest at 5l. per cent. *Id.*

**Guaranties and contracts of indemnity.]—**

A right to sue upon a contract of indemnity against the costs of an action is first vested, when the party to whom the indemnity is given pays the bill of costs, and not when it

is delivered to him, and the statute therefore does not begin to run against his right of action until after such payment. *Collinge v. Heywood*, 1 P. & D. 502; 9 A. & E. 633; 2 W., W. & H. 107.

A., in consideration of B.'s supplying C. with goods, guaranteed to B. the payment of the price. B. having supplied C. with goods, and C. having neglected to pay the price, A., in consideration of B.'s extending to C. a period of two years and upwards for the liquidation of his debt, agreed to reserve to B. all right and claim which B. might then have against him, A., by virtue of the security previously entered into on C.'s behalf, and to be bound by it, if, at the expiration of such period, B.'s demand should not have been fully discharged:—Held, that A.'s liability attached upon default made by C. after the expiration of two years and a few days; that B.'s right of action then accrued; and that, therefore, the statute then began to run. *Holl v. Hadley*, 4 N. & M. 515; 2 A. & E. 758.

H., and plaintiff and D., as his sureties, joined in making a promissory note. The amount of the principal and interest due on the promissory note was paid by the plaintiff more than six years before the commencement of the suit, with the exception of 30l., which was paid by him within that period. The plaintiff having brought an action for contribution against D.:—Held, that the plaintiff was entitled to recover only to the extent of 30l., which had been paid within the six years, and that the statute was a bar to the rest, as the right of action attached as soon as the plaintiff had paid more than his proportion. *Davies v. Humphries*, 6 M. & W. 153; 4 Jur. 250.

Held, also, in an action on the same note against the principal, that the statute was a bar to all except 30l., as the plaintiff had a right of action against the principal the moment he paid anything, for so much money paid to his use. *Id.*

Upon a contract to indemnify an accommodation acceptor, the statute begins to run from the time at which the plaintiff is damaged by actual payment, and not from the day when the bill became payable. *Reynolds v. Doyle*, 2 Scott, N. R. 45; 1 M. & G. 758; 1 Drink. 1; 4 Jur. 992.

A note being given by A. and a surety, to a banker, and a contemporaneous memorandum of agreement, showing the note to be given as security for the banking account to be kept by A. with the bank:—Held, that the statute did not run from the time when A. became indebted to the bank, but from the time when the balance was struck. *Hartland v. Jukes*, 1 H. & C. 667; 9 Jur., N. S. 180; 32 L. J., Exch. 162; 11 W. R. 519; 7 L. T., N. S. 792; 3 F. & F. 149.

When a party is called upon to pay the debt of another, his remedy over against such other runs from the time of actual payment by him, and not from the time when he became merely liable to pay. *Angrove v. Tippet*, 11 L. T., N. S. 708—Q. B.



In 1816 G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents at Calcutta of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. & Co. in London, who were to reimburse themselves their charges, and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in 850*l.*, they and G. applied to B. & Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guaranty:—"Messrs. B. & Co., you having expressed some doubts of the propriety of paying G.'s draft on you for 850*l.*, in our favor, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, in the event of your finding it necessary to call upon us to do so, either from the state of G.'s pending account with you, or from any other circumstances." B. & Co. thereupon accepted and paid a bill for 850*l.*, drawn by G. on them in favor of the defendants. The vessel returned to England with a cargo in April, 1818, when C., the owner (G. having become bankrupt), gave notice to the East India Company (in whose docks she lay), not to deliver any part of the cargo without his authority; they thereupon sold the cargo, and paid the owner's demand for freight, and in consequence of conflicting claims from G.'s assignees and from B. & Co., filed an interpleader bill, and paid the balance of the proceeds into court. Proceedings at law and equity were continued between all the parties, under legal advice, up to 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838 B. & Co. demanded of the defendants the 850*l.* due by the guaranty, with interest, and their share of the expenses incurred by the law proceedings, and, on their refusing to pay, brought an action against them on the guaranty:—Held, that the statute began to run against the plaintiffs, not from the termination of the legal proceedings in 1837, but from the return and sale of the cargo in 1818, when all the facts were ascertained upon which the defendant's legal liability depended, and therefore it was a bar to the action. *Colein v. Duckle*, 8 M. & W. 690.

**Negligence by attorneys.**—In an action for negligence, where the declaration alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty, and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the consequential damage accrued. *Houell v. Young*, 8 D. & R. 14; 5 B. & C. 259; 2 C. & P. 238. S. P., *Smith v. Fox*, 6 Hare, 386; 12 Jur. 130; 17 L. J., *hanc.* 170.

an action for not laying out the plaintiff's

money in an annuity on a good, and a sufficient security, which the defendant promised to do:—Held, that the statute was a bar to the recovery, as the promise of the defendant was the gist of the action, although it was commenced within the period of six years from the time it was discovered that the security was invalid, and he knew it to be so at the time the annuity was granted. *Brown v. Howard*, 4 Moore, 508; 2 B. & B. 73.

But where a declaration against an attorney assigned for breach that he did not make diligent inquiry at the bank, to ascertain whether stock was standing in the name of certain persons there:—Held, that the cause of action arose on the breach of duty by the attorney, and not on its discovery by the client. *Short v. M'Carthy*, 3 B. & A. 626.

And though, on the discovery being made the attorney acknowledged the neglect, and allowed that he was responsible:—Held, that *actio non accrevit infra sex annos* having been pleaded, such an acknowledgment was not sufficient to support the declaration. *Id.*

The plaintiff declared that the defendant promised to invest his money on good security, and assigned for breach that he invested it on bad security, and the defendant pleaded the statute; replication, that he promised within six years, and it was proved that, within that time, he acknowledged the security to be bad, and promised that the plaintiff should be paid:—Held, that as the declaration did not state a debt to which a subsequent promise could be applied, the plaintiff was not entitled to recover. *Whitehead v. Howard*, 2 B. & B. 372; 5 Moore, 105.

The statute, in the absence of fraud, applies to an action or a suit brought by a client against his solicitor. *Hindmarsh, In re*, 1 Drew. & Sm. 129. But see *Burdick v. Garrick*, 39 L. J., *Chanc.* 369, 372; 18 W. R. 387, 388.

**Torts or wrongs.**—The statute is a bar to an action of trover commenced more than six years after the conversion, though the plaintiff was ignorant of the conversion till within six years; the defendant not having committed any fraud to prevent the plaintiff's earlier knowledge. *Granger v. George*, 7 D. & R. 729; 5 B. & C. 149. And see *Compton v. Chandless*, 4 Esp. 20.

In trover the statute runs from the time of conversion, and not from the time of sale. *Denys v. Shuckburgh*, 4 Y. & C. 42.

If a captain of a ship insured, barratrously carries her out of the course of her voyage, and, procuring her to be condemned in a vice-admiralty court, sells and delivers her up to the purchaser, the statute as between the assured and the underwriter begins to run only from the delivery. *Hibbert v. Martin*, 1 Camp. 539—Ellenborough.

A.'s furniture was seized under an execution by the sheriff, who assigned it to the judgment creditor. A.'s friends afterwards purchased it from the judgment creditor, and

the sheriff's officers then returned and left the goods in A.'s possession, who remained in undisturbed enjoyment for more than six years. After his death the furniture was claimed by his friends, who had purchased it, and, adversely, by his administratrix:—Held, that the rights of the former were not barred by the statute, and that as A.'s possession was rightful, the statute could only apply from six years from a conversion. *Edwards v. Clay*, 28 Beav. 145.

Where a statute limits the period within which an action is to be brought for an act done or committed, if the cause of action is a single act, or one which amounts to a trespass (except it is a continuing trespass), the action must be brought within the prescribed period after the actual doing of the thing complained of; but if the cause of action is, not the doing of the thing, but the resulting of damage only, the period of limitation is to be computed from the time when the party sustained the injury. *Whitehouse v. Fellows*, 10 C. B., N. S. 765; 80 L. J., C. P. 306; 9 W. R. 557; 4 L. T., N. S. 177.

A. was owner of houses standing on land which was surrounded by the lands of B., C. and D. E. was owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C. and D. sank in; and after more than six years' interval the sinking occasioned an injury to the houses of A.:—Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the statute. *Backhouse v. Bonomi*, 9 H. L. Cas. 503; 84 L. J., Q. B. 181; 7 Jur. N. S. 809; 9 W. R. 769; 4 L. T., N. S. 754. See also *Bonomi v. Backhouse*, 5 Jur., N. S. 1345; 28 L. J., Q. B. 378; El., Bl. & El. 622—Exch. Cham.; and *Spoor v. Green*, 9 L. R., Exch. 90, 111; 43 L. J., Exch. 57.

Under 5 Geo. 2, c. 30, a commission of bankruptcy issued against a person entitled in remainder to real property, and no assignee was appointed; but neither under that act nor under 6 Geo. 4, c. 16, was any bargain and sale of the future real estate executed by the commissioners. In 1844, after the death of the assignee, the estate vested in the bankrupt in possession, and he afterwards (before the 12 & 13 Vict. c. 106) conveyed it to the defendant. In 1853 the bankrupt, without having obtained his certificate, died. No assignee had been reappointed since the estate came to him until 1859, when assignees were appointed, and they, having recovered the property in ejectment, demanded the deeds, and on refusal brought detinue against the defendant, who pleaded, denying the assignees' property, and also the Statute of Limitations:—Held, that the action was maintainable, and that there was no defense under the statute. *Plant v. Cotterell*, 5 H. & N. 430; 29 L. J., Exch. 198.

A count, in an action for a libel, was in respect of a newspaper published more than seventeen years before action; the statute

being pleaded:—Held, that the plea was negatived by proof that a single copy had been purchased from the defendant for the plaintiff by his agent within the six years. *Brunswick v. Harmer*, 14 Q. B. 185; 14 Jur. 110; 19 L. J., Q. B. 30.

Other counts were, in respect of other libels, alleged to impute to the plaintiff the libelous matter charged in the first count, which was set out by way of inducement in each count. The libels themselves, in those other counts, did not refer to the libel in the first count. The statute was pleaded to so much of these counts as related to the matter in the first count:—Held, that the plea was negatived as to those counts also. *Id.*

Goods having been bailed by the plaintiffs to the defendant for safe custody, he wrongfully sold them; and the plaintiffs, more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which he refused:—Held, in an action of detinue for the goods, that the statute ran from the date of the demand and refusal, and not from that of the sale, inasmuch as the plaintiffs, in such a case, though entitled if they had discovered the sale to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course, by the refusal to deliver up on request. *Wilkinson v. Verity*, 6 L. R., C. P. 206; 40 L. J., C. P. 141; 24 L. T., N. S. 32; 19 W. R. 604.

When the continuance of a wrongful act causes fresh damage it constitutes a new cause of action. *Devery v. Grand Canal Company*, 9 Ir. R., C. L. 194—Exch. Cham.; and see *S. C.*, 8 Ir. R., C. L. 511—C. P.

A canal company in 1866 wrongfully obstructed a stream flowing by the plaintiff's lands, and continued the obstruction down to 1873, when it caused the flooding of his lands:—Held, that the continuance of the wrongful obstruction in 1873 was a fresh cause for action in that year, and therefore the Statute of Limitations began to run from the time of damage in 1873. *Id.*

**Forfeitures and penalties.**—[By 31 Eliz. c. 5, s. 5, all actions, suits, bills, indictments [or informations] brought, sued or exhibited for any forfeiture upon any penal statute made or to be made, whereby the forfeitures shall be limited to the queen, her heirs or successors only, shall be had, brought, sued or exhibited within two years next after the offense committed against such act penal, and not after two years;

And all actions, suits, bills [or informations] for any forfeiture upon any penal statute, the benefit and suit whereof is or shall be by the said statute limited to the queen, her heirs or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued or commenced by any person that may lawfully pursue for the same as aforesaid, within one year next after the offense committed against the said statute, and in default of such pursuit, then the same shall be had, sued, exhibited or brought



for the queen's majesty, her heirs or successors, at any time within two years after that year ended;

And if any action, suit, bill, indictment [or information] for any offense against any penal statute, shall be brought after the time in that behalf before limited, then the same shall be void and of none effect.

By s. 6, where any action [information], indictment or other suit is or shall be limited by any penal statute, to be had, sued, commenced or brought within shorter time than is afore rehearsed, in every such case the action, information, indictment or other suit shall be brought within the time limited by such statute.

By 11 & 12 Vict. c. 43, s. 56, so much of the above act as relates to the time limited for exhibiting an information for a forfeiture upon any penal statute is repealed, and by s. 11, the information shall be laid within six calendar months from the time when the matter of such information arose.

By 3 & 4 Will. 4, c. 42, s. 3, all actions for penalties, damages or sums of money given to the party grieved by any statute now or hereafter to be in force shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions by the party grieved within two years after the cause of such actions or suits, but not after, provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.]

The 31 Eliz. c. 5, s. 5, includes penal actions where the penalty is given to a common informer alone, and, therefore, he must sue within one year after the offense committed. *Dyer v. Best*, 4 H. & C. 189; 1 L. R., Exch. 152; 12 Jur., N. S. 142; 35 L. J., Exch. 103; 14 W. R. 336; 13 L. T., N. S. 753.

In a penal action the plaintiff is at liberty to show the action commenced within a year, as well after as before the objection is made that it does not appear on the record. *Maugham q. t. v. Walker, Peake*, 164; 5 T. R. 98.

The proviso in section 143 of the Turnpike Act, 3 Geo. 4, c. 120, is not confined to that part of the section which immediately precedes it, but extends to the whole matter in the section; and, therefore, if a party seeking to recover the penalties imposed by that act omits to commence his action within the prescribed time, he is not merely barred of his right to costs, but of his right of action altogether. *Cobbett v. Warner*, 1 H. & N. 383; 26 L. J., Exch. 11—Exch. Cham.

An action for a penalty incurred under a by-law made by virtue of a royal charter under the great seal, is not an action of debt grounded upon a contract without specialty, within 21 Jac. 1, c. 16, s. 3, and therefore a plea of the statute bars the recovery of the penalty if the action is not commenced within six years after it was incurred. *Tobacco-pipe Makers Company v. Loder*, 10 Q. B. 765; 15 Jur. 1194; 20 L. J., Q. B. 414.

The commencement of a suit by informa-

tion by the attorney-general on the part of the crown, for the recovery of forfeitures under a penal act, must, with reference to the Statute of Limitations, be taken to be the issuing of process, and not the actual filing of the information. *Att. Gen. v. Hall*, 11 Price, 760.

**Equitable claims generally.**—Though the 21 Jac. 1, c. 16, does not apply to any equitable demand, equity takes the same limitation in cases analogous to those at law. *Stackhouse v. Barnston*, 10 Ves. 466.

Time is a bar in equity to stale demands, independently of the statute. *Harcourt v. White*, 28 Benv. 303; 30 L. J., Chanc. 681.

Length of time, where it does not operate as a statutory or a positive bar, operates simply as evidence of assent or of acquiescence. *Life Association of Scotland v. Siddall*, 7 Jur., N. S. 785; 4 L. T., N. S. 311—H. L.

When there is a remedy at law, and a correspondent remedy in equity, supplementing that of the common law, and the legal remedy is subject by statute to a limit in point of time, a court of equity, in affording the correspondent remedy, will act by analogy to the statute, and impose on the remedy it affords the same limit as to time. *Knox v. Gye*, 5 L. R., H. L. Cas. 656; 42 L. J., Chanc. 234.

When, therefore, in the matter of enforcement of a legal right, the court of common law would, under the provisions of the Statute of Limitations, refuse the enforcement after the lapse of six years from the accruing of the right of action, a court of equity will, where its power to grant relief is asked for under similar circumstances, adopt the principle of the statute, and decline to grant such relief. *Id.*

T. advanced 12,000*l.* to G. on the terms of partnership. T. made a will, leaving this money equally between K. and G. T. died in December, 1854, before old Covent Garden Theater was burned down, which event took place in March, 1856. There had been before December, 1854, negotiations between G. and H. to allow G. the use of Her Majesty's Theatre; but though 5,000*l.* (part of T.'s 12,000*l.*) had been paid to H. under these negotiations, he had never performed his contract. G. finally brought an action against H., and recovered judgment for 5,000*l.*, but ultimately (after the death of T., yet within six years of the date of a bill filed by K. for an account) consented to accept 2,500*l.* as a compromise. K., in December, 1864, filed a bill against G. for an account of profits in the partnership with T., and what was due to K. in respect thereof under T.'s will:—Held, that his right under T.'s will began in December, 1854, and was barred in equity by analogy to the Statute of Limitations, the bill not having been filed till 1864. *Id.*

Held, also, that the surviving partner not being a trustee for the executors of his deceased partner, the payment of the 2,500*l.*



from H. within six years from filing the bill did not take the case out of the statute. *Ib.*

As to limitation of equitable claims in respect of lands and rents, and liens and other charges thereon,—see this title, II., 7.

**Trusts.**—[By 36 & 37 Vict. c. 60 (Judicature Act, 1873), s. 25, sub-s. 2, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of trust, shall be held to be barred by the Statute of Limitations.]

Where a party receives money in the character of a trustee, the statute will not run in his favor. *Bolton, Ex parte*, 1 Deac. & Chit. 556.

Though the rule as to limitation by time does not apply in the case of express trusts, yet, as to them, in equity, the general rule is, that stale demands are not to be encouraged. *McDonnell v. White*, 11 H. L. Cas. 271.

After a dissolution of partnership, by which the continuing partner covenanted to pay the debts and to pay the retiring partner a sum equal to half the next half-year's profits:—Held, that non-payment of a debt by the continuing partner during the half-year could not be set up against the retiring partner as an answer to the Statute of Limitation. *Watson v. Woodman*, 20 L. R., Eq. 721; 24 W. R. 47—V. C. H.

Held, also, that though the debt was from solicitors to a client in respect of moneys received, there was no express trust to exclude the operation of the statutes. *Ib.*

A fund was established at Bombay by the covenanted civil servants of the East India Company serving in that presidency, for granting pensions and annuities to members, their widows and children. By the original articles certain persons were appointed managers, and they were declared to be "the trustees of the fund," and the property was vested in them:—Held, that they were not mere trustees for the association, but trustees properly so-called, and that the members of the fund were the beneficiaries, so that the defense of the Statute of Limitations could not be set up against a claimant on the fund, merely on account of lapse of time. *Edwards v. Warden*, 1 L. R., App. Cas. 281; 45 L. J., Chanc. Div. 713; 35 L. T., N. S. 174—H. L.

As to limitations in respect of trusts in real property,—see this title, II., 7.

**Intestate's personal estate; distributive shares; legacies.**—[By 23 & 24 Vict. c. 38, s. 13, after the 31st of December, 1860, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have

been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one, was made or given.]

The Statute of Limitations is no bar to a claim made by the intestate, where property has been taken possession of by his heir-at-law, being also his administrator, under a mistake as to its real nature. *Reed v. Fenn*, 35 L. J., Chanc. 404; 14 W. R. 704.

A testator being, at the time of his death in 1857, indebted to B. on simple contract, gave by his will his real and personal estate to his wife for life, and appointed executors. The will was not proved for many years, but the widow took possession of all the property, and paid interest on the debt to February, 1864. In September, 1870, the will was proved, and then B. filed a bill on behalf of himself and other creditors against the widow and the executors:—Held, that the claim was barred by the Statute of Limitations, and that the bill must be dismissed with costs. *Boatwright v. Boatwright*, 17 L. R., Eq. 71; 43 L. J., Chanc. 12; 29 L. T., N. S. 603—R.

Semble, that if the remedy of a creditor against the personal estate is barred, while his remedy against the real estate has been kept alive, the real estate can be made liable, although there is no legal personal representative. *Boatwright v. Boatwright*, 23 W. R. 147—R.

A testator gave all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts and enjoy the surplus for her life, and at her death the property was to be divided as in the will mentioned. A farm servant of the testator left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest:—Held, that the statute did not operate as a bar to arrears of interest upon the sum left by the servant in his master's, the testator's, hands. *Blower v. Blower*, 5 Jur., N. S. 33; 28 L. J., Chanc. 181—V. C. S.

A testator gave a fund to his executrix for her life, subject to the immediate payment thereout of a legacy, to be divided among the children of P., to whom he also gave the fund after the death of the executrix. He died in 1847. One of P.'s children, of whom there had been five, was last heard of in 1845. The executrix, W., retained one-fifth of the legacy. She became lunatic in 1851, whereupon the fund was carried to an account entitled "The account of W. and the children of P.," and the income of the whole was applied for the benefit of the lunatic. To a petition presented in 1871 by the four surviving children, for payment of the fifth share, which remained unpaid out of the fund, and for the payment of the interest thereon out of another fund belonging absolutely to the

lunatic, it was objected that the Statute of Limitations was a bar.—Held, that the statute was no bar to the claim for the principal, but was a bar to the claim for more than six years' interest. *Walker, In re*, 41 L. J., Chanc. 219; 7 L. R., Ch. 120; 20 W. R. 171.

An ordinary administration decree in a legatee's suit operates as a judgment in favor of creditors; so that time under the Statute of Limitations begins to run from the date of the decree. *Finch v. Finch*, 45 L. J., Chanc. Div. 816; 35 L. T., N. S. 285—V. C. B.

As to when claims for legacies are barred by lapse of time, — see LEGACY.

**Claims of set-off.**—In cases under 21 Jac. 1, c. 16, s. 3, the statute is not a bar to a set-off, unless the six years have expired before the action is brought. *Walker v. Clements*, 15 Q. B. 1046.

In an action which contained several demands, a defendant pleaded, except as to one, a set-off and the statute. The plaintiff, in order to take the case out of the statute, put in evidence the particulars of set-off, containing an item, "paid to the plaintiff 15l.:"—Held, that the particulars were no evidence in support of the plea of set-off. *Burkitt v. Blanshard*, 3 Exch. 89; 18 L. J., Exch. 34.

A debt due to an intestate's estate from one of the next of kin, barred by the Statute of Limitations, was set off against his share in the estate. *White v. Cordwell*, 44 L. J., Chanc. 746; 20 L. R., Eq. 644; 23 W. R. 826—V. C. B.

**Bills of costs.**—Where a client employs an attorney to conduct a suit, it is an entire contract to carry on the suit to its termination, and determinable only on reasonable notice; and where no such notice has been given, the statute is no bar to that part of the demand which is for business done more than six years before the commencement of an action by the attorney for business done in the suit, which was not brought to a termination till within six years of the commencement of the action. *Harris v. Osbourn*, 2 C. & M. 629; 4 Tyr. 445.

A proctor sued for the amount of his bill, which was chiefly for work done in prosecuting an appeal to judgment; after the judgment a communication had been made by the adverse party to the proctor, and attended to by him, respecting the costs, and an item in respect of this transaction was added to his bill. No previous part of the demand accrued within six years.—Held, that the latter item did not take the rest out of the statute. *Rothery v. Munnings*, 1 B. & Ad. 15.

Where costs are incurred in a suit, the statute does not begin to run against the earlier items, until the suit is terminated. *Martindale v. Fulkner*, 2 C. B. 706.

A. employed an attorney in procuring him money to pay off a mortgage. In an action against A. for the bill of costs, it appeared by items in the bill that the attorney had made applications in several quarters for this purpose, but without success, after which he

wrote to the attorney informing him what he had done, and requesting to know his wishes. This item bore date more than six years before action. The next, dated within six years, was, "Paid the postage of your answer." By subsequent items it appeared that further endeavors were made by the attorney to raise the money. Ultimately it was obtained:—Held, that the transaction was not one in which the attorney's employment was continuous, and that the latter items did not draw after them the previous ones, so as to take these out of the statute. *Phillips v. Broadley*, 9 Q. B. 744; 11 Jur. 264; 16 L. J., Q. B. 72.

A solicitor was retained in a chancery suit in which his client was a defendant, and an order was made that a supplemental bill should be filed, to make the next of kin parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made the solicitor's client died:—Held, in an action by the solicitor against the representative of the client for his bill of costs up to the time when the order was made, that the debt was not barred by the statute. *Whitehead v. Lord*, 7 Exch. 691; 21 L. J., Exch. 239.

Two attorneys in partnership having been retained to defend an action, it was decided in favor of the defendant, upon which the plaintiffs appealed. While the appeal was pending, the partnership was dissolved, and the proceedings were continued by one of the partners separately:—Held, that the partners were not entitled to sue for their costs till the appeal was decided, so that the statute did not until then begin to run as against their claim. *Harris v. Quine*, 38 L. J., Q. B. 331; 4 L. R., Q. B. 653; 20 L. T., N. S. 947; 17 W. R. 967.

**Writs of error.**—[By the Common Law Procedure Act, 1853 (15 & 16 Vict. c. 76), s. 146, no judgment in any cause shall be reversed or avoided for any error or defect therein, unless error be commenced or brought and prosecuted with effect, within six years after such judgment signed or entered of record.

By s. 147, if any person that is or shall be entitled to bring error is or shall be, at the time of such title accrued, within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, then such person shall be at liberty to bring error, so as such person commences, or brings and prosecutes the same with effect, within six years after coming to or being of full age, discover, of sound memory, or return from beyond the seas; and if the opposite party shall, at the time of the judgment signed or entered of record, be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted with effect within six years after the return of such party from beyond seas.]

**On reversal of judgment or of outlawry.**—[By 21 Jac. 1, c. 16, s. 4, if in any the said actions or suits judgment be given for the plaintiff

*iff, and the same be reserved by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if any the said actions shall be brought by original and the defendant therein be outlawed, and shall after reverse the outlawry, in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment be given against the plaintiff or outlawry reversed, and not after.*

By 3 & 4 Will. 4, c. 43, s. 6, a similar limitation and permission are prescribed as to actions upon awards where the submission is not by specialty, or for fines due in respect of copyhold estates, or for money levied under a *fi. fa.*]

A writ of *revivor* is not an action upon a judgment within the Irish C. L. P. Act, 16 & 17 Vict. c. 113, s. 20; and the period of limitation in such proceedings is still regulated by 3 & 4 Will. 4, c. 27, s. 40. *Wall v. Walsh*, 4 Ir. R., C. L. 103—Q. B.

(b) In Respect of Particular Persons and Officers; and of Acts done under Statutes of a Local and Personal Nature.

**The crown.**—[See 21 Jac. 1, c. 2, s. 1; 9 Geo. 3, c. 10, the *Nullum Tempus Act*; 2 & 3 Will. 4, c. 71, ss. 1, 2; 2 & 3 Will. 4, c. 100; 3 & 4 Will. 4, c. 99, ss. 12, 13.]

The crown not being mentioned in 21 Jac. 1, c. 16, s. 3, is not within its operation. *Lambert v. Taylor*, 4 B. & C. 138; 6 D. & R. 188.

Returns of any particular subject-matter by auditors in their accounts of the crown revenue, are sufficient proof of its having been kept in charge to protect the claim of the crown from the operation of the 9 Geo. 3, c. 16, although they have returned "Nihil," and the claim has not been put in suit thereon for more than sixty years. *Att. Gen. v. Eardley*, 8 Price, 39; 1 Daniel, 271.

So, if the auditors make due returns to the office of commissioners for auditing the public accounts of the rents and other profits of lands, forming part of the crown revenue, those returns constitute a putting in charge within that statute, so as to save the right of the crown from the operation of that act; although the auditors have for more than sixty years received nothing in respect of such revenue, and though the crown within that time had not instituted any suit or proceeding to recover any part of it. *Att. Gen. v. Maxwell*, 8 Price, 76, n.

The statute may be pleaded to a *scire facias* issued by the crown against the drawer of a bill of exchange in the hands of the crown debtor, and which has been seized by the sheriff under an inquisition on prerogative process. *Rez v. Morrall*, 9 Price, 24.

As to limitations of proceedings on behalf

of the crown in respect of real property,—see this title, II., 1.

Corporations are not less liable to the operation of prescription than private persons. *Dundee Harbor (Trustees) v. Dougall*, 1 Macq. H. L. Cas. 317.

**Actions by or against assignees or trustees of insolvents or bankrupts; and for acts done under the bankruptcy laws.**—[By the Bankruptcy Consolidation Act, 13 & 18 Vict. c. 106, ss. 159, 276, every action against any person for anything done in pursuance of that statute, must be commenced within three calendar months next after the fact committed.]

Where the statute had begun to run against a petitioning creditor's debt, before the commission issued, it shall not be taken advantage of by a third person against the assignees. *Quantock v. England*, 2 W. Bl. 702; 5 Burr. 2628.

A debtor to a bankrupt, when sued by his assignees, cannot set up the statute as an objection to the petitioning creditor's debt. *Mavor v. Pyne*, 2 C. & P. 91; 3 Bing. 285; 11 Moore, 2.

The statute does not attach to a debt proved under a commission or a fiat of bankruptcy. *Ilaley, Ex parte*, 1 Deac. & Chit. 361.

Or affect the creditors of an insolvent, in respect of the time elapsed since his discharge. *Barton v. Tattersall*, 1 Tam. 878.

If property is delivered by a trustee to an auctioneer for sale, who retains the proceeds, and pays interest thereon to the cestuis que trust, he is a constructive trustee; so that, on his bankruptcy, the statute is no bar to a proof. *Gowers, Ex parte*, 3 Mont. & Ayr. 172.

To an action by the assignees of an insolvent debtor to recover money owing to him before his insolvency, in which they declared that, in consideration of the money being due to the insolvent, the defendant promised to pay it to them as assignees, it is a bad plea to say "that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out the writ of the plaintiffs." *Kinder v. Paris*, 2 H. Bl. 561.

Trover may be brought against the assignees of a bankrupt after the expiration of three months from the time of the alleged conversion, and therefore, they are not within the protection of 6 Geo. 4, c. 16, s. 44. *Carruthers v. Payne*, 2 M. & P. 429; 5 Bing. 270.

Where assignees of a bankrupt entered the premises of a third person, to seize goods which were the property of the bankrupt, it is not necessary that an action should be brought against them within three months after the fact committed; the act of the assignees not being done "in pursuance of the statute," within 6 Geo. 4, c. 16, s. 44. *Elge v. Parker*, 8 B. & C. 697; 3 M. & R. 365.

The 52 Geo. 3, c. 165, s. 54, by which a right



was reserved to creditors to obtain payment out of the future effects of the insolvent, did not prevent the operation of the statute. *Browning v. Puris*, 5 M. & W. 117; 7 D. P. C. 398; 2 H. & H. 63.

**Actions against justices of the peace.**—[By 11 & 12 Vict. c. 44, s. 8, *no action shall be brought against any justice of the peace, for anything done by him in the execution of his office, unless the same be commenced within six calendar months next after the act complained of shall have been committed.* (Former similar provision, 24 Geo. 2, c. 24, s. 8.)]

A complaint having been made against a pawnbroker before a police magistrate, appointed under 2 & 3 Vict. c. 72, the pawnbroker called his assistant as a witness, and he was sworn and examined before the magistrate, who cautioned him against committing perjury. The case was subsequently dismissed from want of jurisdiction in the magistrate; but he, being dissatisfied with the evidence of the assistant, ordered him to be detained without any complaint being made, and afterwards took bail for his appearance, as on a charge of perjury, upon a subsequent day. Upon that day the parties attended, and the charge of perjury was gone into, and the magistrate subsequently took the recognizance of the assistant for his appearance to answer an indictment for perjury. A bill was preferred, but returned not found. The assistant afterwards brought an action for trespass and false imprisonment against the magistrate. The action was not commenced until more than three months after the commission of the alleged trespass, but within six months:—Held, that the magistrate was entitled to the statutory protection of section 53, which limits the time for commencing the action to three months after the fact committed, and therefore the action was too late. *Haselline v. Grove*, 3 G. & D. 210; 3 Q. B. 997; 7 Jur. 86; 12 L. J., M. C. 54.

The time limited for bringing actions against justices of a metropolitan police district, in respect of a conviction, under 2 & 3 Vict. c. 47, s. 18, made in exercise of the jurisdiction given them by 3 & 4 Vict. c. 84, s. 6, is three calendar months, the period prescribed by 2 & 3 Vict. c. 71, s. 53, and not six calendar months, the period given by 10 Geo. 4, c. 44, s. 41. *Barnett v. Cox*, 1 Q. B. 617; 2 New Sess. Cas. 486; 11 Jur. 118; 16 L. J., M. C. 27.

A magistrate is liable to answer in an action for such part of an imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him. *Mussey v. Johnson*, 12 East, 67.

An action brought within six months after the end of a long imprisonment by a justice's warrant is sufficient. *Pickersill v. Palmer*, Bull. N. P. 24.

In an action against a justice of the peace, for false imprisonment, it appeared that the plaintiff was discharged from prison on the 14th December, and the writ issued on the

14th of June:—Held, that the action was commenced in time. *Hardy v. Ryle*, 9 B. & C. 603; 4 M. & R. 295.

In an action against magistrates for an act done by them ex officio, the plaintiff must show *ad nisi prius* that he proceeded upon a writ sued out within six months after notice to them of the action, although there is a continuing cause of action; and therefore he must show a return and a continuance of the first writ, if the second is out of the time fixed by the notice. *Weston v. Fournier*, 14 East, 491.

**Actions against constables.**—[By 24 Geo. 2, c. 44, s. 8, *no action shall be brought against any justice of the peace for anything done in the execution of his office, or against any constable, headborough or other officer, or person acting as aforesaid, unless commenced within six calendar months after the act committed.*]

A constable who, acting *bonâ fide* under a warrant commanding him to take the goods of one person, by mistake takes those of another, is protected, and, therefore, an action must be brought against him within six calendar months. *Parton v. Williams*, 3 B. & A. 330.

So, where constables were directed under a warrant, to search a house for black cloth, and took cloths of another description, and carried them before a magistrate, refusing at the time they took them to tell the owner of the house searched whether they had any warrant or not:—Held, within the protection of the statute, and that an action against them ought to have been commenced within six calendar months. *Smith v. Wiltshire*, 5 Moore, 322; 2 B. & B. 619.

A constable acting *colore*, not *virtute officii*, is not protected from actions not commenced within six months. *Alcock v. Andrews*, 2 Esp. 542, n.—Kenyon.

So, if he acts without a warrant at all. *Postlethorpe v. Gibson*, 3 Esp. 226—Kenyon.

It seems that if a constable acts in his character as such, even without a warrant, that he is within the statute. *Field v. Croft*, 5 Moore, 320, cited. And see *Grapes v. Arnold*, 3 Camp. 242.

An overseer of the poor, who distrains for a poor's rate under a justice's warrant, is an officer within the protection of the act. *Nutting v. Jackson*, Bull. N. P. 24.

Where a constable having a magistrates' warrant of distress to levy a church rate, under 53 Geo. 3, c. 127, broke the door of and entered the plaintiff's dwelling-house:—Held, that although he thereby exceeded his authority, yet that no action could be maintained after the expiration of three calendar months. *Theobald v. Crichmore*, 1 B. & A. 227.

Under 53 Geo. 3, c. 127, s. 12, which requires that an action for anything done in pursuance of the act shall be commenced within three calendar months after the fact committed, an action for seizing, taking, and carrying away and distraining and selling the

plaintiff's goods, under a warrant of distress for arrears of a church rate, may be brought within three calendar months after the sale. *Collins v. Rose*, 5 M. & W. 194.

A constable who does an act *bonâ fide*, intending to do his duty, is within the protection of the statute. *Gosden v. Elphick*, 4 Exch. 445; 7 D. & L. 194; 13 Jur. 989; 19 L. J., Exch. 9.

A. obtained a magistrate's warrant for the apprehension of B. upon a criminal charge which, on the hearing, was dismissed. This warrant was directed "To the constable of D." (a parish in the county of W.) A. delivered the warrant to a county constable of W., and directed him to execute it, which he did:—Held, that the warrant could not be executed by any other constable than by a constable of the parish of D., and consequently that the execution of it by the county constable was illegal; and that the action not having been brought within six months after the commission of the trespass, the constable was protected. *Freegard or Treegard v. Barnes*, 7 Exch. 837; 21 L. J., Exch. 320.

**Actions against guardians of unions or of parishes.**—No action can be maintained against the guardians of a union or a parish for any debt, claim, or demand due from them unless such action is commenced within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, or unless the time has been extended by the Poor Law Board, under 22 & 23 Vict. c. 49, s. 1. *Baker v. Billericay Union (Guardians)*, 2 H. & C. 642; 33 L. J., M. C. 40; 13 W. R. 11.

**Actions against officers of excise.**—[By 7 & 8 Geo. 4, c. 53, s. 115, any action or suit against any person or persons, for any matter or thing done by any officer or officers of excise, or any others acting in his or their aid, must be commenced within three calendar months next after the cause of action shall have arisen.]

An action cannot be maintained against officers of the customs, for seizing goods as forfeited by the revenue laws, unless brought within three months after the actual seizure: notwithstanding a suit is instituted in the Court of Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. *Godin v. Ferris*, 2 H. Bl. 14.

Where the commander of one of the king's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling, and after process in the Exchequer the owner obtained an order for redelivery, under which he obtained only part of the goods from the defendant:—Held, that the owner could not maintain trover for the remainder, if the action was brought after three months from the original seizure, though within three months from the order for the redelivery. *Saunders v. Saunders*, 2 East, 254.

Where an officer in the preventive service boarded a ship, and left three men on board,

and two days afterwards decided on seizing her; and the owner having sued him for such seizure:—Held, that the three months within which the action should have been commenced under 23 Geo. 3, c. 37, s. 23, must be computed from the day of boarding the vessel. *Crook v. M' Tavis*, 8 Moore, 265; 1 Bing. 167.

**Actions for acts done under particular statutes, and statutes of a local and personal nature.**—[Whereas, divers acts commonly called public, local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for anything done in pursuance of the several acts respectively: and whereas the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only: be it therefore enacted, that, from and after the passing of this act (10th August. 1842), the period within which any action may be brought for anything done under the authority or in pursuance of any such act or acts, shall be two years, or, in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision or enactment by which any other time or period of limitation is appointed or enacted, shall be and the same is hereby repealed. (5 & 6 Vict. c. 97, s. 5.)]

An act which was printed as a local and personal act, and contained a clause, enacting that it should be deemed a public act, and judicially noticed as such, gave jurisdiction to the commissioners appointed under it over debts wheresoever contracted, and any person might sue in this court, if the defendant happened to be in any of the places named in the act:—Held, a public local and personal act within this statute. *Cock v. Gent*, 1 D. & L. 418; 12 M. & W. 234; 18 L. J., Exch. 24.

But the Metropolitan Police Acts, 3 & 3 Vict. c. 47; 2 & 3 Vict. c. 71; and 3 & 4 Vict. c. 84, are not. *Barnett v. Cox*, 2 New Sess. Cas. 487; 9 Q. B. 617; 11 Jur. 118; 16 L. J., M. C. 27.

The 8 & 9 Vict. c. 21, empowers justices of the county of Lancaster to make rates on the division of Manchester for the purposes of the act; and s. 21 enacts, that all the provisions of any subsisting act, relating to the enforcing of county rates, shall be taken to apply to rates made under this act. The 55 Geo. 3, c. 51 (a County Rate Act), by s. 23, enacted, that all actions against any person, for anything done by virtue of that act, shall be brought within three months after the fact committed:—Held, that an action against the justices, for issuing a warrant of distress against the goods of an overseer for not collecting and paying over a rate made under 8 & 9 Vict. c. 21, ought to have been brought within three months, as s. 21 of the latter act incorporated s. 23 of 55 Geo. 3, c. 51. *Boden v. Smith*, 13 Jur. 428; 18 L. J., C. P. 121.

Held, also, that even supposing the 8 & 9



Vict. c. 21, to be a local act, it repealed the 5 & 6 Vict. c. 97, so far as regarded the period of limitation for bringing this action. *Id.*

The Ramsgate Harbor Acts, 32 Geo. 3, c. 74, and 55 Geo. 3, c. 84, are acts of a local and personal nature. *Sharp v. Shepherd*, 1 H. & N. 115; 2 Jur., N. S. 617; 25 L. J., Exch. 254—Exch. Cham. S. P., *Moore v. Shepherd*, 10 Exch. 424; 24 L. J., Exch. 28.

If a statute for allotting waste lands within a manor directs all disputed claims to be tried by a feigned issue, and limits the time of bringing such action to six months: an action brought against a copyholder within time, if abated by his death, must be revived against the heir, within six months after the plaintiff has notice of the descent, though the heir is not admitted till long after that time. *Knight v. Bate*, Cowp. 738.

An act authorized a company to make and maintain docks, and to appoint a dock-master, who should have power to direct the mooring, unmooring, moving and removing of all vessels into or in the docks, and should have control over the space of 100 yards from the entrance into the docks, so far as related to the transporting of vessels in and out; the company to be sued in the name of their treasurer; and every action brought against any person for anything done in pursuance of the act, to be commenced within six calendar months after the fact committed. In an action brought against the treasurer for damage done to a vessel by means of improper directions given by the dock-master in transporting her into the docks:—Held, that giving such directions was a thing done in pursuance of the act, and that the action should have been commenced within six calendar months after those directions were given. *Smith v. Shaw*, 5 M. & R. 225; 10 B. & C. 277.

Where a canal company was empowered to supply the canal with water from all streams whatsoever within the distance of 2,000 yards, except as thereafter mentioned, with a proviso that nothing should extend to authorize them to take water from certain specified streams, between 10th June and 10th September, except only that, if one of those streams should overflow, the same may be taken into the canal so long as such overflowing should continue, and that all actions should be brought for anything to be done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or, in case of a continuation of damages, within three calendar months after the committing such damages should have ceased:—Held, that the taking and continuing to take the water by the company from one of the specified streams, during the prohibited times, might, nevertheless, be so far a thing done in execution of the powers and authorities given them by the act, as to entitle the company to the protection of the act as to the time of commencing the action against them. *Gaby v.*

*Wills and Berks Canal Company*, 3 M. & S. 580.

By acts of parliament enabling a company to make and maintain a canal navigation, and to take lands for that purpose, making satisfaction, it was provided, that the company should not take any garden ground without the consent of the owners and occupiers, and that any action to be brought for anything done in pursuance of these acts should be commenced within six calendar months next after the facts should have been committed; or, if there should be a continuance of damage, then within six calendar months next after the committing of such damage should have ceased. The company, wishing to take garden ground for the purpose of sloping the banks of the canal, told the occupier, a tenant, that they had obtained the consent of the owner's agent, without which the tenant would not have given them permission; but the statement was not true. They then paid him a sum which he demanded on account of a former transaction, after which they entered and sloped away the ground. The land in consequence was thenceforth overflowed by the Thames at every high tide. For this damage the landlord sued the company, but not before more than six calendar months after the ground was taken, and the tide let in:—Held, that the injury was one for which an action should have been brought within six calendar months after the taking away of the land; and that the company was within the protection of the limiting clause, inasmuch as the act complained of was really done for the purpose contemplated by the statutes, though in the prosecution of that purpose the company had been guilty of a misrepresentation amounting to bad faith towards the occupier. *Onkley v. Kensington Canal Company*, 5 B. & Ad. 138.

A canal company was authorized by statute to demand and sue for tolls upon the carriage of goods, and to distrain any carriage or goods in respect of which such tolls ought to be paid, and to detain the same until payment made of such tolls and of all arrears of the same due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in the case of a distress for rent; they were not expressly authorized to levy any toll upon carriages. The statute enacted, that any action brought for anything done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that a distress for non payment of tolls was a thing done in pursuance of the act. *Jenkins v. Cooke*, 1 A. & E. 372.

Held, secondly, that where the owner of trams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months

from the time of sale on a count complaining of injury done to his reversionary interest by the seizure and sale. *Id.* S. P., *Collins v. Rose*, 5 M. & W. 194.

A surveyor under a local drainage act may take advantage of a clause limiting the commencement of actions to six months after the act done, where the injury happened to the plaintiff within six months of the action brought. Although it does not appear that a compensation, as directed by the statute for the act complained of, has been made, or a certain course therein specified pursued, on the observance of which he only could have a right of entry on the lands of others. *Boothby v. Morton*, 7 Moore, 51; 3 B. & B. 239.

Though the 18 Geo. 3, c. 78, s. 81, directed that actions against any persons for anything done or acted in pursuance thereof, should be commenced within three calendar months after the fact committed, and not afterwards; yet where surveyors of highways, in the execution of their office, undermined a wall adjoining to the highway, which did not fall till more than three months afterwards, they were subject to an action on the case for the consequential injury, within three months after the falling of the wall. *Roberts v. Read*, 16 East, 215.

By a private act it was enacted, that a company should be sued within "six calendar months after the fact committed."—Held, that the limitation ran from the time of the consequential injury happening, and not from the doing of the act which caused that consequential injury; the act itself not being tortious or injurious, except from those consequences which occurred some time after. *Gillon v. Boddington*, 1 C. & P. 541; R. & M. 161—Abbott.

A local improvement act enacted that actions against persons proceeding under the act should be brought within six calendar months next after the matter or thing done. The treasurer, surveyor, and contractors under the act dug a sewer near the plaintiff's house, in consequence of which the foundation was sunk and the walls were cracked:—Held, that the right of action was limited to six months from the day the cracks were occasioned. *Lloyd v. Wigney*, 4 M. & P. 222; 6 Bing. 489.

By a railway act it was provided, that no action should be brought against any person for anything done, or omitted to be done, in pursuance of the act, unless such action should be commenced within six months next after the act committed, or, in case of a continuation of damages, then within six months next after committing such damages should have ceased. By a subsequent act the company was authorized to alter the course of a canal, provided that, if, in the execution of the works, the canal should be obstructed, the company should pay to the proprietors of the canal 10*l.* an hour as liquidated damages during the continuance of the obstruction, and in default of payment of such sum on demand, the proprietors might recover the same in an action. The company in the exe-

cution of their works obstructed the canal in 1840, and June, 1841. In May, 1842, the proprietors of the canal made a demand on the company for the penalties for the two obstructions, the last of which they described in their demand as having ceased on the 11th of June, 1841. In June, 1842, they brought an action for the penalties:—Held, that the action was not brought in time, as the limitation of six months for bringing the action began to run from the ceasing of the obstruction, and not from the demand and non-payment of the penalties. *Kennet and Avon Canal Company v. Great Western Railway Company*, 7 Q. B. 824; 4 Railw. Cas. 90; 9 Jur. 788; 14 L. J., Q. B. 825.

A. was mortgagee from B. of leasehold coal mines and barges. B. afterwards demised the mines, and assigned the barges to C.:—Held, that A. might bring trover against D., who tortiously seized and sold the barges and part of the produce of the mines. The seizure and sale were for tolls claimed to be due to a canal company:—Held, that no injury resulted to it until the sale; and that therefore an action brought within six months of the sale, but more than six months after the seizure, was not barred by a clause in the canal act, limiting the commencement of actions for anything done in pursuance of that act to within six months after the fact committed. *Frazer v. Swansea Canal Company*, 3 N. & M. 391; 1 A. & E. 354.

By a statute, it was provided that no action should be brought "after six calendar months after the cause of such action should have arisen." A nuisance was caused on the 2d April, and continued until the 2d July, and the jury gave damages at the rate of 10*l.* per month; the action was not commenced until the 30th December:—Held, that damages for two days only could be recovered, the action being brought too late to sustain the previous damage. *Wilks v. Hungerford Market Company*, 2 Scott, 440; 2 Bing. N. C. 281; 1 Hodges, 281.

A., who was entitled by an act of Parliament to all the surplus water and such as was not necessary for the purposes of a canal, brought an action against the canal company for an illegal abstraction of water, and alleged in his declaration continuing acts of commission and omission from an antecedent period, by which he was deprived of the water for nine weeks in 1825, and for seventeen weeks in 1826:—Held, that the company was within the protection of the limitation clause of the 30 Geo. 3, c. 82, s. 79, which enacts, that any action for anything done in pursuance of the act shall be brought within six calendar months next after the fact committed, unless there was a continuation of damage; and also, that there was no continuation of damage, inasmuch as there was a cessation of injury, although the cause from which the injury proceeded was continuing. *Blakemore v. Glamorganshire Canal Company*, 3 Y. & J. 60.

By 3 Geo. 4, c. 126, s. 147, all actions



against trustees of any turnpike-road for anything done in pursuance of the act must be commenced within three months after the fact committed. Trustees of a turnpike-road, acting bona fide in execution of the powers conferred upon them by their act, converted an open ditch at the side of the road into a covered drain, placing gratings at intervals, with catch-pits, to carry off the water from the surface of the road into the drain; but, in consequence of the negligent way in which the catch-pits were constructed and kept, the drain was, in times of heavy rain, insufficient to carry off the water in its accustomed channel, and it was consequently diverted to the plaintiff's land, and drowned his colliery:—Held, that an action within three months after the damage sustained from this continuing nuisance was in time, and that the trustees were liable. *Whitehouse v. McGregor*, 10 C. B., N. S. 765; 30 L. J., C. P. 806; 7 W. R. 557; 4 L. T., N. S. 177.

The plaintiffs claimed compensation in respect of their messuage having been injuriously affected by the sewage works of the Board of Works, made by them under the powers of the Metropolis Management Act, 1855; and by an agreement between the plaintiffs and the Board of Works, under the Lands Clauses Act, 1845, the amount of compensation, if any, to which they were entitled was referred to an arbitrator:—Held, in an action for the amount of compensation awarded, that it was no defense that the claim for compensation was made more than six months after the damages had been sustained, since s. 106 of the Metropolis Management Act, 1862, so limiting the time for issuing process, or instituting any proceeding against the Board of Works, for anything done under the powers of their acts, did not apply to such a claim, and if it could apply, the objection that the claim was made too late should have been set up when the plaintiffs gave notice of their claim, and not after the matter had, with the board's consent, been referred. *Delany v. Metropolitan Board of Works*, 3 L. R., C. P. 111; 37 L. J. C. P. 59; 17 L. T., N. S. 262; 16 W. R. 137—Exch. Cham.; affirming *S. C.*, 2 L. R., C. P. 532; 36 L. J., C. P. 227; 16 L. T., N. S. 380; 15 W. R. 841.

H., late in the evening, was crossing a bridge, from which the handrail had fallen into the brook below. He stretched out his hand to hold it, believing it to be in its usual place, fell over the bridge, and sustained injuries for which he sued the highway board in the county court. Notice that the rail was unsafe had previously been given to the board, and it was repaired by them a few days after. The county court judge nonsuited the plaintiff on the ground that the action was not brought within three months, according to the Highway Act, 1835, s. 5 & 6 Will. 4, c. 50, s. 109:—Held, that this omission to repair was something done in pursuance or under the authority of that act, and that the county court judge was right.

*Holland v. Northwich Highway Board*, 34 L. T., N. S. 137—D. C. A.

## 2. Suspension; Disabilities; Exceptions.

**Suspensory disabilities, generally.**—[By 21 Jac. 1, c. 16, s. 7, if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding or imprisonment, actions on the case for words, be or shall be at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, feme covert, non compos mentis [imprisoned or beyond the seas are no longer disabilities by virtue of 19 & 20 Vict. c. 97, s. 10], then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before mentioned after their coming to or being of full age, discovert, of sane memory [or returned from beyond the seas], as other persons having no such impediment should have done.

By 4 & 5 Anne, c. 16, s. 18, if any person or persons who is or shall be entitled to any suit or action for seamen's wages, be or shall be at the time of any such cause of suit or action accrued, fallen or come within the age of twenty-one years, feme covert, non compos mentis [imprisoned or beyond the seas are no longer disabilities since 19 & 20 Vict. c. 97, s. 10], then such person or persons shall be at liberty to bring the same actions, so as they take the same within six years next after their coming to or being of full age, discovert, of sane memory [at large, and returned from beyond the seas].

By s. 19, if any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions sur trover, or replevin, for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or contract, without speciality of debt for arrearages of rent, or assault, menace, battery, wounding and imprisonment, or any of them, be or shall be at the time of any such cause, or suit, or action given or accrued, fallen, or come, beyond the seas, then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person or persons after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this act and by the 21 Jac. 1, c. 16.

By 3 & 4 Will. 4, c. 42, s. 4, if any person or persons that is or are or shall be entitled to any such action or suit, or to such scire facias [see section 3, col. 8585], is or are or shall be at the time of any such cause of action accrued within the age of twenty-one years, feme covert, non compos mentis [or beyond the seas, by 19 & 20 Vict. c. 97, s. 10, this is no longer a disability], then such person or persons shall be at liberty to bring the same actions, so as they com-

once the same within such times after their dying to or being of full age, discover, of sound memory [or returned from beyond the seas], as her persons having no such impediment should, according to the provisions of this act, have done; and if any person or persons, against whom there shall be any such cause of action, is or are or will be at the time of such cause of action accrued beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as before limited after the return of such person or persons from beyond the seas, no longer a disability by virtue of 19 & 20 Vict. c. 97, s. 10.]

When the statute once begins to run, it continues to do so, notwithstanding any subsequent disability. *Cutterell v. Dutton*, 4 Taunt. 826. S. P., *Doe d. Griggs v. Sheen*, 4 Taunt. 826.

In computing the time under 3 Jac. 1, c. 16, s. 17, it is not necessary to the operation of the statute that there must be continued laches on the part of the plaintiff during the full period of six years; but the rule is, that the statute begins to run so soon as there is in existence in England a plaintiff capable of suing; and having once begun to run, no subsequent interruption to the right of suing, even from causes beyond his control, will stop it. *Rhodes v. Smethurst*, 4 M. & W. 42; 1 H. & H. 237; 2 Jur. 893; affirmed in error, 6 M. & W. 351; 4 Jur. 702—Exch. Cham.

But if, after the statute has begun to run, the right to sue and the liability to be sued meet by act of law in the same person, the running of the statute is suspended. *Seagram v. Knight*, 36 L. J., Chanc. 918; 15 W. R. 1152—C.

On reversal of judgment or of outlawry.]

—[By 3 & 4 Will. 4, c. 42, s. 6, if in any of the said actions [see section 4, *supra*, col. 8618] judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, then in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.]

Parties in prison.]—[By 19 & 20 Vict. c. 97, s. 10, no person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by 21 Jac. 1, c. 16, s. 3, or by 4 Anne, c. 16, s. 17, or by 43 Geo. 3, c. 127, s. 5, or by 3 & 4 Will. 4, c. 27, ss. 40, 41, 42, and 3 & 4 Will. 4, c. 42, s. 3, or by 16 & 17 Vict. c. 113, s. 20 (Irish), shall be entitled to any time, within which to commence and sue such action or suit, beyond the period so fixed for the same by the enactments aforesaid,

or in cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.]

This section applies to cases where the cause of action accrued before the act came into operation, and no action is commenced till after that period. *Cornill v. Hudson*, 8 El. & Bl. 429; 3 Jur., N. S. 1257; 27 L. J., Q. B. 8.

An action was brought for willfully and maliciously procuring A., as creditor of the plaintiff, to oppose the discharge of the plaintiff by the Insolvent Debtors Court, and for willfully and maliciously obtaining from A. an affidavit, containing, to the defendant's knowledge, a false statement, and for using the affidavit in the opposition, by reason of which the plaintiff was adjudged to be discharged as soon as he should have been in custody sixteen months from the date of the order, at the suit of A., and that, by reason of the premises and of a detainer lodged by the defendant, at the suit of A., while the plaintiff continued in custody, and before the expiration of the sixteen months, the plaintiff did not enjoy the benefit of the act so soon as he otherwise would, and was detained in prison. The action was commenced more than six years from the order of the court and the lodging of the detainer, but within six years of the termination of the imprisonment:—Held, that the action was barred by the statute. *Violet v. Sympton*, 8 El. & Bl. 344; 3 Jur., N. S. 1217; 27 L. J., Q. B. 138.

An action of assumpsit for unliquidated damages was within the saving clause of the 21 Jac. 1, c. 16, s. 7, and therefore, such an action accruing while the plaintiff was in prison, might be brought at any time within six years from the first time of his being at large. Or it might be commenced while the plaintiff continued in prison, or before his enlargement, although more than six years after the cause of action accrued. *Piggott v. Rush*, 6 N. & M. 376; 4 A. & E. 912; 2 H. & W. 29.

Foreigners and parties abroad.]—[By 3 & 4 Will. 4, c. 42, s. 7, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of that act, or of the 21 Jac. 1, c. 16.

By 19 & 20 Vict. c. 97, s. 10, no person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by 21 Jac. 1, c. 16, s. 3, or by 4 Anne, c. 16, s. 17, or by 43 Geo. 3, c. 127, s. 3, or by 3 & 4 Will. 4, c. 27, ss. 40, 41, 42, and 3 & 4 Will. 4, c. 42, s. 3, or by 16 & 17 Vict. c. 113, s. 20 (Irish), shall be entitled to any time, within which to commence and sue such action or suit, beyond the period so fixed for the same by the enactments



aforesaid, by reason only of such person or some or one of such persons being, at the time of such cause of action or suit accrued, beyond the seas.

By s. 11, where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors, who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas;

And such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid. See *King v. Hoare*, 13 M. & W. 494.

By s. 12, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the 4 & 5 Anne, c. 16, or of the 19 & 20 Vict. c. 97.]

The 21 Jac. 1, c. 16, s. 7, was no bar to a party, whether a subject of the realm or a foreigner, who was not in England at the time the cause of action accrued, and who continued resident abroad. *Le Veux v. Berkeley*, 2 D. & L. 81; 5 Q. B. 836; 8 Jur. 606; 13 L. J., Q. B. 213.

The absence beyond seas of one of several co-contractors, against whom there was a cause of action, prevented the statute from running. *Fannin v. Anderson*, 7 Q. B. 811; 9 Jur. 969; 14 L. J., Q. B. 282.

If one plaintiff is abroad, and the others in England, the action must be brought within six years after the cause of action arises. *Perry v. Jackson*, 4 T. R. 516.

The proviso in favor of persons under disabilities in 21 Jac. 1, c. 16, s. 7, applied as well to foreigners who had never been in England as to parties residing abroad at the time of the accruing of the cause of action, and returning afterwards to England. *Lafond v. Ruddock*, 13 C. B. 813; 1 C. L. R. 339; 22 L. J., C. P. 217; 17 Jur. 624.

The words in 21 Jac. 1, c. 16, s. 7, beyond the seas, are synonymous in legal import with the words out of the realm, or out of the land, or out of the territories, and are not to be construed literally. *Ruckmaboys v. Lulloobhoy Mottichund*, 5 Moore Ind. App. 234; 8 Moore P. C. C. 4.

Under 4 Anne, c. 16, s. 19, if a right of action accrued against several, one of whom was beyond seas, the statute did not run till

his return or death, though the others had never been absent from the kingdom. *Town v. Mead*, 16 C. B. 123; 3 C. L. R. 381; 1 Jur., N. S. 355; 24 L. J., C. P. 89.

The statute does not apply to a defendant who was abroad when the cause of action accrued, and who has not since returned; for, by 4 Anne, c. 16, s. 19, a plaintiff is not barred of his action, unless the defendant has returned, and six years have elapsed since his return. *Forbes v. Smith*, 11 Exch. 161; 1 Jur., N. S. 503; 24 L. J., Exch. 299.

Where two partners were sued in 1812 for a debt, and one of them being abroad, writs were issued against him, with a view to outlawry; but a commission of bankruptcy having been sued out against the other partner, resident in England, the proceedings as to the outlawry were suspended; and the absent partner never returned to England, except by touching at Deal, in 1814, for a mere temporary purpose, in his passage from one foreign port to another:—Held, that the touching at Deal was not a return from beyond seas. *Gregory v. Hurrell*, 8 Moore, 189; 1 Bing. 324.

A. and B., bankers at Frankfort, sued C. on a bill of exchange, which became due on the 2d of December, 1848. He pleaded the statute, to which they replied, that, at the time of the accruing of the debt, they were beyond the seas, and that they did not, nor did either of them, come to England until within six years before the commencement of the action. In support of the replication, A. was called. He stated that he was not in England at any time between the maturity of the bill and 1851; and that his partner, B., had never been in England. Upon cross-examination, he admitted that B. was occasionally absent from Frankfort for three or four days, and sometimes for a week or a month together:—Held, evidence to go to the jury, and that it was not necessary to call B. himself to negative his having been in England. *Koch v. Shepperd*, 18 C. B. 191.

Though the cause of action accrued within the jurisdiction of the Supreme Court at Calcutta while both the parties were resident there, and by the king's charter, granted in pursuance of the 13 Geo. 3, c. 63, that court is authorized to exercise the same jurisdiction in civil cases as is exercised by the court of King's Bench within England by the common law, and assuming that by such authority the provisions of the 21 Jac. 1, c. 16, s. 7, and 4 Anne, c. 16, s. 19, are transferred to India, as part of the law of England, auxiliary to the common law; yet, by the express terms of the savings in those statutes, as applicable to the English courts, the plaintiff's right of action upon an assumpsit is saved, if he (having returned home before the defendant) commenced such action within six years after the defendant's return home, though more than six years had elapsed in India after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the

court in that country. *Williams v. Jones*, 13 East, 439.

The word "return" in 21 Jac. 1, c. 16, s. 7, means being in England at the time when the statute begins to run, although the person has never been in England before. *Pardo v. Bingham*, 4 L. R., Ch. 735; 39 L. J., Chanc. 170; 20 L. T., N. S. 464; 17 W. R. 419.

The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 10, is retrospective in its operation. *Id.*

Where, therefore, a creditor who was domiciled abroad, and had visited England in 1846, made no claim in England against his debtor's estate for debts contracted abroad before the passing of that act, within the time fixed by the Statute of Limitations:—Held, that he was barred from recovering with regard to debts contracted both before and after he was in England. *Id.*

As to the extent to which statutes of limitation are binding on foreigners, generally,—see this title, I.

**License, fraud and other acts of creditor.]**

—A mere letter of license by a creditor to his debtor does not suspend the operation of the statute. *Fuller v. Redman*, 26 Beav. 614.

Where a personal representative found among the papers of the deceased a mortgage deed, and assigned it more than six years before for the mortgage money, affirming and reciting in the deed of assignment that it was a mortgage deed, made or mentioned to have been made between the mortgagor and mortgagee for that sum:—Held, that the assignee could not recover back the mortgage money, although it appeared that the mortgage was a forgery, and that the assignee did not discover the forgery till within six years before he brought his action, unless the assignee knew it to be a forgery. *Bell v. Holbeck*, 2 Dougl. 654.

It is no answer to a plea of the statute that the plaintiff was prevented by the fraud of the defendant from knowing of the cause of action, until after the time of limitation expired. *Imperial Gaslight and Coke Company v. London Gaslight Company*, 10 Exch. 89; 2 C. L. R. 1230; 23 L. J., Exch. 303; 18 Jur. 497. See *Hunter v. Gibbons*, 1 H. & N. 459; 26 L. J., Exch. 1.

As to effect of fraudulent concealment of rights in respect of real property—see this title, II., 7.

**Death of creditor or of debtor.]**—If a plaintiff is in England at the time the cause of action accrues, the time of limitation begins to run; so that if he dies abroad, and his executor or administrator does not sue within six years, he is barred. *Smith v. Hill*, 1 Wils. 134.

But when a person dies abroad, to whom a right of action has accrued during his residence there, and he never returned to England after the accrual thereof, his execu-

tors may sue for it, although more than six years have elapsed since it accrued. *Townsend v. Deacon*, 8 Exch. 706; 6 D. & L. 659; 18 Jur. 366; 18 L. J., Exch. 298.

No one has a complete cause of action,—that is, a right to prosecute an action with effect,—until there is some one within the jurisdiction of the courts whom he can sue; and therefore, where a testator resided and died abroad:—Held, that his executor in England might be sued at any time within six years after taking out probate for a cause of action arising while the testator was abroad. *Douglas v. Forrest*, 4 Bing. 680; 1 M. & P. 663.

When a creditor of a firm in India died there before his right of action was barred by lapse of time, and his personal representative in Scotland brought an action there against the partner of the firm, twenty-three years after the creditor's death:—Held, that the English Statute of Limitations did not take effect, the action having been brought within six years after English letters of administration were taken out to the deceased creditor. *Fergusson v. Fyffe*, 8 C. & F. 121.

If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted. *Frenke v. Cranefeldt*, 3 Mylne & C. 409; 4 Jur. 1080. S. P., *Rhodes v. Smethurst*, 4 M. & W. 42; 2 Jur. 893; 8 C. (in error), 6 M. & W. 351; 4 Jur. 702.

In an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, the statute begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party in a capacity to sue. *Murray v. East India Company*, 5 B. & A. 204.

It is not competent to an executor to maintain an action for a debt which accrued to his testator more than six years before the issuing of the writ of summons. *Penny v. Brice*, 18 C. B., N. S. 393; 13 W. R. 342; 11 L. T., N. S. 632.

A. had a right of action against B. for a debt, in respect of which the statute began to run in September, 1856. A. died on the 31st of May, 1862. His executor proved his will on the 12th of July, and commenced an action against B. on the 5th of November:—Held, that the statute was a bar to the claim, notwithstanding a jury (or an arbitrator) might think that the executor had commenced the action within a reasonable time. *Id.*

Where an action by a creditor against his debtor, commenced within six years, abates by reason of the death of the debtor, the reasonable time allowed for commencing a fresh action against the personal representatives of the debtor, in order to prevent the operation of the statute, under the 21 Jac. 1, c. 16, s. 4, dates from the grant of the letters of administration; and the right of a creditor



in this respect is not affected by delay or laches on the part of the next of kin of the debtor in obtaining administration. *Curlen v. Mornington*, 7 El. & Bl. 283; 3 Jur., N. S. 660; 26 L. J., Q. B. 181; affirmed on appeal, 4 Jur., N. S. 1102; 27 L. J., Q. B. 439—Exch. Cham.

In 1831 an obligee of a bond brought an action upon it against the obligor. After notice of trial, the action abated by the death of the obligor in 1835. The obligor left a will, which was not proved. In 1857, administration of the goods and effects of the obligor, with his will annexed, was granted to the defendant. In 1852, the obligee petitioned the Insolvent Debtors' Court, and his effects vested in the provisional assignee, who commenced an action on the bond against the defendant in 1859.—Held, that the right of action was not barred by the 3 & 4 Will. 4, c. 42, s. 8. *Sturgis v. Darrell*, 4 H. & N. 622; 28 L. J., Exch. 266; affirmed on appeal, 6 H. & N. 120; 6 Jur., N. S. 1351; 29 L. J., Exch. 472; 8 W. R. 653—Exch. Cham.

The same equitable construction which has been given to the 21 Jac. 1, c. 16, should be given to the 3 & 4 Will. 4, c. 42, as regards actions on specialties. *Id.*

A person resident in Jersey died in 1850 indebted to a person resident in England. He appointed his wife executrix, and she proved the will in Jersey alone. The executrix had in 1851 been in England for three weeks, and had, while in Jersey, received a sum due to her testator in England.—Held, in 1860, that the 19 & 20 Vict. c. 97, s. 12, did not apply, the executrix not having been liable to be sued in England, and having done no act there to constitute herself an English executrix. *Flood v. Patterson*, 29 Beav. 295; 30 L. J., Chanc. 486; 7 Jur., N. S. 324.

After six years from the last acknowledgment the Statute of Limitations is a bar to a simple contract debt of a testator, although there has been no legal personal representative to sue. *Boatwright v. Boatwright*, 23 W. R. 147—R.

### 3. Avoidance by Process.

**Within what time.**—[By 15 & 16 Vict. c. 76, s. 58, a plaintiff shall be deemed out of court unless he declares within one year after the writ of summons is returnable.]

Where an action must be brought within three months, it is sufficient for the plaintiff to prove a writ sued out within such time, and his declaration within a year afterwards, without showing such writ returned. *Parsons v. King*, 7 T. R. 6.

A concurrent writ of summons under 15 & 16 Vict. c. 76, s. 9, can only be issued within six months from the time of issuing the original writ. *Cole v. Sherard*, 11 Exch. 482.

Where there are cross demands between parties, which accrued at nearly the same time, for which bills are given, both of which would be barred by the statute, but the plaintiff has

saved his limitation by suing out process, and the defendant has not, such process operates upon the set-off, and prevents the plaintiff from availing himself of the statute to defeat it. *Ord v. Ruspini*, 2 Esp. 570—Kenyon.

A plea of the statute stated that the cause of action did not accrue within six years next before the commencement of the suit. The plaintiff replied, that the cause of action did accrue within six years:—Held, that without specially replying process issued, the plaintiff might, on this replication, prove a *quominus* to have issued within the six years, and produce the roll to show the continuances regularly entered up accordingly. *Dickenson v. Teague*, 1 C., M. & R. 241; 4 Tyr. 450.

**Process and service.**—[By 1 & 2 Vict. c. 110, s. 2, all personal actions in the superior courts of law at Westminster are to be commenced by writ of summons.]

By 15 & 16 Vict. c. 76, s. 2, all personal actions brought in her majesty's superior courts of common law shall be commenced by writ of summons.

By s. 14, the writ of summons in any action may be served in any county.

By s. 168, in ejectment a writ shall be issued directed to the persons in possession by name, and to all persons entitled to defend the possession of the property claimed.]

Under 2 & 3 Will. 4, c. 39, s. 10, it was not necessary to serve or endeavor to serve a writ which was issued to avoid the effect of the statute: it was sufficient to return it non est inventus, and enter it of record. *Williams v. Roberts*, 1 C., M. & R. 676; 3 D. P. C. 513; 5 Tyr. 421; 1 Gale, 56.

The court would not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the statute. *Frith v. Donegal*, 2 D. P. C. 527.

The court will allow a writ of summons to be amended where the statute would otherwise operate as a bar. *Green v. Kettleby*, 8 D. P. C. 783.

The court refused to allow the dates of writs of summons to be altered, for the purpose of preventing the plaintiff's claim from being barred by the statute. *Campbell v. Smart*, 5 C. B. 106; 5 D. & L. 335; 17 L. J., C. P. 63.

Where a writ of summons, tested in time to save the statute, was re-sealed in consequence of an alteration in the description of the defendant and the county in which he resided, and was not served until after the six years had expired:—Held, that the re-sealing did not amount to a re-issuing of the writ, and that it was not necessary for the plaintiff to show when the re-sealing took place. *Braithwaite v. Montford*, 2 C. & M. 408; 4 Tyr. 276.

**Renewing and continuing process;** before the Common Law Procedure Act, 1852.—The issue, as set out in a writ of trial, stated the suing out of a former writ of summons to meet a plea of the statute. The plaintiff hav-

ing obtained a verdict upon an issue taken on the accrual of the action within six years, the court refused to grant a new trial upon an affidavit that no such writ had ever been returned, and that no continuance had been entered upon the roll, and that the issue delivered contained no notice of a former writ. *Harper v. Phillips*, 7 M. & G. 397; 8 Scott, N. R. 115.

To a plea of the statute, the plaintiff replied that a writ issued under 2 Will. 4, c. 39, s. 10, and alleged that the writ was returned "by Henry Weeks and William Gilbertson:"—Held, no ground of demurrer. *Williams v. Williams*, 2 D., N. S. 209; 10 M. & W. 174.

It was not necessary, in order to prevent the operation of the statute, that the writ of summons should, after an appearance entered by the defendant subsequently to the issuing of a distringas, have been served on the defendant in person, or returned non est inventus, or entered of record in compliance with 2 Will. 4, c. 39, s. 10. *Jones v. Boxer*, 6 D. & L. 574; 7 C. B. 58; 13 Jur. 960; 18 L. J., C. P. 185.

A declaration stated that the plaintiff retained the defendant as an attorney to prosecute and conduct an action, for the recovery of a debt, and it became his duty, as such attorney, to use due care and diligence in prosecuting and conducting the action. Breach, that he did not use due care and diligence; but, on the contrary thereof, prosecuted and conducted the action in a careless and an unskillful manner, in this, to wit, that he, having sued out writs for the purpose of preventing the action from being barred, "did not duly file the writs with the proper officer of the court, according to the necessary and accustomed practice of the court:"—Held, after verdict, and after judgment for the plaintiff, that the word "filing" might be understood of bringing the writ into the office for the purpose of its being entered on the record; and that the duty of the defendant was properly laid, and the breach of that duty properly assigned in the declaration. *Hunter v. Caldwell*, 10 Q. B. 69; 12 Jur. 285—Exch. Cham.

[The provisions relating to the duration of writs and to alias and pluries writs, and to the proceedings for making the first writ available to prevent the operation of the Statute of Limitations, under the Uniformity of Process Act, 2 Will. 4, c. 39, s. 10, were repealed by 15 & 16 Vict. c. 76, s. 10, except as to writs issued before the 24th of October, 1852, and proceedings thereon.]

A writ of summons issued under the Uniformity of Process Act expired before the 24th of October, 1852, when the 15 & 16 Vict. c. 76, came into operation:—Held, that an alias to save the statute must issue pursuant to the former act. *Gapp v. Robinson*, 12 C. B. 838.

—under that act.—[By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 11, no original writ of summons shall be in

force for more than six months [by 18 & 14 Vict. c. 21, s. 4, calendar months] from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed, at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a praecipe;

And a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons.

The six months during which a writ continues in force after its renewal are to be computed inclusively of the day of renewal. *Anon.*, 1 H. & C. 664; 32 L. J., Exch. 88; 11 W. R. 298; 7 L. T., N. S. 718.

By s. 12, where a writ of summons issued before, and is in force at the commencement of the act, the writ may, before it expires, be renewed according to the provisions of s. 11. So, where a writ issued in continuation of a preceding writ, under 2 Will. 4, c. 39, is in force, or where one month after the expiration thereof has not elapsed at the commencement of the act, such continuing writ may, without being returned or entered of record, be filed within one month after the expiration of the writ, or within twenty days after the act came into operation, and the original writ may thereupon be renewed in the manner directed by the act. A writ so renewed is to have the same duration and effect for all purposes, and may, if necessary, be subsequently renewed, as if the writ had issued under the new act.

By s. 13, the production of a writ of summons purporting to be marked with the seal of the court, showing the same to have been renewed according to the act, shall be sufficient evidence of its having been so renewed, and of the commencement of the action as of the first date of such renewed writ for all purposes.]

Where a writ of summons has been issued before the Common Law Procedure Act of 1852 came into operation, and has been duly continued up to that time, the first renewal under that act is quasi the original writ. *Cole v. Sherard*, 11 Exch. 482.

A writ of summons was issued dated November 7, 1853, with a view to save the statute. It was renewed on the 6th of May, 1854. On November 6th following, the plaintiff applied to the officer of the court to renew it again, but the latter refused, considering it too late, and that the six calendar months had expired. The court, without deciding whether the renewal would be valid, directed that the writ should be renewed nunc pro tunc, as the



dates would appear on the record. *Anon.*, 3 C. L. R. 78; 18 Jur. 1104; 24 L. J., Q. B. 23. S. P., *Black v. Green*, 15 C. B. 262; 3 C. L. R. 38; 18 Jur. 1017; 24 L. J., C. P. 1.

Within six months of issuing a writ, the plaintiff's attorney paid the proper fees at the office for its renewal, but he inadvertently neglected to get the seal of the court impressed upon it; after the lapse of the six months the omission was discovered. There having been no default in their officer, the court refused to order the seal to be impressed nunc pro tunc, in order to prevent the running of the statute. *Naser v. Wade*, 81 L. J., Q. B. 5; 1 B. & S. 728; 8 Jur., N. S. 184; 5 L. T., N. S. 604. S. P., *Bailey v. Owen*, 9 W. R. 128.

The last day for re-sealing a writ, so as to save the statute, expired on Saturday, the 28th December, within the Christmas holidays. A party who attended at the office on that day for the purpose, found it shut, and the officer having refused to re-seal the writ on the following Monday, the court refused to order him to do it afterwards nunc pro tunc. *Evans v. Jones*, 2 B. & S. 45.

Where any one of several defendants named in a writ of summons has not been served, and there are others, upon whom service might have been, but is not, effected, a renewal of the writ, on the ground of the non-service of such one, will prevent the operation of the statute in favor of such others. *Dickson v. Capes*, 11 Ir. C. L. R. 384—Exch.

A creditor issued a writ of summons in the Common Pleas against an administrator for a debt not then barred by statute. Within six months after issuing this writ (which was never served), at which time the debt was barred unless saved by the writ, the creditor took out an administration summons:—Held, that the writ only saved the bar for six months in the Court of Common Pleas, and that the statute was a bar to the administration suit. *Manby v. Manby, Fievet v. Manby, Manby. In re*, 3 L. R., Ch. Div. 101; 35 L. T., N. S. 307; 24 W. R. 609—V. C. M.

After the expiration of a writ of summons, the court will not enlarge the time for its renewal where so doing would defeat the Statute of Limitations. *Doyle v. Kaufman*, 26 W. R. 98—Q. B. Div.

A company was ordered to be wound up in February, 1865. The certificate of debts and claims was made in December, 1870; and in January, 1871, a dividend was paid on the debts which had been established. In March, 1871, the holder of bills of exchange to a large amount, which had been accepted by the company and had become payable in February, 1865, gave the first notice of his claim and applied for leave to prove, not disturbing previous dividends:—Held, that by the Companies Act, 1862, the assets are made applicable to the payment of all liabilities of the company subsisting at the date of the winding-up order; that from that time the Statute of Limitations does not run against a creditor, and that the claimants were entitled to

prove, not disturbing former dividends. *General Rolling Stock Company, In re. Joint Stock Discount Company's Claim*, 7 L. R., Ch. 646; 27 L. T., N. S. 88.

#### 4. Acknowledgment by Writing or by Part Payment.

##### (a) Acknowledgment of Debts on Simple Contracts.

**Statute.**—[By 9 Geo. 4, c. 14, s. 1, in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the 21 Jac. 1, c. 16, or the 10 Car. 1, ~~sess.~~ 2, c. 6 (Irish), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby;

And, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever;

Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said acts, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

Bys. 2, if any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said acts, or either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

By s. 3, no indorsement or memorandum of any payment, written or made upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.



By s. 4, the said acts shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise.

By s. 8, no memorandum or other writing, made necessary by the act, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.]

**Construction and operation of the statute generally.**—The first clause has a retrospective operation, and applies to a parol acknowledgment made before the statute came into effect, although the acknowledgment was made before the passing of the act. *Towler v. Chatterton*, 3 M. & P. 619; 6 Bing. 258. S. P., *Ansell v. Ansell*, 3 C. & P. 568; *Amner v. Cuttle*, 2 M. & P. 367. But see *Moon v. Durden*, 2 Exch. 22.

The statute does not alter the law as to the nature of the promise, but merely substitutes a different mode of proof. *Haydon v. Williams*, 4 M. & P. 811; 7 Bing. 163. S. P., *Dickinson v. Hatfield*, 5 C. & P. 46; 1 M. & Rob. 141.

The construction of a doubtful document, given in evidence, to defeat the statute, is for the court and not for a jury; if it is explained by extrinsic facts, they are for the consideration of the jury. *Morrell v. Frith*, 3 M. & W. 402; 8 C. & P. 246; 1 H. & II. 100; 2 Jur. 619.

The question whether a particular document takes a case out of the statute, is for the judge and not for the jury. *Sidwell v. Mason*, 2 H. & N. 306; 3 Jur. N. S. 649; 26 L. J., Exch. 407.

— in connection with the Statute of Frauds.]

—Where a person having entered into a written guaranty, and become liable upon it, at a period of more than six years before the commencement of the action, verbally promised, within six years, that the matter should be arranged; and afterwards, on an action being brought, pleaded *actio non accrevit infra sex annos*:—Held (before 9 Geo. 4, c. 14, s. 1), that the Statute of Frauds having been once satisfied by the original promise being in writing, it was not necessary, in order to take the case out of the Statute of Limitations, that the latter promise should also be in writing. *Gibbons v. M'Casland*, 1 B. & A. 690.

**What acknowledgment is sufficient, in general.**—To take a case out of the statute, the acknowledgment of a debt must contain an express or implied promise to pay. *Linley or Linsell v. Bonsor*, 2 Scott, 399; 2 Bing. N. C. 241; 1 Hodges, 305. S. P., *Bristocks v. Smith*, 1 C., M. & R. 483; 2 Tyr. 445.

A debtor having accompanied an acknowledgment of debt with an assertion that he should have nothing to do with the claim; that he wished the claimant would make him a bankrupt, and that he would rather go to jail than pay the claimant:—Held, that it was properly left to a jury to consider whether the acknowledgment was one from which a promise to pay could be implied. *Id.*

The acknowledgment in writing must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. *Buckett v. Church*, 9 C. & P. 209—Parke.

If a debtor by a letter admits a balance to be due, without stating the amount, this will take the case out of the statute. *Dickinson v. Hatfield*, 5 C. & P. 46; 1 M. & Rob. 141—Tenterden.

But, if the whole evidence is merely proof of the writing, and no proof of the original cause of action, the creditor can only recover nominal damages. *Id.*

When a debt is barred by the statute there must be, in order to take it out of the statute, one of three things; an acknowledgment of the debt from which a promise to pay it must be implied; or an unconditional promise to pay the debt; or a conditional promise to pay the debt, in writing, and evidence that that condition has been performed. *River Steamer Company, In re, Mitchell, Ex parte*, 25 L. T., N. S. 819; 19 W. R. 1130; 6 L. R., Ch. 822. S. P., *Skeet v. Lindsay*, 3 L. R., Exch. Div. 814; 46 L. J., Exch. Div. 249; 36 L. T., N. S. 98.

**Acknowledgment by statement or recognition of debt.**—A mere parol statement of an antecedent debt, without any new contract or consideration, made within six years before action brought, does not constitute a sufficient cause of action to prevent the operation of the statute. *Jones v. Ryder*, 4 M. & W. 83; 1 H. & H. 250.

A letter, the fair effect of which is, that the writer is not certain whether the debt is owing, and will have the matter examined into, is not a sufficient acknowledgment, notwithstanding that it contains expressions of regret that the debt should have been left so long unpaid. *Collinson v. Margesson*, 27 L. J., Exch. 805.

But a letter not in itself sufficient to bar the statute may be left, with other evidence, to the jury, upon the question whether there have been payments or deliveries of goods, in part satisfaction of the debt, within the six years. It will be a question for the jury, whether the payments or deliveries of goods were made and received on account of the particular debt sued for. *Id.*

The defendant having a claim against the plaintiff, the latter, at the foot of his bill, acknowledged the debt as follows:—"By Mr. Lacy's bill," leaving a blank for the amount. He then wrote below, "Agreeably to your request above, I send you my bill, which I will thank you to peruse, and, if correct, favor me with a bill for the balance."—Held, a sufficient acknowledgment of the defendant's claim. *Waller v. Lacy*, 1 Scott, N. R. 180; 1 M. & G. 54; 8 D. P. C. 563; 4 Jur. 495. See *Wauagh v. Cope*, 6 M. & W. 824.

A letter as follows:—"I beg to say I cannot comply with your request. The best way for you would be to send me the bill you hold, and draw another for the balance of your money, 30*l.* 0*s.* 9*d.*," is a sufficient acknowl-

edgment that the balance was due. *Dalby v. Humphries*, 10 Bing. 446; 4 M. & Scott, 285.

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had also a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows:—"September 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st November, and when the policy is paid, on the 29th October, I hope that you will have the whole of your account ready for me, as I hope to be with you on that day." "October 25. Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.*; of course this includes the 100*l.*, and interest, that I had some years since, and the 40*l.* promissory note, that I jointly signed with the late Mr. B.; of course, you are aware that you have paid 25*l.* to my credit that Mr. Y. paid over when he could not complete the purchase of the property in the High street."—Held, a sufficient acknowledgment. *Godwin v. Culley*, 4 H. & N. 373.

The following passages, in a letter written by a debtor to his creditor:—"Before closing this, I have to request you will be pleased to send me in any bill or what demands you have to make on me, and if just, I shall not give you the trouble of going to law. If you refer to your books you will find the last payment I made was in May, 1839. I shall leave town to-morrow, but shall be back in a few days for a month, and if you will bring my bill in here to me, by eleven, I shall be at your service,"—are sufficient to take the debt out of the statute. *Spong v. Wright*, 9 M. & W. 629; 12 L. J., Exch. 144.

L., being the holder for value of certain promissory notes made by the defendant, and being indebted to the defendant and D., as executors, in a large amount, it was agreed between them that the amount of the notes should be set off against, and satisfied by, the same amount of L.'s debt. On that occasion, the defendant gave to L., a paper, in which the amounts of the several notes and the interest thereon were enumerated, at the foot of which the defendant wrote as follows:—"8th June, 1842. Approved due to T. L.—W. D." L. retained possession of the notes, and afterwards indorsed them to the plaintiff for value:—Held, that the paper so signed by the defendant was not such an acknowledgment in writing as to defeat a plea of the statute, inasmuch as, coupling it with the evidence, no promise to pay the debts could be inferred from it. *Cripps v. Davis*, 12 M. & W. 159; 13 L. J., Exch. 217.

To an action by the executor of an attorney, for his bill of costs, the defendant pleaded a set-off. The testator had transacted the law business of the defendant, and received his tithes and rents. The defendant, for the purpose of taking his set-off out of the statute, put in evidence an account furnished by the testator to the defendant, in obedience to a rule of the court; and also an

affidavit made and signed by the testator on the occasion of his furnishing such account. The account contained items to the credit of the defendant, for tithes and rents received by the testator for the defendant, and also items to the credit of the testator, for cash paid to the defendant, and for work done; and the account claimed a balance as due to the testator. The affidavit in like manner claimed a balance as due to the testator on the same account:—Held, that the account and affidavit were not sufficient to take the set-off out of the statute. *Williams v. Griffiths*, 3 Exch. 335; 18 L. J., Exch. 210.

A., being indebted to B., supplied him with goods, and afterwards sent 10*l.* on account of his own debt, and a bill for the goods supplied. B. replied by letter, "I beg to acknowledge the receipt of 10*l.* and a bill amounting to 17*l.*, both of which sums I have placed to your credit. I have inclosed your bill; receipt it and return the same by post.—B." No receipt was returned:—Held, that the letter was sufficient to defeat the statute for the price of the goods. *Evans v. Simons*, 9 Exch. 282; 2 C. L. R. 416; 23 L. J., Exch. 16.

In 1853, H., as principal, and the defendant as surety, gave to the plaintiff their joint and several note for payment of 200*l.* on demand. In 1861, H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter:—"I hereby consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received the dividend, and in 1862 sued the defendant for the balance of the note:—Held, that the letter was not an acknowledgment of the debt, so as to take the case out of the statute. *Cockrill v. Sparks*, 1 H. & C. 699; 9 Jur., N. S. 307; 32 L. J., Exch. 118; 11 W. R. 428; 7 L. T., N. S. 752.

To an action by the executor of an attorney, for his bill of costs, the defendant pleaded the statute. The testator had transacted the law business of the defendant, and received his tithes and rents. A letter, written to the testator by the steward of the defendant by his desire, stated that the defendant wished to have the testator's account, for the purpose of settling it. Another letter, written in Welsh, stated that the defendant intended to borrow money on his estates, and that the writer would come to the testator's house for the deeds, and if any account required looking over, the writer and testator might do that at the same time. With reference to the last mentioned letter, the testator wrote to the defendant as follows:—"I have received a (Welsh) letter from your agent, and as far as I am able to understand it, he requests to have the abstract of title, and my bill against you, and account, as you are about to receive a sum of money to pay off the mortgages on your estates. I should be glad to hear from you, as I am no Welsh scholar, myself, pre-

cisely what is wanted." In answer, the defendant wrote, "Being one of those people who think short accounts make long friends, I directed my agent, last year, to apply to you for your bill, in order that we might settle the like accounts. What he applied to you in Welsh the other day, was for my title-deeds:"—Held, that the letters were not sufficient to take the plaintiff's claim out of the statute. *Williams v. Griffith*, 8 Exch. 335; 18 L. J., Exch. 210.

M. agreed with a company to build for them certain ships, to be delivered at certain times, and to be paid for by installments. In case of delay in delivery of the ships, fortnightly sums were to be paid as liquidated damages, and the company was to be at liberty to deduct them from the unpaid purchase-money. The agreement contained a provision for referring all disputes to arbitration. The ships having been supplied, M., who had received some installments, sent in, at the end of 1861, an account, showing the final balance which he claimed. The company insisted that he was liable to deductions for delay to an amount exceeding this balance, and that nothing was due to him. A correspondence ensued, and the company proposed to refer the dispute to arbitration; and in 1863, a draft reference having been approved, they named an arbitrator on their part, but M. would not name one on his. On the 19th of February, 1867, the managing director wrote to M. saying that his account omitted all the deductions to which the company was entitled, and which would leave the balance in their favor, but that they were still willing to have all questions decided by arbitration, according to the contract, and called on M. to concur in referring them. This letter was expressed to be "without prejudice." M. did not answer this letter, nor take any steps to proceed to arbitration. A petition to wind up the company was presented in October, 1869, and an order made. M. claimed to prove for his balance, which was resisted, on the ground of the statute:—Held, that the letter did not contain an acknowledgment taking the case out of the statute, for that it did not contain any admission of a debt, since under the contract the liquidated damages were a deduction from the price, and not merely matter of set-off; and, semble, even the admission of a debt, if coupled with a claim to a set-off of larger amount, would not take a case out of the statute, as no promise to pay could be implied from it. Nor did it contain any unconditional promise to pay. Nor did it contain any promise to pay upon a condition which had since been performed; for on its fair construction it contained at most only a promise to pay what should be found due on an arbitration under the contract, if M. named an arbitrator within a reasonable time, which he had not done. *River Steamer Company, In re, Mitchell, Ex parte*, 6 L. R., Ch. 822; 25 L. T., N. S. 810; 19 W. R. 1130.

In 1839, B. M., with his two brothers, made

a joint and several promissory note to secure a sum of money advanced by the plaintiff to one of the brothers. No acknowledgment of liability was made by him until September, 1870, when, the brother to whom the money was advanced having failed to pay the amount, the lender applied for payment to B. M., who, in reply, wrote to the lender as follows: "I suppose I and my brother Thomas signed the note of hand to serve my brother Robert, therefore we trust you will use such means that you know will make him pay (he having plenty by him) before you ask us, you being able to do that which we should not like to take in law with a brother. Please don't let him know you have applied for the money, and oblige, yours respectfully, B. MITCHELL. You had better send him a writ at once:"—Held, that this was a sufficient acknowledgment, or promise, to prevent the operation of the statute. *Fisk or Fiske v. Mitchell*, 24 L. T., N. S. 272; 19 W. R. 793—Q. B.

In 1846, L. gave B. and S. a promissory note for 500*l*. The note was made payable three months after date to B. or S. M., his wife. In 1866, after the death of B., and on the application of S. M., L. wrote his name, and the date 1866, on the back of the note:—Held, a sufficient acknowledgment within 9 Geo. 4, c. 14; and that the debt, therefore, was not barred. *Bourdin v. Greenwood*, 41 L. J., Chanc. 73; 25 L. T., N. S. 782; 13 L. R., Eq. 281; 20 W. R. 166—V. C. W.

To an action on a promissory note, the defendant pleaded the statute. As an answer the plaintiff put in evidence the following letter written by the defendant to the plaintiff:—"The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid. Perhaps in the meantime you will let your clerk send me an account of how it stands:"—Held, that the letter was a sufficient acknowledgment of the debt to bar the statute, and that the plaintiff was entitled to recover. *Chasmore v. Turner*, 45 L. J., Q. B. Div. 66; 10 L. R., Q. B. 500; 33 L. T., N. S. 823; 24 W. R. 70—Exch. Cham.

**Entries in books of public commissioners or companies.**—Commissioners under a town improvement act, being in debt, appointed a finance committee, who made a report, to which was appended a schedule of liabilities, including arrears of salary due to the clerk of the commissioners more than six years. The commissioners made an entry in their minute-book that they accepted the report:—Held, no sufficient acknowledgment of the debt. *Bush v. Martin*, 2 H. & C. 311; 10 Jur., N. S. 347; 33 L. J., Exch. 17.

Where a turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the statute, unless it is so entered in writing. *Emery v. Day*, 1 C., M. & R. 245; 4 Tyr. 695.

A resolution by a board of directors that "L. shall have the option of taking, within one month, any number of shares not exceeding 1,600, at par, in liquidation of 1,600/., part of his claim (the claim therein referred to having been made only as to a collateral security for part of an alleged debt), is no acknowledgment sufficient to defeat the operation of the statute. *Lowndes v. Garnett and Moseley Gold Mining Company*, 83 L. J., Chanc. 418; 12 W. R. 572; 10 L. T., N. S. 229—V. C. W.

**Insertion of debt in bankrupt's or insolvent's schedule.**—An admission in an unsigned letter, sent by order of the assignees of a bankrupt, will not take a debt out of the statute. *Pott v. Cleg*, 16 M. & W. 321; 11 Jur. 289; 16 L. J., Exch. 210.

One of three joint makers of a note became insolvent, and inserted the note and the holder's name in his schedule, and a dividend was afterwards paid to the holder by order of the Insolvent Debtors' Court in respect of the note.—Held, that such was not sufficient to take the case out of the statute, either as against the other makers of the note or as against the insolvent himself. *Davis v. Edwards*, 7 Exch. 22; 15 Jur. 1014; 21 L. J., Exch. 4.

A creditor proved, that within six years of action brought, the debtor presented a petition for arrangement with his creditors, under 7 & 8 Vict. c. 70, and had inserted the debt upon which the action was brought in the account of his debts; and his proposal was, that, "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate and effects to trustees;—Held, not to be sufficient to take the case out of the statute, as not showing that from which the court could infer an unconditional promise, or a promise upon a condition fulfilled. *Everett v. Robertson*, 1 El. & El. 10; 4 Jur., N. S. 1083; 28 L. J., Q. B. 23.

The insertion of a debt in the schedule to a deed of inspectorship executed for the purpose of administering the estate of a debtor, is not, although the schedule is verified by the affidavit of the debtor, a sufficient acknowledgment to take the debt out of the operation of the statute, so as to entitle the creditor to prove for the debt under a subsequent administration of the debtor's estate in bankruptcy. *Topping. Ex parte*, 4 De G., J. & S. 551; 34 L. J., Bank. 44; 13 W. R. 1025; 12 L. T., N. S. 787—C.

And the payment by the inspectors of a dividend upon the debt is not a sufficient part payment for that purpose. *Ib.*

An entry in a bankrupt's examination, of a certain sum being due to A., is evidence of an account stated between them, and is a sufficient acknowledgment to take the case out of the statute. *Eicke v. Noakes*, 1 M. & Rob. 359—Tindal.

**Promises of payment.**—A., having become bankrupt in August, 1819, wrote, in November, 1826, a letter in which he alluded to a

debt of 98l. 15s. due from him to B., and stated as follows:—"By the end of next month I shall have my bankers' account here, and I shall remit the sum due to you in a draft on them."—Held, that the letter contained a sufficient promise in answer to a plea of the statute. *Lang v. Mackenzie*, 4 C. & P. 463—Tindal.

In a letter written to the creditor within six years, the debtor says, "I can never be happy until I have not only paid you everything, but all to whom I owe money;" and "your account is quite correct; and, oh! that I were now going to inclose you the amount of it."—Held, that this was evidence to go to the jury of an acknowledgment. *Dodson v. Mackey*, 4 N. & M. 327; 8 A. & E. 225, n.

Held, that such promise, accompanied by this expression—"It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but, immediately it is settled, you shall be informed"—is an absolute unconditional promise, and not a qualified or a conditional promise. *Ib.*

In an action against one of the makers of a note, it appeared that he had signed the note as surety for the other maker, and after the expiration of six years, having been applied to by letter for the amount, wrote to request that application might be made to the executrix of the other maker, adding, "and what she may be short, I will assist to make up." Application was accordingly made to the executrix, who did not pay the amount.—Held, that this acknowledgment was sufficient to take the case out of the statute as against him, and that it was not necessary to take legal proceedings against the executrix before proceeding against the surety. *Humphreys v. Jones*, 14 M. & W. 1; 9 Jur. 333; 14 L. J., Exch. 254.

A debtor, on application for payment of a debt, handed over to the creditor certain book debts due to himself, with the following acknowledgment in writing:—"I give the above accounts to you; so you must collect them, and you and I will be clear."—Held, that this was no bar to the statute, for, though an acknowledgment of the debt, no general promise to pay could be inferred from it, but merely a promise to pay in one particular manner. *Routledge v. Ramsey*, 8 N. & P. 319; 8 A. & E. 221; 1 W., W. & H. 232; 3 Jur. 789.

In an action to recover 170l. with interest, the plaintiff proved the loan of between 150l. and 180l., and offered in evidence this document:—"170l., 16th March, 1841. Received from B. and T. 170l., for which I promise to pay her at the rate of 5l. per cent. from the above date."—Held, a sufficient acknowledgment. *Taylor v. Steele*, 16 M. & W. 605; 11 Jur. 806; 16 L. J., Exch. 177.

In an action for work, labor, and materials, it appeared that the work had been done more than six years before, but within the six years the debtor, in answer to a bill sent in to

him by the creditor, wrote the following letter: "I have received your bill. It does not, I think, specify sufficiently to which cottages the work is done. For instance you say—" [The letter here repeated the first six items of the bill.] "I do not know where all this is done. I shall feel obliged if you will more particularly explain, and take your agreement to Mrs. H. It is my wish to settle your account immediately, but being at a distance, I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return them by the first post, with instructions to pay if correct."—Held, a sufficient acknowledgment, within the 9 Geo. 4, c. 14, to take the case out of the 21 Jac. 1, c. 16. *Sidwell v. Mason*, 2 H. & N. 306; 3 Jur., N. S. 649; 26 L. J., Exch. 407.

A creditor having applied for payment of a debt, the debtor wrote in answer, "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time, and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labor; this term will decide the matter."—Held, a sufficient acknowledgment. *Collis v. Stack*, 1 H. & N. 605; 26 L. J., Exch. 138.

The question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made. *Id.*

The following letter is an acknowledgment from which a promise to pay may be implied so as to rebut the statute:—"In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat. Yours, J. J." *Cornforth v. Smithard*, 5 H. & N. 18; 29 L. J., Exch. 228; 8 W. R. 8.

A wife had lent the defendant 20*l.* (her own money) during her husband's lifetime, for which the defendant, shortly after the husband's death, viz., on the 10th of July, 1867, gave her an I O U. On the 12th of October, 1870, the defendant wrote to her agent,—"Yours of the 10th instant received, respecting Mrs. W.'s claim upon me. It is totally out of my power at the present time to liquidate the whole or even part of the same. I am in the anticipation of a better position, and, should I be successful, Mrs. W.'s claim shall have my first consideration. Meanwhile, I shall be pleased to pay a reasonable interest on the amount. Show this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity possible;" and on the 6th of March, 1871, he again wrote,—"At present it is utterly out of my power to do anything. I am willing to endeavor to pay it off by easy installments; or I am willing to pay you any reasonable interest to let the matter remain for the present." In an action for money lent, with

a count upon a promise to pay in consideration of the plaintiff's forbearance to sue upon the I O U.—Held, that these letters amounted to a sufficient promise, founded upon a good consideration, to take the case out of the Statute of Limitations. *Wilby v. Elgee*, 10 L. R., C. P. 407; 44 L. J., C. P. 254.

In an action for work done, the plaintiff, in answer to a plea of the statute, put in the two following letters written within six years of the commencement of the action by the defendant's testator, the person for whom the work was done, to the plaintiff:—"I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week."—Held, that they amounted to a promise to pay the balance due on the account, and took the case out of the statute. *Quincey v. Sharpe*, 1 L. R., Exch. Div. 72; 45 L. J., Exch. Div. 347; 24 W. R. 373; 34 L. T., N. S. 495.

A debtor, whose debt to his creditor was barred by the Statute of Limitations, wrote to the creditor within six years before action the following letter:—"I return to Shepperton about Easter. If you send me there the particulars of your account, with vouchers, I shall have it examined and check sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim."—Held, that the debt was revived, as the request to be furnished with an account with vouchers at a particular time and place did not negative the implied promise to pay arising from the admission of a balance due. *Skeet v. Lindsay*, 2 L. R., Exch. Div. 314; 46 L. J., Exch. Div. 249; 25 W. R. 322; 36 L. T., N. S. 98—Cleasby, B.

**Conditional promises or propositions for payment.**—A debtor writing, "I cannot pay the debt at present, but will pay it as soon as I can," is not sufficient to take it out of the statute, without proof of his ability to pay. *Tanner v. Smart*, 6 B. & C. 603; 9 D. & R. 549.

A debtor within six years from the time of contracting a debt, stated in a letter written to his creditor, "that he was incapable at that time to pay the money, but that he would pay as soon as he had it in his power to do so."—Held, that this was a conditional promise only, and therefore not sufficient, per se, to take the case out of the statute. *Haydon v. Williams*, 4 M. & P. 811; 7 Bing. 163.

In an action on a note payable with interest, the words in the letter acknowledging the debt were as follows:—"I shall be most happy to pay you both interest and principal as soon as convenient."—Held, that this was a conditional promise, and that the creditor was bound to give some evidence to



show that the debtor was able to pay, or that it was convenient for him to do so. *Edmunds v. Downes*, 2 C. & M. 459; 4 Tyr. 173.

On a demand being made for payment of a debt barred by the statute, the debtor said he would be happy to pay it if he could; that a sum was due to him from one G., and that if the creditor could recover that debt he might pay himself thereout:—Held, that this was a mere conditional promise, and that the debtor's ability to pay must be shown to entitle the creditor to recover. *Ayton v. Bowers*, 12 Moore, 303; 8 C., nom. *Ayton v. Bolt*, 4 Bing. 105. S. P., *Gould v. Shirley*, 2 M. & P. 581.

In a letter from a drawer to the holder of a bill of exchange, he said, "if in funds I would immediately pay the money, and take the bill out of your hands:"—Held, insufficient. *Richardson v. Barry*, 29 Beav. 22.

A debtor wrote to his creditor, "I will pay you as soon as I get it in my power:"—Held, that the statute did not commence running until the debtor became of ability to pay. *Hammond v. Smith*, 38 Beav. 452; 9 L. T., N. S. 746; 10 Jur., N. S. 117; 12 W. R. 328.

A letter was written by the debtor to his creditor as follows:—"I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts, but interest upon them if I can. As you have mentioned the Limitation Act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever sum is due to you. To pay you now or within the year I am utterly unable; I really have not, as you imagine, received 600*l*. It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shown you, in a former letter, that your account is not in accordance with the estimate upon which you agreed. If you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deduction should be made from your charges. You will perhaps say what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow it from a friend, which I have a hope of doing, and so wipe the account entirely from your books. I am fully sensible of and thankful for the forbearance you have shown, but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained:"—Held, that the letter contained an unconditional promise to pay, and prevented the statute from operating. *Gardner v. McMahon*, 3 Q. B. 561; 2 G. & D. 593; 6 Jur. 712.

The statute is not barred by a letter in which the debtor states, "that family arrangements have been making to enable him

to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the debtor has handed the account to A.; that some time must elapse before payment, but that the debtor is authorized by A. to refer the creditor to him for any further information." For, by 9 Geo. 4, c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby, and such letter does not charge the debtor, as it is at most only a promise to pay as soon as the trustee is in cash. *Whippy v. Hillary*, 3 B. & Ad. 399; 5 C. & P. 209.

An agreement to refer certain accounts between the parties hereto, after reciting that disputes had arisen between them in respect of them, empowered the arbitrators to ascertain what was due and of right payable, and to order any sum which might be found due to be paid at such times and in such proportions as they should deem fit. The arbitration having proved abortive:—Held, that the agreement amounted to a conditional recognition of the debt only on the part of the debtor, and that the condition being unfulfilled, it did not amount to a sufficient acknowledgment of the debt to take it out of the operation of the statute. *Hales v. Stevenson*, 9 Jur., N. S. 300; 11 W. R. 33; 7 L. T., N. S. 317—Q. B.; affirmed on appeal, 11 W. R. 952; 8 L. T., N. S. 798—Exch. Cham.

Where a deed, executed by A. and B., recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck; and that A. was willing to pay B. the amount which might appear to be due to B. in respect of such sums, such amount to be ascertained and paid, as thereafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed:—Held, that, notwithstanding the clause as to arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained; and that, when coupled with extrinsic parol evidence as to the amount, they were sufficient to take the debt out of the statute. *Cheslyn v. Dalby*, 4 Y. & C. 238.

A creditor, in order to take a debt, pleaded as a set-off, out of the operation of the statute, gave in evidence a letter written by the debtor to a third person, stating an account showing the existence of the debt, but also that a balance was due from the creditor to the debtor; and proposing to settle the matter upon payment by the creditor to the debtor of a sum named. The creditor had not acceded to the proposal:—Held, that the latter was not a sufficient acknowledgment of the debt to defeat the operation of the statute. *Francis v. Hauckesley*, 1 El. & El. 1052; 5 Jur., N. S. 1391; 28 L. J., Q. B. 370.

A debtor, by a deed reciting that he was indebted to the plaintiff and others, assigned his property to the plaintiff, in trust to pay all such creditors as should sign the schedule of debts annexed; provided, that, if all did

not sign, the deed should be void. The plaintiff never signed, nor was the amount of his debt stated:—Held, not a sufficient acknowledgment to take his debt out of the statute, although it was admitted orally that he had but one debt. *Kennett v. Milbank*, 8 Bing. 38; 1 M. & Scott, 102.

The following letter, addressed by the defendant to the plaintiffs, within six years, respecting a debt otherwise barred by the statute, is not a sufficient acknowledgment:—"I am surprised at receiving a letter from H. (the plaintiffs' attorney) this morning, for the recovery of your debt. I must candidly tell you once for all I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantehnicon, by paying the expenses incurred thereon, without which they cannot be taken out as before agreed when Mr. F. (one of the plaintiffs) was in town." *Cawley v. Furnell*, 12 C. B. 291; 15 Jur. 908; 21 L. J., C. P. 197.

**Expression of hopes for payment; apologies for non-payment, &c.]**—T. owed P. & Co., before their bankruptcy, 275*l.* as surviving partner of T., Y. & Y., and 6,565*l.* due independently of such partnership. As part security for the latter debt, he had given P. & Co. a mortgage for 5,000*l.* The official assignee of P. & Co. wrote to T.: "By the books of these bankrupts, there is a balance of 275*l.* standing against you," and requested immediate payment. T. replied, "You have no occasion to blame yourself respecting any claim on me from the estate of P. & Co. The matter has been arranged with the assignees here; and at the last meeting it was arranged that I should pay 450*l.* on the 20th of May, 450*l.* on the 20th of August, 450*l.* on the 20th of November, and 450*l.* on the 20th of February next; after which I am in hopes that I shall be able to transfer the 5,000*l.* mortgage, to enable me to clear off the whole that may be standing against me." It was admitted that the installments of 450*l.* were to be paid in respect of the debt of 6,565*l.*; that the mortgage mentioned in the letter was the mortgage for 5,000*l.* given as part security for that debt; that the 275*l.* mentioned by the official assignee was the debt due to P. & Co. from T., as surviving partner of T., Y. & Y., and that T. had paid off the 6,565*l.*:—Held, that the judge was right in directing the jury that the two letters did not amount to a sufficient acknowledgment or promise to take the debt of 275*l.* out of the statute, the letters not containing any absolute acknowledgment of a debt, or unqualified promise to pay, but only expressing a hope that, in the transfer of the mortgage, T. might be able to clear off the whole that might be standing against him. *Smith v. Thorne*, 18 Q. B. 134; 16 Jur. 332; 21 L. J., Q. B. 199—Exch. Cham.

In answer to an application for payment of a debt, the debtor wrote, "I hope to be at H. soon, when I trust everything will be arranged with W. (the creditor) agreeably to

her wishes."—Held, a sufficient promise. *Edmonds v. Goater*, 15 Beav. 415; 21 L. J., Chanc. 290.

The following letter by a debtor to a clerk of the creditor, in answer to one applying for payment of a debt, is insufficient to defeat the statute:—"I will not fail to meet Mr. H. (the creditor) on fair terms, and have now a hope, that, before perhaps a week from this date, I shall have it in my power to pay him at all events a portion of the debt, when we shall settle about the liquidation of the balance." *Hart v. Prendergast*, 14 M. & W. 741; 15 L. J., Exch. 228.

The following letter from a debtor to the creditor's attorney is a sufficient acknowledgment:—"Since the receipt of your letter, and indeed for some time previously, I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith*, 8 M. & W. 402; 8 C. & P. 246; 1 H. & H. 100; 2 Jur. 619.

A letter containing the following passage: "I wish I could comply with your request, for I am very wretched, on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last," is a sufficient acknowledgment. *Bird v. Gammon*, 5 Scott, 213; 3 Bing. N. C. 883; 3 Hodges, 224.

A letter written by a debtor to his creditor before the debt was barred, in the following terms:—"It is quite true that I have not sent any money for years, but really I have none of my own. We just manage to exist on my wife's, at least, on what is left of hers. We have hard work to get on, but I will try to pay you a little at a time, if you will let me. I am sure that I am anxious to get out of your debt. I will endeavor to send you a little next week"—is a sufficient acknowledgment. *Lee v. Wilmot*, 1 L. R., Exch. 864; 12 Jur., N. S. 762; 35 L. J., Exch. 175; 4 H. & C. 469; 14 W. R. 998; 14 L. T., N. S. 627.

**Allegation of payment or discharge.]**—A letter in these terms:—"I have received a letter from Messrs. P. and L., solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly," is not a sufficient acknowledgment to take the case out of the statute. *Buckmaster v. Russell*, 10 C. B., N. S. 745; 8 Jur., N. S. 155—Exch. Cham.



"I will see Davis, or write him; I have no doubt he has paid it; if, by chance, he has not paid it, it is very fit it should be," in a letter, is not a sufficient acknowledgment of the debt. *Poynder v. Bluck*, 5 D. P. C. 570; W. W. & D. 191.

Where, after the lapse of six years, a debtor being asked for the payment of a debt, said, "I owed the money, but I have a receipt in full of all demands; I shall search for it, and let you know in the event of my not being able to find it:"—Held, that this was not sufficient to take the case out of the statute. *Brydges v. Plumtree*, 9 D. & R. 740. S. P., *Berk v. Guy*, 4 Esp. 184.

A debtor admitted a debt, but claimed to be discharged by a written instrument, which upon production did not amount to a legal discharge:—Held, that the acknowledgment was sufficient. *Partington v. Butcher*, 6 Esp. 60—Mansfield.

**Reliance on the statute.**—In answer to an application for payment of a debt, the debtor wrote as follows:—"I do not wish to avail myself of the Statute of Limitations, to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance:"—Held, that the letter contained no sufficient acknowledgment or promise to take the case out of the statute. *Ruckham v. Marriott*, 1 H. & N. 234; 2 Jur., N. S. 619; 25 L. J., Exch. 324; affirmed on appeal, 2 H. & N. 106; 3 Jur., N. S. 495; 26 L. J., Exch. 315—Exch. Cham.

**Denial of the claim.**—The following letter does not raise the implication of a promise to pay, and is not sufficient to take the case out of the statute:—"In reply to your application of the 19th inst, for the payment of 89l. 10s. 11½d. to Mr. D. Brigstocke, I beg to say that it is a claim I am by no means prepared to admit to the full extent, and to make the following observation respecting it. Of that sum, 68l. 3s. 8d. is made up of items for business and materials, stated to have been done and furnished between 1817 and 1821, a period during which I was concerned in two successive partnerships, to one or other of whom the accounts Mr. B. was entitled to recover ought to have been charged. Having at different times wound up both those concerns, and quitted Carmarthen as long back as 1824, I was surprised to receive Mr. B.'s bill in 1829, five years afterwards; and it is certainly not a little strange that he should not send in a charge of so old a date, when, if any account was due, it could hardly be expected that the means would remain of ascertaining its correctness. I cannot, therefore, allow that I am liable to pay any part of the account previous to 1825; but as I anticipate being in Carmarthen shortly, I will then

communicate with Mr. B. personally respecting it. The remainder of the account is for repairs ordered by an agent under the late firm of Robert Smith & Co., to be done at the works in Carmarthen, in 1827, together with a few items for glazing in 1825, making together 20l. 17s. 5d., which I believe to be correctly charged, and for which I inclose a check, and will thank you to acknowledge the receipt of it." *Brigstocke v. Smith*, 1 C. & M. 483; 2 Tyr. 445.

On a debtor being arrested for a debt more than six years old, he said, "I know that I owe the money, but the bill I gave is on a threepenny receipt stamp, and I will never pay it:"—Held, not such an acknowledgment as would revive the debt. *A'Court v. Cross*, 3 Bing. 329; 11 Moore, 198.

The defendant wrote to the plaintiff's attorney as follows:—"I have received yours respecting the plaintiff's demand; it is not a just one; I am ready to settle the account whenever the plaintiff thinks proper to meet on the business; I am not in his debt 90l., nor anything like that sum; shall be happy to settle the difference by his meeting me:"—Held, that the judge was justified in directing the jury, that after this letter the statute was out of the question. *College v. House*, 3 Bing. 119; S. C., nom. *Colledge v. Horn*, 10 Moore, 431.

A letter written by a debtor to the creditor's attorney (pleading the statute), on being served with a writ, couched in ambiguous terms, neither expressly admitting nor denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute. *Lloyd v. Maund*, 2 T. R. 760.

In an action against an acceptor of a bill of exchange, evidence that he acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, it was not in his power to pay it, was sufficient to take the case out of the statute. *Leaper v. Tatton*, 16 East, 420.

**Effect of devise for payment of debts.**—A devise in trust for payment of debts does not revive a debt, upon which the statute had taken effect by the expiration of the time before the testator's death. *Burke v. Jones*, 9 Ves. & B. 275.

A direction for the payment of debts in a will of personal estate will not stop the running of the statute. *Freaker v. Cranefeldt*, 3 Mylne & C. 499; 4 Jur. 1080.

A debt which, at the death of a testator, is not barred by the statute, may become so afterwards as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his personal estate; nor will the operation of the statute be prevented, though the testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it. *Scott v. Jones*, 4 C. & F. 382.

A stale debt, bearing interest, is not taken out of the statute by an engagement, signed by the debtor, to charge his estate with a sum corresponding in amount with the debt, with interest from the date of the engagement. *Martin v. Knowles*, 1 N. & M. 421.

**Acknowledgment made to creditor or to stranger.**—An acknowledgment, to take a case out of the statute, must be made to the creditor, and, semble, that one to his agent is sufficient. *Fuller v. Redman*, 26 Beav. 614.

A deed made between the debtors and a third person, in which they acknowledged the existence of a debt, was sufficient to take the case out of the statute, although the creditors were wholly strangers to the deed. *Mount-Stephen v. Brooke*, 3 B. & A. 141. See *Cheslyn v. Dalby*, 4 Y. & C. 238.

An admission of a debt made to a person who, at the same time, signed a paper, purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of the statute, though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe. *Goats v. Goats*, 1 H. & N. 29.

**Acknowledgment by agents.**—[By 19 & 20 Vict. c. 97, s. 13, in reference to the provisions of the 9 Geo. 4, c. 14, ss. 1, 8, and 16 & 17 Vict. c. 113 (Irish), ss. 24, 27, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.]

Before this enactment, an acknowledgment by a wife, who had been accustomed to act as the agent of her husband, in purchasing the goods and managing the business generally, was sufficient. *Anderson v. Sanderson*, 2 Stark. 204; Holt, 591. S. P., *Paletthorp v. Furnish*, 2 Esp. 511, n.

So, in an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years was admissible to take the case out of the statute. *Gregory v. Parker*, 1 Camp. 394—Ellenborough.

But as the 9 Geo. 4, c. 14, s. 1, directed that no acknowledgment or promise shall be sufficient to take a case out of the statute, unless in writing, "and signed by the party chargeable thereby," an acknowledgment contained in a letter which was written by the wife of the debtor, in his name, and at his request, was insufficient, because the statute gave no authority to an agent to make the acknowledgment. *Hyde v. Johnson*, 3 Scott, 289; 2 Bing. N. C. 776; 2 Hodges, 94.

Where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assented to it, an acknowledgment or a promise by him to pay was sufficient. *Burt v. Palmer*, 5 Esp. 145—Ellenborough.

So, a reference by a debtor for payment to a trustee, to whom he had assigned his effects, was sufficient. *Baillie v. Inchiquin*, 1 Esp. 485—Kenyon.

A debtor had written a letter to T., to make a proposition to the creditor respecting a debt he owed him; and in this letter he desired T. to arrange with the whole of his creditors. T. wrote a letter to the creditor, offering an acceptance for 7s. 6d. in the pound on the debt:—Held, not sufficient to take the case out of the statute. *Gibbon v. Bagshott*, 5 C. & P. 211—Parke.

—by bankrupts.]—An accountant employed by the assignees of a bankrupt, sent to the debtor an unsigned statement of the account between the bankrupt and the debtor, in which he stated a balance in favor of the debtor:—Held, that this was not a sufficient acknowledgment of a debt to take the case out of the statute, as against the assignees. *Pott v. Oleg*, 16 M. & W. 321; 11 Jur. 289; 16 L. J., Exch. 210.

An admission by a bankrupt in his balance-sheet will not take a debt out of the statute as against his assignees. *Id.*

—by infants.]—An acknowledgment in writing given by an infant of a debt due for necessities is effective for the purpose of taking the debt out of the statute. *Willins or Williams v. Smith*, 4 El. & Bl. 180; 3 C. L. R. 16; 1 Jur., N. S. 168; 24 L. J., Q. B. 62.

—by executors or administrators.]—In 1835, A. filed a creditor's bill against the administrator of his debtor, founded on a debt due on a note, but in respect of which no payment of either principal or interest had been made since 1823. In 1832, the administrator, on the citation of a third person, signed and exhibited, in the ecclesiastical court, an inventory and account of the debtor's assets and debts, in which A.'s debt was entered:—Held, that that entry was a sufficient acknowledgment. *Smith v. Poole*, 12 Sim. 17; 10 L. J., Chanc. 192.

Semble, per Parke, B., an acknowledgment in writing by one of two executors of a debt due from the testator is not sufficient to take the debt out of the statute as against his co-executors, even although made by him in his representative capacity. *Scholey v. Walton*, 12 M. & W. 510; 8 Jur. 319; 13 L. J., Exch. 122.

Where one of two joint executors was applied to for payment of a debt of his testator's, who had been dead twenty years, and as against whom the debt was barred, and said, "I believe the debt is a just one, and has never been paid; I should be happy to serve you in the matter if I could, but I cannot do anything without the consent of the testator's family:"—Held, in an action against both the executors, that there was no such acknowledgment of the debt as took the case out of the statute as against them, there being no promise, express or implied, to pay the debt. *M'Culloch v. Dawes*, 9 D. & R. 40.

In an action against several executors:—



Held, that neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute; there must be an express promise by all. *Tullock v. Dunn*, R. & M. 416—Abbott.

After an administration decree, an executor has no right, as against the parties interested in the estate, to give an acknowledgment to take a debt barred by the statute out of its operation. *Phillips v. Beal*, 32 Beav. 26.

Where the statute had run against a debt due from a testator before his death, and the executor wrote thus to the creditor, "The legatees object to my paying the claim, though I think it just," and "I not only do not dispute the claim, but admit it, thinking it just, but am compelled to refuse payment without an order of the court."—Held, that the debt was not revived, and that the real estate could not be subjected to it by any act of the devisees in trust, though they were also executors. *Briggs v. Wilson*, 5 De G., M. & G. 12.

A debt is not taken out of the statute by an advertisement published by the administrator, requesting all persons, having claims on the estate, to send in statements of their demand, prior to their being laid before A., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient. *Scott v. Jones*, 4 C. & F. 332.

—by one of several joint debtors or contractors.]—An acknowledgment of a debt, contained in a letter from one partner to another, undertaking to assign to the latter the debts and liabilities of the firm, upon his satisfying debts due to a person named in the letter, and others, or "obtaining a release of my liabilities in respect of such debts," does not amount to a promise to pay the debts, and therefore does not take the debts out of the statute. *Hindmarsh, In re*, 1 Drew. & Sm. 129.

An admission made by one of two partners after the dissolution of the partnership, concerning joint contracts that took place during the partnership, was sufficient to bar the statute. *Wood v. Braddick*, 1 Taunt. 104.

But the admission of one partner, to bind another, must be clear and explicit. *Holme v. Green*, 1 Stark. 488—Ellenborough.

Where one of two partners, who was a certificated bankrupt, acknowledged a debt due to the plaintiff by his partner and himself:—Held, that it was not a sufficient acknowledgment to take the case out of the statute in an action against both, when the bankrupt pleaded his bankruptcy, and the other the statute. *Marten v. Bridges*, 3 C. & P. 83—Tenterden.

Signing.]—A debtor being called upon by his creditor (the holder of two promissory notes for 510*l.*, more than six months overdue) for a statement of his affairs, made out

an account in which the notes were inserted as a debt for which he was liable:—Held, a sufficient acknowledgment. *Holmes v. Mackrell*, 3 C. B., N. S. 789.

Held, also, that the whole document being in the handwriting of the debtor, his name written at the top was a sufficient signature to bind him. *Ib.*

A defendant pleaded the Statute of Limitations. To prove the case on the part of the plaintiff a series of accounts for several years between himself and the house of A. & Co., in which the defendant was a partner, was put in evidence. In the last of those accounts the balance of the preceding account was carried over. The date of this item, as well as those of the other items, with three exceptions, were beyond six years from action brought. The exceptions were, that, on the credit side, there was one item within the six years—"Balance of interest to this day at 8*l.* per cent.;" and on the debit side there were two items within that period, viz., "postage, petty charges, and commission on disbursements." The balance of account, for which the action was brought, was then struck at a date also within the six years. The signature to the account was A. & Co., in the same handwriting as that affixed to the accounts of other customers with the firm; but there was no evidence that such signature was in the handwriting of the defendant or in that of any of the partners:—Held, first, that the signature to the account was not "an acknowledgment in writing, signed by the parties chargeable thereby," within 9 Geo. 4, c. 14, s. 1. *Clark v. Alexander*, 8 Scott, N. R. 147; 8 Jur. 496; 13 L. J., C. P. 133.

Held, secondly, that the account was not evidence of any payment of principal or interest admitted to be due within the six years, so as to take the debt out of the statute. *Ib.*

Held, thirdly, that there was no evidence of an account stated between the parties, so as to be a new transaction, and to give a new right of suit, independent of and distinct from the original debt. *Ib.*

The following letter:—"Mr. S. begs to inform Messrs. L. & Co. that he will take an early opportunity of settling their account," was a ratification, to render a certificated bankrupt liable for a debt incurred before his bankruptcy, under 6 Geo. 4, c. 16, s. 131, of a debt otherwise barred; and the letter is sufficiently signed by the party sending it. *Lobb v. Stanley*, D. & M. 635; 5 Q. B. 574; 8 Jur. 462; 13 L. J., Q. B. 117. See *Kirkpatrick v. Tattersall*, 1 C. & K. 577—Cresswell.

Stamping.]—The following memorandum—"I acknowledge to owe M. 36*l.*, which I agree to pay him as soon as my circumstances will permit"—is exempt from stamp duty, under 9 Geo. 4, c. 14, s. 8, as a writing made necessary by that statute, provided it is put in for the mere purpose of barring the statute, the debt itself being proved by other evidence.

*Morris v. Dixon*, 6 N. & M. 438; 4 A. & E. 845; 2 H. & W. 57.

A note improperly stamped is not admissible as a memorandum; the 9 Geo. 4, c. 14, s. 8, applies only to instruments which might be stamped with an agreement stamp. *Jones v. Ryder*, 4 M. & W. 32; 1 H. & H. 256.

P. being indebted to the executors of C. in 11,000*l.*, to which A. was beneficially entitled, sent a letter to A. as follows:—"I have sent you a note for the money due to you which your mother left for you." Inclosed in this letter was a promissory note, on a receipt stamp, for 11,000*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent, the debt was barred by the statute:—Held, that there was not a sufficient acknowledgment by P., without referring to the note, to see what was the promise made, and this could not be done for the want of a proper stamp. *Parmiter v. Parmiter*, 80 L. J., Chanc. 508; 3 De G., F. & J. 461.

**Effect of revival of debt by acknowledgment.**—The legal effect of acknowledging a debt barred by the statute is that of a promise to pay the old debt, which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law; but if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him; for the old debt is revived no further than as a consideration for the new promise. *Philips v. Philips*, 3 Hare, 299.

An acknowledgment of a debt bars the statute, because it amounts to a new promise; and, therefore, if made after action, it is no bar. *Bateman v. Pinder*, 3 Q. B. 574; 2 G. & D. 790.

As to acknowledgment of debts secured by mortgage or other charge on lands or rents,—see this title, II., 4.

As to proof of acknowledgment, and explanation by parol of acknowledgment in writing,—see this title, IV.

#### (b) Payment on Account of Simple Contract Debts.

**Payment of part of debt, in general.**—The mere fact of the payment of a sum by a debtor to his creditor, is not enough to take a case out of the statute without some evidence to satisfy a jury, first, that it was a payment of a debt, and next, that it was not the discharge of a balance due, but a payment intended to be applied to the part in discharge of the particular debt. *Tippette v. Heane*, 1 C., M. & R. 252; 4 Tyr. 772.

Seemle, that part payment will not bar the statute, where the debt to which it is applied consists of several items. *Bristock v. Smith*, 2 Tyr. 445; 1 C. & M. 483.

Where a specific sum of money is due, as upon a note, the mere fact of a payment of a smaller sum by the debtor to the creditor, is

some evidence of a part payment to take the case out of the statute. *Burn v. Boulton*, 2 C. B. 476; 15 L. J., C. P. 97.

In an action on a note, dated 7th December, 1845, for payment of 500*l.* and interest, on demand, to C., the plaintiff's testator, and on a similar note for 500*l.*, dated 20th January, 1846, at the trial it appeared from the defendant's answer to a bill of discovery, that in 1835 and in 1842, C. lent to the defendant two sums of 500*l.*, upon the security of his notes payable on demand, with interest. The interest was duly paid, and memoranda thereof indorsed by C. on the backs of the notes. At length, the backs of the notes being covered with these memoranda, it was arranged between C. and the defendant that new notes should be substituted, and accordingly the defendant gave C. the notes on which the action was brought. In February, 1846, C. told the defendant that he intended to give him the 1,000*l.* secured by the notes, and he wished to give the defendant a release and a discharge for the same and interest due thereon, and he directed the defendant to write out a receipt for 1,000*l.* and interest, for him, C., to sign, as a release and a discharge; and thereupon the defendant purchased a 10*s.* receipt stamp, and wrote thereon the receipt as follows:—"Hull, 16 February, 1846. Received of R. D. (the defendant) 1,080*l.*, being the interest and principal on the notes, dated December, 1845, and January, 1846, and in full of all demands," which C. signed and delivered to the defendant. C. subsequently died, having previously bequeathed the notes to his executors, with directions as to the investment of the proceeds:—Held, that the giving of the receipt was not a part payment or an acknowledgment of the debt, so as to take the case out of the statute; and that the renewal of the two notes in January, 1846, could not be considered as a promise so as to render the defendant liable, by a new promise, to pay the original notes. *Foster v. Dauder*, 6 Exch. 839; 20 L. J., Exch. 885.

The application by a trustee of the income of trust property received by him, to the partial liquidation of a debt due to him by his cestui qui trust, will, if made by the authority of the latter, prevent the residue of the debt from being affected by the Statute of Limitations, in respect of the lapse of time preceding the last application. *Stewart v. Connick*, 5 Ir. R., C. L. 502—Exch.

**Payment of interest.**—A payment made within six years, of interest which has become due upon a note more than six years before, is sufficient, where the note remains in the hands of the payee. *Baley v. Greenlade*, 2 Tyr. 121; 2 C. & J. 61.

To constitute a payment of interest sufficient to take a debt out of the statute, it is not essential that money should actually pass between the debtor and creditor. *Maber v. Maber*, 2 L. R., Exch. 153; 86 L. J., Exch. 70; 16 L. T., N. S. 26.



After a debt due to a father from his son had been barred by the statute, the father, his son, and his son's wife, had an interview, at which the interest due was calculated. The son then put his hand into his pocket, as if to get out the money to pay it. The father stopped him, and, writing a receipt for the interest, gave it to his son's wife, saying that he would make her a present of the money. No money actually passed between the parties:—Held, that this transaction was a sufficient payment to take the debt out of the statute. *Ib.*

Part payment of a debt will not take the case out of the statute, unless the payment is made under circumstances which warrant a jury in inferring a promise to pay the residue; therefore, where a party, on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it:—Held, that it was a question for the jury to say, whether he intended to refuse payment or merely spoke in jest. *Wainman v. Kynman*, 1 Exch. 118; 16 L. J., Exch. 232.

In an action for money lent, at the trial the plaintiff proved the transmission of the money to the defendant, and the payment by him of a half-yearly sum for interest up to a certain time, and produced an answer to a bill in Chancery, in which the defendant admitted having paid the same half-yearly sum within six years, but asserted that it was paid by way of annuity and not of interest:—Held, that the evidence for the plaintiff was sufficient to go to the jury; that the construction of the admission in the answer was for the court; and that the whole of it should have been left to the jury, but that they might believe the fact of the payments having been made half yearly, but reject the residue, and infer from the other evidence that the payments were really made in respect of interest. *Baillon v. Wulton*, 1 Exch. 617; 17 L. J., Exch. 357;—Exch. Chanc.

Words used at the time of making a payment qualify it, but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment. *Ib.*

Payment of interest upon a note payable on demand is sufficient to take the case out of the statute, although there is no independent evidence that any demand of payment of the note has been made. *Bamfield v. Tupper*, 7 Exch. 27; 21 L. J., Exch. 6.

**Appropriation of payments.**—Where there are two debts, one of which is barred by the statute, and there is a part payment not specially appropriated by the debtor, it is a question for the jury whether the payment was made generally on account of whatever might be due from the debtor at the time, or on a particular account. *Walker v. Butler*, 6 El. & Bl. 503; 2 Jur., N. S. 687; 25 L. J., Q. B. 377.

A. being indebted to B. on three promissory notes, was applied to by B., for payment on account of interest, but without referring to any debt in particular; in consequence of this

application A. paid 5*l.*; at the time of this payment two of the notes were barred:—Held, that the payment must be attributed as made exclusively in respect of the note not barred, and that the effect was as to it to prevent the operation of the statute. *Nash v. Hodgson*, 6 De G., M. & G. 474; 1 Jur., N. S. 946; 25 L. J., Chanc. 186.

Between Midsummer, 1845, and Lady-day, 1854, the guardians of the Wycombe Union made payments by way of relief to non-settled paupers of the Eton Union. The only authority for these payments were letters written in 1847, 1849 and 1850, in which the guardians of the Eton Union requested the guardians of the Wycombe Union to make weekly payments to certain paupers. One of these letters stated that "the money would be repaid quarterly," and another stated that "if they would furnish an account at the end of each quarter they would be repaid." In July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account, in which they claimed a balance (after giving credit for a payment made in November, 1849), for relief of non-settled paupers of the Eton Union, from Lady-day, 1845, to Lady-day 1847, and from Lady-day, 1849, to Lady-day, 1850. No previous account had been sent in or claim made in respect thereof:—Held, that the payment not being generally on account, did not take the case out of the statute. *Wycombe Union (Guardians) v. Eton Union (Guardians)*, 1 H. & N. 687; 26 L. J., M. C. 97.

Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the statute the debts due longer than six years. *Mills v. Foulkes*, 7 Scott, 444; 5 Bing. N. C. 455; 2 Arn. 62; 3 Jur. 406.

But the creditor may, at any time, apply such payment to the debts due longer than six years. *Ib.*

And may manifest his election to make such application by bringing an action within a reasonable time after such payment. *Ib.*

Where there are two clear and undisputed debts, the case is not taken out of the statute, as to either debt, by evidence of a part payment within six years, not specifically appropriated to the one debt or the other. *Burn v. Boulton*, 2 C. B. 476; 15 L. J., C. P. 97—Per Tindal, C. J.

**By giving bills of exchange or promissory notes.**—Where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid, when due, by the drawee to the creditor, it operates as a part payment, to defeat the statute, only from the time of the delivery of the bill by the debtor, not from the time of its payment. *Ireing v. Veitch*, 3 M. & W. 90; Mur. & H. 313. See *Gowan v. Forster*, 3 B. & Ad. 507.

Giving a bill of exchange in payment on account of a debt, under circumstances which raise an implication of a promise to pay the balance, is a payment within the proviso of 9 Geo. 4, c. 14, s. 1, and therefore takes the debt out of the statute, notwithstanding the bill is afterwards dishonored. *Turney v. Dodwell*, 3 El. & Bl. 136; 2 C. L. R. 666; 18 Jur. 187; 23 L. J., Q. B. 137.

A creditor, who had, more than six years before, supplied ships' stores on seven separate occasions to the debtor, amounting in the aggregate to more than 300*l.*, within six years, asked his debtor for money. The debtor answered that he had not looked into his accounts, but supposed the balance due to be between 90*l.* and 100*l.*, but he had not cash. Being pressed, he accepted a draft at four months for 60*l.*, taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ships' stores was 95*l.*; but the different accounts were never balanced or ascertained between the creditor and the debtor:—Held, that evidence of the giving of the acceptance under these circumstances was evidence to go to the jury of a payment on account of all the debts, so as to be evidence of a fresh promise to pay what was due, sufficient to take the whole out of the statute. *Walker v. Butler*, 6 El. & Bl. 506; 2 Jur., N. S. 687; 25 L. J., Q. B. 377.

A person died in 1829; part of his assets consisted of a note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute:—Held, that the taking the second note was equivalent to payment of the first, and the executor was charged with the 100*l.* *Sparkes v. Restal*, 22 Beav. 587.

**By delivery of goods.**—A delivery of goods by a debtor to his creditor in liquidation of a previous debt, is a sufficient part payment. *Hooper v. Stevens*, 4 A. & E. 71; 1 H. & W. 480; 5 N. & M. 635; 7 C. & P. 260. S. P., *Hart v. Naish or Nish*, 2 C., M. & R. 337; 1 Gale, 171; 5 Tyr. 953.

**By allowing or setting off cross or mutual claims.**—A., having authority to collect the debts of a firm, agreed with B., who was indebted to the firm, to purchase goods from him, and to allow him the amount of the purchase-money in his account with the firm, and drew a check including that amount, and delivered the same to the bankers of the firm. The greater part of B.'s debt to the firm was incurred beyond the period of the statute:—Held, that there was sufficient evidence of a part payment to prevent the operation of the statute. *Pearce v. Selby*, 6 Jur. 800—Q. B.

Where A. has an account against B., some of the items of which are more than

six years old, and B. has a cross account against A., and they meet and go through both accounts, and a balance is struck in A.'s favor, this amounts to an agreement to set off B.'s claim against the earlier items of A.'s, out of which arises a new consideration for the payment of the balance, and takes the case out of the operation of the statute. *Ashby v. James*, 11 M. & W. 542; 12 L. J., Exch. 295.

The setting off a sum of money in an account stated and settled is a payment within the 9 Geo. 4, c. 14. *Scholey v. Walton*, 12 M. & W. 510; 8 Jur. 319; 13 L. J., Exch. 122.

In January, 1833, A. gave B., then a feme sole, his note for 240*l.* B., after having received part of the amount, died in 1834, leaving her husband, the plaintiff, surviving, and one child. The plaintiff did not then take out letters of administration, but arranged with A. that the interest of the note should go towards the maintenance of B.'s child, then under the care of A. In September, 1839, A. and the plaintiff settled their accounts, and A. indorsed on the note a memorandum that all the interest upon the note was paid up to that date, but no money passed. In 1848 the child died. In 1853 the plaintiff took out letters of administration, and brought an action as administrator against A., to recover the amount of the note:—Held, that there was a payment sufficient to take the case out of the statute, the maintenance of the child being treated by the parties as a money payment equivalent to the interest. *Bodger v. Arch*, 10 Exch. 823; 2 C. L. R. 1491; 24 L. J., Exch. 19.

One of two persons who had dealings together, and were mutually indebted to one another, had supplied some bricks on the credit of the other, in 1834, but no account had been delivered or made out on either side. In 1845 they signed, in duplicate, a memorandum, thus expressed: "It is agreed that Mr. R., in his general account, shall give credit to Dr. H. for 174*l.*, being for bricks delivered in 1834:"—Held, that this was insufficient to exclude the mutual debts from the operation of the statute. *Hughes v. Paramore*, 7 De G., M. & G. 229; 1 Jur., N. S. 1101; 24 L. J., Chanc. 681.

**By agents.**—To show a part payment within six years, the creditor proved a payment of a portion of his demand by the trustee under a deed of composition, who was expressly instructed to make the payment as a full satisfaction, instead of which he handed the money over as a part payment, and took a receipt accordingly. This payment so made was expressly repudiated by the debtor:—Held, that this was not a payment within the exception. *Linley or Linsell v. Bonsor*, 2 Scott, 399; 2 Bing. N. C. 241; 1 Hodges, 305.

A parish vestry having agreed to borrow money for building almshouses, the defendants, being two of the parish officers, in 1830



gave to the testator, who advanced the money, a promissory note, signed thus:—

“ J. H.,	} Churchwardens.	} Or others for the time being.”
“ G. R.,		
“ J. E.,	} Overseers.	
“ W. G.,		

Interest on this note had been regularly paid by the overseers for the time being up to 1847, and had been by them debited to the parish. An action having been brought upon the note, and the statute pleaded:—Held, that the very form of the note made the existing parish officers the agents of the defendants for the payment of the interest on the note, and therefore that the judge was wrong in withdrawing the form of the note from the consideration of the jury, and stating that the question was, whether the interest had been paid with the authority or knowledge of the defendants. *Jones v. Hughes or Evans*, 5 Exch. 104; 19 L. J., Exch. 200.

Accounts between G. and D., drawn up by G., more than six years old, showed sums due from him for interest and payments made by him of rent for D. The first payment of rent appeared to be without express authority. In subsequent accounts the rent was treated as deductions from the sum due for interest, and as having been paid for D., and were classed with cash payments on account. Afterwards the direct interest account disappeared, but G. stated accounts on one side only, in which he charged the rents as paid for D. In the early periods the interest and rent nearly balanced each other in amount; in later periods, by a lowering of the rent, the interest exceeded. The payments of rent were proved to have been continued down to 1841. In an action by D. for money lent:—Held, that the jury might infer that the payments of rent were made by G., as agent for D., out of the interest due to D., in which case they were payments of interest, and would take the case out of the statute. *Worthington v. Grimsditch*, 7 Q. B. 479; 10 Jur. 26; 15 L. J., Q. B. 52.

Where money is paid by a debtor on behalf of a creditor, the character of such payments is matter rather of evidence than of law. *Ib.*

The payment of interest on a note given by churchwardens on the parish account from time to time by the vestry, is a sufficient acknowledgment of the debt, as against the makers: a fortiori, where one of them has audited the parish accounts, in which payments of interest on the note are entered. *Crow v. Petit*, 3 N. & M. 456; *S. C.*, nom. *Row v. Pettet*, 1 A. & E. 190.

The defendant, in order to obtain an advance of money, gave a note to H., a customer of the plaintiffs, who were bankers. H. indorsed the note to the plaintiffs on obtaining the money, with which he was debited by them. The defendant was debited by H. with the amount, and H. had paid interest on the note to the plaintiffs within six years:—Held, that these payments did not take the

note out of the statute as against the defendant, H. not being his agent for that purpose. *Harding v. Edgecumbe*, 28 L. J., Exch. 313.

A., B. and C. carried on business as copartners under articles containing a covenant by which the partnership effects were made a security for the repayment of the sum in which the concern might be indebted to any partner; and the other partners covenanted to make up the deficiency according to their equitable liability. After the death of A. and B. their respective personal representatives filed a bill against C. to take the accounts of the partnership, and a receiver was appointed, who got in the assets and, without the sanction of the court, but with the approbation of the parties, paid them to the executors of A., to whom the partnership was largely indebted, and the suit was not further prosecuted. These payments were insufficient to discharge the debt due to A.'s estate, and the estate of B. remained liable to the estate of A. to a considerable amount in respect of that debt:—Held, that it not being proved that the receiver made the payments with the sanction of the personal representative of B. for the purpose of discharging the liability of C.'s estate, those payments did not take the demand against B.'s estate out of the statute. *Whitley v. Lowe*, 2 De G. & J. 704; 4 Jur., N. S. 815.

B. deposited 110*l.* with Messrs. H. B. L., C. F., E. L. and C. S. F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. B. L. died, having devised his real and personal estate to trustees, one of whom was his son, upon trust to raise money to pay his debts, and subject thereto upon trust for his son, whom he appointed sole executor. The son was admitted a partner in the bank. Subsequently E. L. and C. F. died. C. S. F. and the son continued the business, but became bankrupts in 1847. B., from the death of H. B. L., received interest at the bank upon his deposit note until the bankruptcy, when he proved his debt against the bankrupts' estate; and on a bill filed to make the real and personal estate of H. B. L. liable to the payment of the 110*l.*:—Held, that the interest was not paid by the continuing partners, as agents of H. B. L.; that no agency could be implied; that the interest was paid on account of the firm; that all claim against the real and personal estate was barred by the statute in six years; that B. had accepted the surviving partners as his debtors, and the devise made by H. B. L. for payment of debts was satisfied. *Brown v. Gordon*, 22 L. J., Chanc. 65; 16 Beav. 302.

By or to executors and administrators.]—The payment of interest upon a note by the makers to the personal representatives of the payee within six years of the commencement of the action, is a sufficient acknowledgment, although the letters of administration under which the party claimed to whom the payments were made were not obtained in the diocese in which the note was bonum nota-



**Bile.** *Clarke v. Hooper*, 4 M. & Scott, 353; 10 Bing. 430.

To an action by the payee of a note for 30*l.*, against the surviving executors of W. P., the maker, the plaintiff proved that he had been supplied by J. P., the deceased executor, with malt and other articles, and he put in evidence an account between them, signed as follows:—"Settled, J. P.;" on one side of which the plaintiff was charged with various quantities of malt, and on the other side had credit for payments, there being amongst others the following item:—"To one year's interest, 15*l.*:"—Held, that this settlement of account was evidence of payment of the 15*l.* by J. P., but not in his representative character. *Scholey v. Walton*, 12 M. & W. 510; 8 Jur. 819; 13 L. J., Exch. 122.

**Semble**, per Parke, B., payment by one of several executors, of a debt due from the testator, is not sufficient to take the case out of the statute as against his co-executors, even though made by him in his executive capacity. *Id.*

Where the action is by an executor, who has also claims due to himself in his own right, it will be for the jury to consider whether the payments were upon account of the debt due to the testator, or to the executor in his own right. *Collinson v. Margesson*, 27 L. J., Exch. 805.

A father bequeathed to his two daughters 250*l.* each, to be paid when they arrived at the age of twenty-one, and, till that period, the expenses of board, clothes, and education to be borne and paid by his executors. He appointed executors, and also trustees, with all necessary powers to fulfill the will. At a meeting of the trustees and executors, for the purpose of settling the testator's affairs, the executors paid over to the trustees 500*l.*, to be set apart for the payment of the legacies to the daughters, when they attained their majority. This sum was afterwards lent by the trustees to the defendant on a note, which described them as "trustees acting under the will of the late Mr. W. B.:"—Held, that a payment of principal and interest to one of the legatees within six years was sufficient to take the case out of the statute, and that the trustees had a right to maintain an action on the note. *Meggison v. Harper*, 2 C. & M. 322; 4 Tyr. 94.

**By or to husband and wife.**—A feme sole being a payee of a note payable with interest, married, and her husband survived her:—Held, that the note did not become the property of the husband, but passed to her administrator, though the husband had received the interest during her life; for that he did not thereby reduce the chose in action into possession; and that the payment of such interest in the wife's lifetime, to the husband, within six years before action, must be considered as made to him in the character of an agent to the wife, and was an answer to a plea of the statute. *Hart v. Stephens*, 6 Q. B. 937; 9 Jur. 225; 14 L. J., Q. B. 148.

In an action by payee against a maker of a note, he pleaded the statute. Replication, that when the cause of action accrued, the plaintiff was the wife of B., and that she continued to be so until B. died, and the plaintiff became discover, and that she sued within six years after the death:—Held, good. *Scarpellini v. Atcheson*, 7 Q. B. 864; 14 L. J., Q. B. 333.

A declaration against husband and wife, upon a joint and several note made by the wife, before coverture, and A., alleged a promise by the wife, *dum sola*. The plaintiffs proved a payment of interest within six years, made by the wife after marriage, with money sent by A., but without the privity or subsequent ratification of the husband:—Held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the statute; inasmuch as, the wife being incapable of making any promise in law, expressed or implied, payment by her or the other joint maker of the note could create no promise on her part; and, as such payment was not made by the husband, or for any consideration affecting him, or with his sanction, it raised no implied promise on his part. *Neve v. Holland*, 18 Q. B. 262; 16 Jur., N. S. 933; 21 L. J., Q. B. 289.

Where an action was brought on a joint note, made by A. and B. while B. was sole, against A., B. and C., the husband of the latter, who was joined for conformity; and they pleaded *actio non accrevit infra sex annos*; to which the plaintiff replied, that the cause of action arose within six years:—Held, that an acknowledgment by A., within six years, that the debt was due, would not take the case out of the statute, such acknowledgment being made after the intermarriage of B. and C. *Pittam v. Foster*, 2 D. & R. 363; 1 B. & B. 248.

**By one or more of several joint contractors or their executors, before the Mercantile Law Amendment Act, 1856.**—A payment of interest by A., on the joint and several note of A. and B., was evidence of a promise by B., and took the note out of the statute, though B. was a mere surety, and the payment was made without his knowledge. *Burleigh v. Stott*, 2 M. & R. 93; 8 B. & C. 36.

Under 9 Geo. 4, c. 14, a payment of interest within six years by one of several joint contractors took the debt out of the statute as against all. *Wyatt v. Hodson*, 8 Bing. 209; 1 M. & Scott, 442. S. P., *Chippendale v. Thurston*, 4 C. & P. 98; M. & M. 411; *Pease v. Hirst*, 10 B. & C. 122; 5 M. & R. 88.

Payment of interest by one of the makers of a joint and several note, though made more than six years after it became due, was sufficient as against the other maker. *Channell v. Ditchburn*, 5 M. & W. 494; 3 Jur. 1107.

One of two makers of a joint and several note having become a bankrupt, the payee received a dividend under the commission on account of the note:—Held, that this would

prevent the other maker from availing himself of the statute for the remainder of the money due on the note; the dividend having been received within six years before the action brought. *Jackson v. Fairbank*, 2 H. Bl. 340.

But where one of two joint drawees of a bill of exchange became bankrupt, and under his commission the indorsees proved a debt (beyond the amount of the bill) for goods sold, and exhibited the bill as a security they then held for their debt, and afterwards received a dividend:—Held, in an action by the indorsees of the bill against the solvent partner, that the statute was a good defense, although the dividend had been paid by the assignees of the bankrupt partner within six years. *Brandram v. Wharton*, 1 B. & A. 463.

An acknowledgment of one of several makers of a joint and several note took it out of the statute as against the others, and might be given in evidence in a separate action against any of the others. *Whitcomb v. Whiting*, 2 Dougl. 628.

So, in the case of a joint note, even though one of the makers had never made any acknowledgment, and had signed the note as a surety only. *Perham v. Raynal*, 9 Moore, 566; 2 Bing. 306.

A. having applied to B. for a loan of 300*l.* on mortgage, B., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several note for 50*l.* from A. and C., payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by A. to pay the 300*l.*, and interest at 5*l.* per cent. Several half-yearly payments of 7*l.* 10*s.* each for interest having been made by A.:—Held, in an action against C. upon the note, that such payments by A. kept all the securities alive, and prevented the operation of the statute as to the note. *Dowling v. Ford*, 11 M. & W. 329; 12 L. J., Exch. 342.

A payment made by one partner, after the dissolution of partnership, on account of a partnership debt, and after six years had elapsed without any acknowledgment of the debt, was sufficient to take the case out of the operation of the statute, as against the other partner, though the jury found that the payment was fraudulently made, against his consent, and in concert with the creditor to revive the debt. *Goddard v. Ingram*, 3 Q. B. 830; 3 G. & D. 46; 6 Jur. 1060; 12 L. J., Q. B. 9.

In 1832 A. employed B. and C., then in partnership as attorneys, to lay out 500*l.* on mortgage. It was invested accordingly on a mortgage to D. D. subsequently sold the property, subject to the mortgage, and the purchaser shortly afterwards paid 500*l.* to C., who, however, did not inform either D., his partner, or A. of such receipt; and again lent the purchaser 300*l.*, and continued to receive the interest thereon. The partnership was dissolved in 1833; but both before and after the dissolution, and after the death of A., which took place in 1840, interest was paid

as upon a mortgage of 500*l.* to A. and his representatives, up to 1843, by C. In 1846 the 300*l.* was paid to C., and the mortgage deed was given up by C., but no reconveyance was ever executed. Neither A. nor his representatives had any knowledge of these facts till 1848. Entries had been made by C. in the partnership books, of the receipts and payments; but B. had no knowledge of the transaction subsequent to the original advance of 500*l.*:—Held, in an action by the executors of A. against B. and C., that the statute was a bar to the action. *Sims v. Brutton*, 5 Exch. 802; 20 L. J., Exch. 41.

Where A., through misrepresentation, received from B. and several other persons, his tenants, sums of money, to which he was not entitled; and B. applied to him to have the money returned, stating that he and the other tenants had been induced to pay more than was due; and A. replied, "that, if there was any mistake, it should be rectified":—Held, that this obviated the statute as to payments made by the other tenants, as well as by B. *Clark v. Hougham*, 3 D. & R. 322; 2 B. & C. 140.

A. and B. made a joint and several note, and, after the lapse of six years, A. died, leaving B. one of his executors, who, ten years after his death, paid interest on the note, but not in his character of executor, but personally, as a maker of the note. In an action on the note by the executors of the payee, against the executors of A.:—Held, that the payment of interest by B. (who suffered judgment by default) within six years from the commencement of the action, was not sufficient, so as to make A.'s executors liable. *Atkins v. Tredgold*, 3 D. & R. 200; 2 B. & C. 23.

After the death of one maker of a joint and several note, signed by two, a payment upon it by the executor of the deceased party, did not take the debt out of the statute as against the survivor. *Slater v. Lawson*, 1 B. & Ad. 396.

By co-contractors or co-debtors, their executors or administrators, under the **Mercantile Law Amendment Act, 1856.**—[By 19 & 20 Vict. c. 97, s. 14, in reference to the provisions of the 21 Jac. 1, c. 16, s. 3, and of the 8 & 4 Will. 4, c. 43, s. 3, and the 16 & 17 Vict. c. 113, s. 20 (*Irish*), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

By s. 16, in citing the act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."]

The statute does not apply to a payment made before the act. *Jackson v. Woolley*, 8 El. & Bl. 778; 4 Jur., N. S. 656; 27 L. J.,



**Q. B. 448**—Exch. Cham.; reversing the judgment of the Queen's Bench, 4 Jur., N. S. 409; 27 L. J., Q. B. 181.

When a payment by one co-debtor is made with the mere knowledge and consent of the other, the latter does not lose the benefit of the statute. *S. C.*, 4 Jur., N. S. 409; 27 L. J., Q. B. 181.

To a plea of the statute on a note, the plaintiff replied that the note was made by the defendant jointly with P., and that within six years before action P. paid the plaintiff interest on the note:—Held, that, assuming the payment to have been made before the 19 & 20 Vict. c. 97, the replication was bad on general demurrer. *Ridd v. Moggridge*, 2 H. & N. 567.

A. and B., partners, gave a note in the name of the firm; A. died, leaving B. his sole executor, and no proceedings were taken against his estate for more than six years; but B., who continued the business, made payments of interest, and then became bankrupt:—Held, that the payments were made in his character of surviving partner, and not as executor of A., and that, having regard to the above statute, the debt was barred as against the estate of A. *Thompson v. Waithman*, 3 Drew. 628; 2 Jur., N. S. 1080; 26 L. J., Chanc. 1080.

In 1853, H., as principal, and the defendant as a surety, gave a joint and several note to the plaintiff, payable on demand. In 1861, H. made an assignment for the benefit of his creditors, and the defendant signed and gave the following letter to the plaintiff: "I consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received a dividend on the note, and afterwards brought an action on it against the defendant for the balance:—Held, that the payment of the dividend, coupled with the letter, did not amount to more than a payment only by one co-debtor under 19 & 20 Vict. c. 97, s. 14, and that therefore the other co-debtor was entitled to the benefit of the statute by virtue of that section. *Cockrill v. Sparke*, 1 H. & C. 699; 33 L. J., Exch. 118.

The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 14, applies to a case of dissolution of partnership where agency has not been expressly or necessarily or otherwise impliedly created between the persons who were formerly partners. *Watson v. Woodman*, 24 W. R. 47; 20 L. R., Eq. 721; 45 L. J., Chanc. Div. 57—V. C. II.

**Effect of payment after action; or payment into court.**—Part payment after action, will not take a debt out of the statute. *Bateman v. Pinder*, 2 G. & D. 790; 3 Q. B. 574.

Paying money into court for goods sold and delivered, does not deprive a defendant of the benefit of the statute as to the residue of the demand. *Long v. Greville*, 4 D. & R. 632; 3 B. & C. 10.

And payment of the principal into court, the claim for which is barred by the statute, will not take the claim of interest out of the statute. *Collyer v. Willock*, 12 Moore, 557; 4 Bing. 313. See *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Tyr. 450.

Upon a plaint brought in the county court within six years before an action, to recover two years' interest due upon a promissory note, made for the payment of a principal sum and interest, against the representatives of the deceased maker of the note, they, in the plaint, being also the defendants in the action, pleaded the Statute of Limitations, in answer to which plea an acknowledgment within six years was given in evidence and judgment was given for the plaintiff, and the defendants thereupon paid into court the amount of the judgment:—Held, that to this action, brought to recover the principal and further interest thereon two years after such payment into court and more than six years after the acknowledgment proved in such plaint, such payment did not necessarily imply a promise to pay the principal, and therefore was no evidence of an acknowledgment to pay the debt within six years, so as to take the case out of the Statute of Limitations, 21 Jac. 1, c. 16, s. 3. *Morgan v. Rowlands*, 41 L. J., Q. B. 187; 7 L. R., Q. B. 493; 20 W. R. 726; 26 L. T., N. S. 855.

Part payment of a debt does not take it out of the operation of the 21 Jac. 1, c. 16, unless it is made under such circumstances that a promise to pay the remainder may be reasonably inferred from it. *Id.*

As to effect of payment on account of debts secured by mortgages or other charges on lands or rents,—see this title, II., 4.

As to proof of payment on account,—see this title, IV.

#### (c) Bonds and other Specialties.

**Statute.**—[By 8 & 4 Will. 4, c. 42, s. 5, if any acknowledgment shall have been made, either by writing, signed by the party liable by virtue of such indenture, specialty, or recognisance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment or part satisfaction as aforesaid, or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid [or the party making such acknowledgment be at the time of making the same beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond the seas, as the case may be, no longer a disability by virtue of 19 & 20 Vict. c. 97, s. 10]; and the plaintiff or plaintiffs in any such action, or [on] any [such] indenture, specialty, or recog-

*nizancè, may by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of the statute.]*

**What acknowledgment or payment sufficient; and its effect.**—The acknowledgment provided for by the above section, in order to take a specialty debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay. *Modie v. Bannister*, 4 Drew. 433; 5 Jur., N. S. 402; 28 L. J., Chanc. 881.

A payment by a devisee for life of interest on a specialty of his testator, in which the heirs were bound, is an acknowledgment made "by the party liable by virtue of such specialty," within this section, and as such, sufficient to keep the right of action alive in its integrity against all parties interested in remainder. *Roddam v. Morley*, 1 De G. & J. 1; 3 Jur., N. S. 449; 26 L. J., Chanc. 438; reversing decision of Wood, V. C., 2 Kay & J. 336; 2 Jur., N. S. 805; 25 L. J., Chanc. 329. See *Pears v. Laing*, 12 L. R., Eq. 42, 55, 56; 40 L. J., Chanc. 225, 229; 24 L. T., N. S. 19, 21, 22.

Under 3 & 4 Will. 4, c. 27, s. 5, where creditors of a testator had a claim against land as against mortgagees of an equitable life estate devised by the will, and interest on the debt had been regularly paid by the testator's legal personal representatives, who also had the legal estate in the land:—Held, that this payment did not operate to prevent the statute from running in favor of the mortgagees. *Coope v. Cresswell*, 15 W. R. 242; 2 L. R., Ch. 112; 26 L. J., Chanc. 114; 15 L. T., N. S. 427—C.

A mortgagor assigned the equity of redemption by a deed, which contained a recital that all the interest had been paid within twenty years of the commencement of the action, and a covenant by the assignee to pay the principal and future interest to the mortgagee, and to indemnify the mortgagor in case of default. The mortgagee was no party to the deed, but continued to receive the interest upon the mortgage from the assignee of the equity of redemption:—Held, that the recital in the deed was evidence of an acknowledgment by part payment of interest within twenty years. *Forsyth v. Bristowe*, 8 Exch. 716; 17 Jur. 675; 22 L. J., Exch. 253.

Held, also, that the payment of interest by the assignee of the equity of redemption was a sufficient acknowledgment to take the case out of the statute as against the mortgagor. *Id.*

More than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of a meeting, unless some one is ready with the money to pay me off."—Held, that this letter was a sufficient acknowledgment in writing to exclude the operation of the stat-

ute, although not written within twenty years after the mortgagee had entered into possession. *Stansfield v. Hobson*, 3 De G., M. & G. 620; 22 L. J., Chanc. 637.

In 1833, trustees of a marriage settlement lent to the husband, at interest, some of the money settled to the separate use of his wife, on the security of a joint bond of the husband and the defendant. No interest was paid, but on the 31st October, 1847, it was arranged between the trustees and the husband and wife that she should give the trustees her receipt for the interest up to that date, which she accordingly did. She afterwards from time to time gave receipts for each half-year's interest up to November, 1860. No money ever passed:—Held, that the transaction amounted to a payment or a satisfaction of the interest, so as to take the case out of the 3 & 4 Will. 4, c. 42, s. 5. *Amos v. Smith*, 1 H. & C. 238; 31 L. J., Exch. 423; 10 W. R. 759; 7 L. T., N. S. 66.

In an action on a mortgage deed of houses, executed in 1824 by the defendant in favor of the plaintiff's testator, to secure payment of 400*l.* and interest, the plaintiff gave in evidence a deed executed by the defendant within twenty years before action brought, but to which deed the testator was no party. The deed, after reciting that the defendant had executed a mortgage of the houses to the testator, for securing to him 320*l.* and interest, stated that he conveyed that and other property to trustees on trust to sell, and out of the proceeds to pay off all the mortgages and other incumbrances affecting the property, and then to pay the creditors, with an ultimate trust as to the surplus:—Held, that this was not an acknowledgment within s. 5, so as to take the case out of the operation of s. 3. *Howcutt v. Bonser*, 3 Exch. 491; 18 L. J., Exch. 262.

Where a tenant for life of a mortgaged estate by deed admitted the payment of interest of the mortgage:—Held, not a sufficient acknowledgment of the debt as against the remainder-man to prevent the statute from operating. *Gregson v. Hindley*, 10 Jur. 383—V. C. E.

As to acknowledgment in respect of rents reserved by indenture, and of moneys secured by mortgage or other charge on lands or rents,—see this title, II., 4.

#### IV. PLEADING AND EVIDENCE.

**Declarations to avoid bar of the statute.**—The plaintiff may declare on the original promise, although he relies on a subsequent promise, to take the case out of the statute. *Leaper v. Tatton*, 16 East, 420. S. P., *Irving v. Veitch*, 3 M. & W. 90.

A new promise *infra sex annos* need not be declared on specially, although made thirteen years after the accrual of the original cause of action. *Upton v. Else*, 12 Moore, 303.

But a promise to pay a debt, barred by the statute, if conditional, must be declared on as conditional, notwithstanding it was given



within six years from the time of the contraction of the debt. *Haydon v. Williams*, 7 Bing. 103; 4 M. & P. 811.

A declaration, reciting a writ issued on the 28th of November, 1843, stated that heretofore, to wit, on the 29th day of December, A.D. 1830, the defendant contracted that he would, within twelve months from a certain day, to wit, the day and year aforesaid, supply the plaintiff with certain articles. Breach, that he did not nor would, within twelve months from the said day, to wit, the day and year aforesaid, supply the articles. Plea, that the cause of action did not accrue within six years next before suit. Replication, that the defendant, when the action accrued, was beyond the seas; and that the action was commenced within six years of his first return after such accruing:—Held, that the declaration was substantially good, the averments showing that twelve months had elapsed before the action; and, also, that the plea might be resorted to as showing that the twelve months had so elapsed. *Pannin v. Anderson*, 7 Q. B. 811; 9 Jur. 960; 14 L. J., Q. B. 283.

**Necessity of pleading the statute.**—Where a statute of limitations extinguishes the right, and does not merely bar the remedy, the defense under such statute need not be pleaded specially; and therefore, in replevin, evidence of the lapse of twenty years, under the 3 & 4 Will. 4, c. 27, ss. 23, 34, since the last payment of rent, may be given under a plea in bar of non tenuit. *De Beauvoir v. Owen* (in error), 5 Exch. 166; 19 L. J., Exch. 177—Exch. Cham.

Where a writ, issued within six years after the cause of action accrued, had not been continued pursuant to 2 Will. 4, c. 39, s. 10, the defendant was not bound to plead such non-continuance specially, but might take advantage of it under the plea that the cause of action did not accrue within six years next before the suit; for this purpose the last writ which was served was the commencement of the suit. *Pratt v. Hawkins*, 15 M. & W. 809.

The 2 Will. 4, c. 39, having put all actions on the same footing and made the issuing of the writ of summons the commencement of the suit, the plea of the statute ought to be in the same form; and, if the plaintiff replied that the cause did accrue within the limited time, he must have shown by proper record all the formalities required by s. 10 to have been complied with, just as he must have done before the statute where there was a plea that the cause of action did not accrue within six years before the commencement of the suit. *Higgs v. Mortimer*, 1 Exch. 711; 5 D. & L. 757; 12 Jur. 249.

The Statute of Limitations must, under the new procedure, be pleaded, and cannot be raised by demurrer. *Wukelee v. Davis*, 25 W. R. 60—Q. B. Div.

It is sufficient, on demurrer, to plead some special ground and "other grounds sufficient

to sustain the demurrer" to enable a party demurring to raise the Statute of Limitations at the bar, which can be raised by demurrer in an action for the recovery of real estate. *Dawkins v. Penrhyn*, 26 W. R. 6; 37 L. T., N. S. 80; 6 L. R., Ch. Div. 318—C. A.

**Form and sufficiency of pleas.**—[In schedule (B.) to 15 & 16 Vict. c. 76, the following form of plea, No. 30, is given: That the alleged cause of action did not accrue within six years [state the period of limitation applicable to the case] before this suit.

By s. 84, the plea may be pleaded with certain other pleas without leave of the court or a judge.]

In trover by an administrator, "not guilty of the premises within six years," is a bad plea, not being equivalent to an allegation that the cause of action did not accrue within six years. *Pratt v. Swaine*, 2 M. & R. 350; 8 B. & C. 285.

To a declaration in an action, founded on tort, a plea of not guilty of the supposed grievances in the declaration mentioned within six years before the exhibiting the plaintiff's bill, was bad on special demurrer. *Dyster v. Battye*, 3 B. & A. 448.

So a plea that "the supposed debt, if any such there be," did not accrue within six years, was bad on special demurrer, for not confessing the debt. *Margett v. Bays*, 4 A. & E. 489; 6 N. & M. 228.

But a plea that a debt accrued more than six years ago, without stating that it did not accrue within the six years, does not amount to an informal plea of the statute. *Bush v. Martin*, 2 H. & C. 311; 10 Jur., N. S. 347; 33 L. J., Exch. 17; 12 W. R. 205; 9 L. T., N. S. 510.

Action by an administratrix of A. for money received by the defendant, who was an attorney, to the use of A., in his lifetime. Plea, the statute. Replication, that A. was beyond the seas when the cause of action accrued, and did not return to England before his death, and that until the grant of administration there was no one to sue, and that the action was brought within three days after administration granted. Rejoinder, that before and at the time of his death, the plaintiff was his wife, and might, within a reasonable time after his death, have obtained administration of his effects; but that she suffered more than seven years to elapse after his death before she took out letters of administration:—Held, that if there were circumstances which, at law, prevented the defendant, being an attorney, from setting up the defense of the statute to a money demand at the suit of his client, the proper way for the plaintiff to avail herself of them was by a sur-rejoinder, and not by calling on the court to interpose its summary jurisdiction and prevent the defendant from pleading the statute. *Tristram, In re*, 1 L., M. & P. 74—B. C.—Wightman.

In an action for money due on a promissory note, payable with interest, the declaration

stated, that the defendant had not paid the amount of the note and interest, "except interest on the note from its date up to a certain day within six years next before the commencement of the suit." The defendant pleaded the statute in the usual form:—Held, that the plea was good, because the interest was accessory to the principal; and the allegation of the payment of the interest was merely a statement of evidence, which might or might not take the case out of the statute. *Hollis v. Palmer*, 3 Scott, 205; 2 Bing. N. C. 713; 2 Hodges, 55.

To an action on a bond, a plea setting out the bond, which appeared to be conditioned for the payment of money, and the performance of covenants, and alleging that the cause of action in the declaration mentioned did not accrue within twenty years, is bad. *Sanders v. Coward*, 1 D. & L. 1012; 13 M. & W. 65; 13 L. J., Exch. 342.

In an action on a bond, which appeared to be conditioned for the performance of the covenants or conditions contained in a deed, a plea that no cause of action in respect of the bond, by reason of any breach of the condition of the bond, or of the covenants or conditions in the deed, had accrued at any time within twenty years next before the commencement of the suit, is bad; first, for not setting out the deed; and, secondly, because it did not clearly appear whether the plea meant that every condition or covenant was to be performed and was broken more than twenty years before the commencement of the suit, or that during such twenty years every condition or covenant had been duly performed; and if the latter was the meaning of the plea, it was incorrect in form, as the plea ought to have shown affirmatively that the condition was duly performed. *Sanders v. Coward*, 15 M. & W. 48; 3 D. & L. 281; 10 Jur. 186; 15 L. J., Exch. 97.

Seemingly, the proper form of plea would have been to set out the deed, to aver performance of all that was performed within twenty years, to admit the breaches beyond twenty years, and to those breaches to plead the Statute of Limitations. *Id.*

To a declaration on a bond, not setting out any condition, plea, that the debt and cause of action did not accrue within twenty years. At the trial the bond and condition were produced, when it appeared that the bond had been executed more than twenty years, but that the condition was for the payment of the money after the death of a party who was proved to have died within twenty years:—Held, that the plea was disproved. *Turkey v. Hawkins*, 4 C. B. 655; 11 Jur. 919; 16 L. J., C. P. 209.

— of replications and subsequent pleadings. ]—The statute must be replied specially to a plea of set-off, and cannot be taken advantage of under a general replication of nil debet. *Chappel v. Durston*, 1 C. & J. 1.

If a plaintiff intends to rely on fraud committed by the defendant as an answer to a

plea of the statute, it must be replied specially, and cannot be taken advantage of under the replication, that the latter did promise within six years. *Clark v. Hougham*, 3 D. & R. 322; 2 B. & C. 149.

A plea of set-off stated that the plaintiff made his promissory note payable to C., which was duly indorsed, and delivered to the defendant at C.'s death, by C.'s administrator, and was unpaid. Replication, that the supposed cause of set-off on the note did not accrue to the defendant within six years:—Held, that this replication admitted not only the making of the note, but the indorsement of it to the defendant by C.'s administrator, and that the defendant might, therefore, avail himself of memorandums of the payment of interest, written on the note by C. before 9 Geo. 4, c. 14, to bar the statute. *Gale v. Tapern or Capron*, 1 A. & E. 102; 3 N. & M. 868.

A plaintiff, under a replication of the statute, to a plea of set-off, could not, on the trial, reduce the amount of the set-off by showing payment of part, before 15 & 16 Vict. c. 76, s. 75; the payment of part ought to have been replied. *Moore v. Wood*, 2 M. & Rob. 407—Tindal.

In an action for the value of coal wrongfully taken out of the plaintiff's mine, a replication to a plea of the statute that the wrongful taking was fraudulently concealed from the plaintiff until within six years before action, was disallowed to be pleaded, on the ground that a court of equity would not restrain the defendant from setting up the defense, and that, if there was any right to equitable relief, it could only be by a bill for account in equity, in which the amount allowed would be different from the amount recoverable at law. *Hunter v. Gibbons*, 3 Jur., N. S. 1249; 26 L. J., Exch. 1; 1 H. & N. 459.

A replication to a plea of the statute to a declaration, containing several counts on promises, averred, that, before and at the time of the making of the several promises, the defendant was in parts beyond the sea, and afterwards returned, which was his first return after making the several promises:—Held, that the word "several" might be taken distributively, and considered to mean that it was the defendant's first return after "each and every" of the promises. *Plummer v. Woodburne*, 7 D. & R. 25; 4 B. & C. 625.

It is unnecessary, in a replication, under 4 Anne, c. 16, s. 19, to allege that the defendant has returned from beyond the seas, or that the action was brought within six years after his return from beyond the seas since the cause of action accrued. *Forbes v. Smith*, 1 Jur., N. S. 503; 11 Exch. 101; 24 L. J., Exch. 299.

In an action by payee against the maker of a note, he pleaded the statute. A replication, that when the cause of action accrued the plaintiff was the wife of B., and that she continued to be so until B. died, and the plaintiff became discoverd, and that she sued with-



**X** years after his death, is good. *Scar-*  
*ni v. Atcheson*, 7 Q. B. 864; 9 Jur. 827;  
L. J., Q. B. 333.

**rejoinder**, that the plaintiff was a feme  
sole, and the wife of B. until the time of  
his death; that the note was payable to her  
or to the order of her; and that, before it was due, B. author-  
ized her to indorse it in blank in her own  
name, and deliver it to F., which she did for  
him; that, when the note became due,  
more than six years before action brought,  
the note was in the hands of another indorsee,  
who presented it for payment; and that after-  
wards, and before action brought, the note  
came to the possession of the plaintiff by de-  
ivery from the last-mentioned indorsee, who  
was then entitled to sue thereon, is bad, for  
her the matter alleged was a departure  
from pleading the statute, which plea ad-  
mitted an original right of action, or if the  
rejoinder was confined to the matter stated in  
the replication, it was no answer for want of  
denial that the action was brought within  
six years after the husband's death. *Id.*

**To a plea of the 3 & 4 Will. 4, c. 42, in an**  
action upon a mortgage deed, the plaintiff, in  
order to take the case out of such statute by  
an acknowledgment in writing, under s. 5,  
must reply such acknowledgment specially.  
*Kempe or Kent v. Gibbon or Gibbons*, 9 Q. B.  
609; 11 Jur. 299; 16 L. J., Q. B. 120.

But the plaintiff need not set out the ac-  
knowledgment in his replication. *S. C.*, 12  
Q. B. 662; 12 Jur. 607; 17 L. J., Q. B.  
998.

**To an action on a deed the defendant**  
pleaded the 3 & 4 Will. 4, c. 42, to which the  
plaintiff replied, that the defendant before  
suit made an acknowledgment that the debt  
remained unpaid and due to the plaintiff,  
within the true intent and meaning of the  
statute, and that the action was brought with-  
in twenty years next after such acknowl-  
edgment. The court directed this replication  
to be amended, as being so framed as to  
prejudice the fair trial of the cause; but re-  
fused to give the defendant the costs of the  
application, or to compel the plaintiff to  
specify the date of the acknowledgment on  
which he relied. *Forsyth v. Bristowe*, 8 Exch.  
347; 17 Jur. 46; 22 L. J., Exch. 70.

**In trespass quare clausum fregit, the de-**  
fendant, in his plea, deduced title by an in-  
closure act to an allotment of land, compris-  
ing the locus in quo, to T., a trustee for him.  
It stated the entry and possession of T., until  
just before the time of the trespasses, gave  
express color to the plaintiff, and stated his  
possession at the time of the trespass under  
a charter of demise, without livery, and just-  
ified the trespass as servant of T., and by his  
command. The plaintiff replied, that the de-  
fendant entered and committed the tres-  
passes after the 1st December, 1833; and that  
the entry was made for the purpose of recov-  
ering the close, and that the supposed right  
to enter did not first come to T. or the de-  
fendant, or any person through whom he

claimed the estate and interest in the close, at  
any time within twenty years before making  
that entry; and that by reason thereof the  
supposed right of T., and the defendant as  
his servant, was extinguished.—Held, that  
the replication was sufficient, and that it was  
not necessary that it should show what the  
defendant's title was, and how it was barred;  
and that, if the defendant wished to avail  
himself of the right of entry under 3 & 4 Will.  
4, c. 27, s. 15, he ought to have rejoined it.  
*Jones v. Jones*, 4 D. & L. 494; 16 M. & W.  
609; 11 Jur. 335; 16 L. J., Exch. 209.

**To an action for seizing two beasts of the**  
plaintiff the defendant pleaded that they were  
taken as customary heriots, and the plaintiff  
replied a discontinuance of taking heriots  
for more than twenty years, and that the  
right to heriots then accrued to the lord  
within the meaning of the Statute of Limita-  
tions, 3 & 4 Will. 4, c. 42.—Held, that the  
replication was bad. *Zouches v. Dalbiac*, 44  
L. J., Exch. 109; 10 L. R., Exch. 172; 23  
W. R. 564; 33 L. T., N. S. 221.

**Proof of time when statute begins to run.**  
—In an action for goods sold and delivered,  
the general issue and the statute were pleaded.  
The replication traversed the latter plea. The  
plaintiff's evidence consisted of such an admis-  
sion by the defendant as would have been evi-  
dence to go to a jury, on the general issue,  
that a debt was owing from him to the plain-  
tiff, but he did not prove when the debt was  
contracted. No evidence was given for the  
defendant in support of his plea.—Held, that  
it was incumbent on the plaintiff to support  
the affirmative terms of his replication, by  
showing that the debt was contracted within  
six years, or that the acknowledgment or  
promise was made in some writing signed by  
the defendant, so as to take the case out of  
the statute, pursuant to 9 Geo. 4, c. 14, and a  
nonsuit was entered accordingly. *Wilby v.*  
*Henman*, 4 Tyr. 957; 2 C. & M. 658.

**A promissory note given by a defendant to**  
the plaintiff, payable five years after date, for  
value received, is evidence of an account  
stated, against which the statute does not  
commence running until the maturity of the  
note. *Fryer v. Roe*, 12 C. B. 437.

**Proof of issue and renewal of summons to**  
avoid the bar of the statute.—[By 15 & 16  
Vict. c. 76, s. 12, the production of a writ of  
summons purporting to be marked with the seal  
of the court, showing the same to have been re-  
newed according to that act, shall be sufficient  
evidence of its having been so renewed, and of  
the commencement of the action as of the first  
date of such renewed writ for all purposes.]

Before this provision the nisi prius record,  
showing that the writ of summons issued  
within six years of the accrual of the cause of  
action, was not conclusive evidence to pre-  
vent the operation of the statute. *Pritchard*  
*v. Bagshawe*, 11 C. B. 459; 2 L., M. & P. 323;  
15 Jur. 730; 20 L. J., C. P. 161.

In order to save the statute, a second or a

subsequent writ of summons must, at the time a copy was served, have contained the indorsement required by 2 Will. 4, c. 39, s. 10, and such indorsements must have been made by the plaintiff or his attorney, and the roll was no evidence of these facts. *Walker v. Collick*, 4 Exch. 171; 7 D. & L. 225; 18 L. J., Exch. 387.

**Parol evidence to explain acknowledgment in writing.**—When a written promise to pay a debt barred by the statute has been lost, oral evidence of the contents of the writing may be given. *Haydon v. Williams*, 4 M. & P. 811; 7 Bing. 163.

When a letter, acknowledging the existence of a debt, which was produced for the purpose of taking the case out of the statute, did not contain any date;—Held, that the time when the letter was written might be supplied by parol evidence. *Edmunds v. Downes*, 2 C. & M. 459; 4 Tyr. 173. And see *Hartley v. Wharton*, 3 P. & D. 529; 11 A. & E. 934.

A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt more than six years old, is a sufficient compliance with the provisions of the 9 Geo. 4, c. 14, s. 1, to take the case out of the statute, though no amount is specified in the promise; and a creditor suing on such promise is not confined to nominal damages, but may recover the whole of such proportion, upon proving the amount by extrinsic evidence. *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Tyr. 450.

A. gave to B. a note, dated October, 1834, for 837l. 1s. 6d., payable on demand. In December, 1834, a demand was made, and A. then promised to pay interest, and signed an unstamped memorandum, dated the 2d December, 1844, as follows:—"I promise to pay to B. 837l., with 4l. per cent. interest thereon." Neither principal nor interest was paid, but in January, 1848, A. wrote to B. a letter referring to a note for a debt, which he acknowledged, and promised thereby to pay:—Held, that the memorandum of December, 1834, and a letter accompanying it, showed that interest was running; and that, though in form a note and unstamped, it could be looked at to see to what debt this interest was to be referred; and that as no other debt was proved to exist, the 837l. there mentioned was to be assumed to be part of the 837l. 1s. 6d. secured by the former note. *Spickernell v. Hotham*, 1 Kay, 669.

Held, also, that in the absence of proof of the existence of any other note to which it could relate, the letter of 1848 must be taken to refer to the note of October, 1834, and thus to take it out of the statute. *Ib.*

The plaintiffs and S. sold a library of books for the defendant, some of which were returned by the purchasers as imperfect. The defendant thereupon wrote to the plaintiffs the following letter, dated the 18th December, 1827:—"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80l. 7s.,

which sum I will pay in two years."—Held, evidence of an account stated of debts which would become due in two years, so as to defeat a plea of the statute. *Wheatley v. Williams*, 1 M. & W. 533; Tyr. & G. 1043.

**Proof of payment on account.**—Indorsements, on a promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date. *Smith v. Battens*, 1 M. & Rob. 341—Taunton.

In an action on a note bearing interest, proof that the defendant, being sent to by the plaintiff for money, paid 1l., and said, "This puts us straight for last year's interest, all but 18s.; some day next week I will bring that up," is sufficient answer to a plea of the statute, no evidence being given of any other debt being due. *Evans v. Davies*, 4 A. & E. 840; 2 H. & W. 15.

A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant, was in his own handwriting, but said he could not recollect the fact:—Held, sufficient evidence of payment to go to a jury. *Trentham v. Denerill*, 4 Scott, 128; 3 Bing. N. C. 397.

The plaintiff, an attorney, had done professional business of various kinds for the defendant in 1827, and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the defendant wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were 2l. 2s. and 10s. 6d., inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the 2l. 2s. and 10s. 6d. were paid to the plaintiff on the production of those receipts. In 1831, the plaintiff delivered to the defendant a bill of costs, amounting to 289l., the first item being in 1827, and the two last in 1830 and 1831. These two were charges for 3l. and 5l. cash lent; the rest of the bill was for professional business. In an action on this bill, commenced in June, 1839:—Held, that the letters given in evidence did not sufficiently show that the 2l. 2s. and 10s. 6d. were paid in the discharge of the debt for which the action was brought, so as to take the case out of the statute as to any part of the demand. *Waugh v. Cope*, 6 M. & W. 824. See *Waller v. Lacey*, 1 Scott, N. R. 186; 1 M. & G. 54; 8 D. P. C. 562; 4 Jur. 435.

An acknowledgment of payment, in writing, although unsigned, is sufficient to take a debt out of the statute. *Cleave v. Jones*, 6 Exch. 573; 15 Jur. 515; 20 L. J., Exch. 298.—Exch. Cham.



Part payment of principal or payment of interest on account of a debt is not affected by 9 Geo. 4, c. 14, s. 3, and therefore a parol acknowledgment of payment within six years before action will take the case out of the statute. *Ib.*

To a note for 350*l.*, with interest, the debtor pleaded the statute. At the trial the only evidence given by the creditor was the following unsigned entry in a book of the debtor, and in her handwriting:—"1843. Cleave's Int. on 350*l.*—17*l.* 10*s.*"—Held, sufficient evidence of payment of interest to the creditor to take the case out of the statute. *Ib.*

In an action by payee against maker of a note, to rebut a plea of the statute, the plaintiff proved the fact of a payment on account of the note within six years, and he further proved a parol admission by the party paying that he had made this payment:—Held, that this admission was rightly received to corroborate the direct proof of the fact of payment, as 9 Geo. 4, c. 14, s. 3, merely excludes the acknowledgment "by words only." *Bevan or Bevan v. Gething or Gethin*, 8 Q. B. 740; 3 G. & D. 59; 6 Jur. 971; 12 L. J., Q. B. 87.

In an action by the executor of a payee of a note against the maker, in order to take the case out of the statute, he produced a book in which he had made memorandums by the direction of the testatrix, of payments of interest by the defendant to the testatrix within six years:—Held, admissible, and not excluded by 9 Geo. 4, c. 14, s. 3. *Bradley v. James*, 13 C. B. 822; 23 L. J., C. P. 193.

A debtor sent to one of the persons beneficially interested, under the will of his creditor, a note insufficiently stamped, for the amount of the debt, with a letter referring to the note as being for the money due:—Held, that the letter was not of itself a sufficient promise or acknowledgment to exclude the operation of the statute, and that the note, being unstamped, could not be received in evidence to show what the promise was, that being a direct and not a collateral purpose. *Parmiter v. Parmiter*, 3 De G., F. & J. 461; 30 L. J., Chanc. 508; 23 L. T., N. S. 799.

Evidence of verbal admissions, in 1850, by A., since deceased, that he owed a debt of 2,300*l.* to B.'s estate, the interest of which he had arranged to discharge, and was discharging, by paying two annuities by B.'s will, together with a statement in an affidavit by B.'s executor in 1850, which was inserted in a draft affidavit from A.'s dictation, to the effect that B.'s executor had received in August, 1850, from A., a half-year's interest on 2,300*l.*, and had paid the annuities the same half year, is sufficient to take the debt of 2,300*l.* out of the statute. *Edwards v. James*, 1 Kay & J. 584.

When an indorsement on a note of payment of interest made by the authority of a deceased holder, appears to have been made, after the statute had run, it is not evidence to exclude the operation of the statute. *Briggs v. Wilson*, 5 De G., M. & G. 12.

## Liquidated Damages.

See CONTRACT OR AGREEMENT; PENAL ACTIONS AND PENALTIES.

## Liquidation.

- I. UNDER BANKRUPTCY ACT. See INSOLVENCY AND BANKRUPTCY.
- II. WINDING UP OF PUBLIC COMPANIES. See PUBLIC COMPANY.

## Lis Mota.

See EVIDENCE.

## Lis Pendens.

**Effect.**—The doctrine as to the effect of lis pendens on the title of an alienee, is not founded on any principles of courts of equity with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding, not only on the litigant parties, but on those who derive title from them pendente lite, whether with notice of the suit or not. *Bellamy v. Sabine*, 1 De G. & J. 566; 3 Jur., N. S. 943; 20 L. J., Chanc. 797.

A person who, without notice of a suit, purchases from one of the defendants property which is the subject of it, is not, in consequence of the pendency of the suit, affected by an equitable title of another defendant, which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary, for any of the purposes of the suit, to give effect. *Ib.*

A registered lis pendens does not create a charge or a lien on the property, nor does it excuse a purchaser from completing his contract; it merely puts him upon an inquiry into the validity of the claim. *Bull v. Hutchens*, 32 Beav. 615; 9 Jur., N. S. 954.

A petition to wind up a company does not constitute a lis pendens as against a contributory. *Thornton, Ex parte*, 30 L. J., Chanc. 190; 2 L. R., Ch. 171; 15 W. R. 292; 15 L. T., N. S. 523—L. J.

When a suit has been instituted in order to obtain a specific property, and the object of the suit may be wholly baffled by a sale by the defendant if the suit is not registered, that is a case of lis pendens. *Plant v. Pearlman*, 20 W. R. 314; 41 L. J., Q. B. 169; 26 L. T., N. S. 313.

In a suit which had been registered as a lis

pendens, a decree was made for administration of a testator's estate. The executrix subsequently deposited an asset of the testator with a bank as security for advances. The bank had no notice of the suit:—Held, that the bank had a good lien on the property deposited. *Berry v. Gibbons*, 20 L. T., N. S. 88—L. JJ.

**Vacating registration.**—[Whereas a registered *lis pendens* cannot be vacated without the consent of the person by whom it was registered, and such consent is sometimes withheld, although the suit or proceeding is at an end, or is not being bona fide prosecuted; for remedy whereof be it enacted, that the court before whom the property sought to be bound is in litigation may, upon the determination of the *lis pendens*, or during the pendency thereof, where the court shall be satisfied that the litigation is not prosecuted bona fide, make an order, if it shall see fit, for the vacating of the registration without the consent of the party who registered it, and may, in the discretion of the court, direct the party on whose behalf the registration was made, to pay all the costs and expenses occasioned by the registration or the vacating thereof;]

The application to the court pending the litigation may be in a summary way, by petition or motion in the court, or by summons at chambers, and if an order shall be made for vacating any such registration, the senior master of the Court of Common Pleas at Westminster shall, upon the filing with him of an office copy of such order, enter a discharge of such *lis pendens* on the register, and shall be entitled for every such entry of discharge to the sum of 2s. 6d., and no more, and may charge for every such certificate the sum of 1s., to be paid and collected by stamps, as under 28 & 29 Vict. c. 45. (30 & 31 Vict. c. 47, s. 2.)]

When an official liquidator of a company registered the winding up as a *lis pendens* against a contributory, the Court of Chancery ordered him to vacate the registry. *Thornton, Ex parte*, 36 L. J., Chanc. 190; 2 L. R., Ch. 171; 15 L. T., N. S. 523; 15 W. R. 292—L. J.

On an application, under 30 & 31 Vict. c. 47, s. 2, by a defendant in a suit which had been registered as a *lis pendens*, and subsequently by consent dismissed for want of prosecution, the court ordered the registration to be vacated upon production of an affidavit of service of the notice of motion, upon the solicitor of one of two plaintiffs who could not be found, and upon the solicitor of the trustee in bankruptcy of the other plaintiff. *Jervis v. Berridge*, 44 L. J., Chanc. 164; 31 L. T., N. S. 420; 23 W. R. 43—V. C. M.

An application, under 30 & 31 Vict. c. 47, s. 2, for vacating the registration of a *lis pendens* after the determination of the litigation, should be made by motion or otherwise in the matter of the act, and in the action, suit or proceeding; but an independent action is not improper. *Clutton v. Lee*, 45 L. J., Chanc. Div. 684; 24 W. R. 607—R.

## Literary Property.

See COPYRIGHT.

## Livery.

- I. OF SEIZIN. See DEED.
- II. OF LONDON. See CORPORATION.
- III. LIVERY STABLE KEEPER. See HOUSE.

## Loan Societies.

See FRIENDLY AND LOAN SOCIETIES.

## Local Acts.

- I. GENERALLY. See STATUTE.
- II. ACTIONS FOR ACTS UNDER.
  1. Limitation of Actions. See LIMITATION OF ACTIONS AND SUITS.
  2. Notice of Actions. See ACTION AND SUIT.

## Local Boards.

See HEALTH (PUBLIC).

## Local Government and Authority.

- I. IN GENERAL, 8678.
- II. METROPOLITAN. See METROPOLIS.
- III. BY LOCAL BOARDS. See HEALTH (PUBLIC).

I. IN GENERAL.

**Statutes.**—[21 & 23 Vict. c. 98, is "The Local Government Act, 1858," amended by 24 & 25 Vict. c. 61, 26 Vict. c. 17, and 26 & 27 Vict. c. 70.

23 & 24 Vict. c. 51, requires an annual return to be made to a secretary of state, of the rates, taxes, tolls, and dues levied for local purposes in England.

By 30 & 31 Vict. c. 22, any local authority may, with the approval of a secretary of state, contract with a neighboring local authority for lock-up houses, and for the custody and maintenance of persons therein committed for trial.

By 34 & 35 Vict. c. 70, a local government board is constituted, vesting therein the functions of the secretary of state and privy council, con-

ing the public health and local government, either with the superadded powers and duties of the Poor Law Board.

35 & 36 Vict. c. 79, amends the law relating to public health and the constitution of local government boards.

35 & 36 Vict. c. 69, constitutes a local government board in Ireland.

37 & 38 Vict. c. 89, amends and extends the sanitary laws.

38 & 39 Vict. c. 83, amends the law relating to securities for loans contracted by local authorities.]

**Interpretation and effect of Local Government Acts.**—A stable in a yard at the rear of the proprietor's premises was pulled down and re-erected, of smaller superficial dimensions, but somewhat higher, in another part of the same yard, the old materials, with some addition, and the boundary walls of the yard being made use of in such re-erection:—Held, that this was a "new building" within the Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 34, and the by-laws of the local board. *Hobbs v. Dance*, 9 L. R., C. P. 30; 43 L. J., M. C. 21; 29 L. T., N. S. 687.

Held, also, that the question was properly raised as a question of law for the opinion of the court. *Ib.*

The words, "so as to deteriorate or affect the purity or quality of the water in such natural stream" in the Local Government Act Amendment Act, 1861, 24 & 25 Vict. c. 61, s. 4, mean the water at the point of discharge of any outfall drain, and not the water in the stream generally. *Att. Gen. v. Cockermouth Local Board*, 22 W. R. 619; 30 L. T., N. S. 590—R.

The Local Government Act, 1858, 21 & 22 Vict. c. 98, s. 24, which enacts, that in corporate boroughs the local boards "shall be the mayor, aldermen and burgesses acting by the council" does not make the local board a new and separate body, but in substance enacts that in corporate boroughs the corporation shall be the local board; and if in making contracts the name and style of the corporation "acting as the local board" is used, the corporation is the essential body and contracting party and may be sued as such on the contracts. *Andrews v. Ryde (Mayor, &c.)*, 43 L. J., Exch. 174; 9 L. R., Exch. 302; 23 W. R. 58.

**Adoption of Local Government Acts.**—The 21 & 22 Vict. c. 98, s. 18, empowers any ratepayer who disputes the validity of a vote for the adoption of the act, to appeal to a secretary of state, who may, after inquiry, issue such order thereon as he may deem requisite to determine the questions arising on such appeal, and as to the validity or invalidity of such vote. By s. 81, all orders made by a secretary of state in pursuance of the act shall be binding and conclusive, in respect of the matters to which they refer:—Held, that an order issued by the secretary of state, upon an appeal to him by rate-payers, whereby he determined the validity of the

vote appealed against, was binding and conclusive, by reason of s. 81, although it was doubtful, on the face of the order, whether his ratio decidendi was good. And therefore the court refused to issue a mandamus to the summoning officer of the district in which the vote had been taken, to summon a meeting of the ratepayers, and ascertain by a poll whether the act should be adopted. *Bird, Ex parte*, 1 El. & El. 931; 5 Jur., N. S. 1009; 28 L. J., Q. B. 223.

A district not having any ascertained or defined boundary, and a portion of a parish, obtained from the secretary of state for the Home Department an order under 21 & 22 Vict. c. 98, s. 18, settling its boundaries for the purposes of that act, and subsequently adopted the act within the district. Afterwards the parish adopted the act. The court refused a mandamus to the secretary of state to publish the notice of the adoption of the act by the district, under s. 19, holding that s. 14 applied to places the boundaries of which were settled by an order of the secretary of state, and therefore that the district could not adopt the act unless the parish had refused to do so. *Mullock Bath District, In re*, 2 B. & S. 543; 31 L. J., Q. B. 177; 10 W. R. 537; 6 L. T., N. S. 243.

A district for spiritual purposes, formed under 6 & 7 Vict. c. 37, s. 9, is entitled, by resolution of its owners and ratepayers (without reference to the proceedings of townships out of which it is formed), to adopt the Local Government Act, 1858, as being a place with "a known or definite boundary" according to the provisions of the act. *Reg. v. Northoram and Clayton*, 35 L. J., Q. B. 90; 7 B. & S. 110.

The rate-payers of a district petitioned the secretary of state to settle the boundaries with a view to the adoption of the act. An order was made, settling out the boundaries, and a resolution was duly carried for the adoption of the act. An appeal was presented to the secretary of state by a rate-payer, on the ground that the boundaries, as set out, comprised land not included within the limits from which the petition proceeded. After inquiry into the circumstances, the secretary of state dismissed the petition, and ordered that the act should, after the expiration of one month from the date of the order, have the force of law within the district:—Held, that the court would not, after all this had been done, issue a certiorari to bring up the order for settling the boundaries of the district. *Todmorden (District), In re*, 30 L. J., Q. B. 305; 4 L. T., N. S. 509; *S. C.*, nom. *Smith, Ex parte*, 1 B. & S. 412.

A parish of L., containing 1400 acres, comprised within its area the corporate borough of L., which was in extent 100 acres. The parliamentary borough of L. comprised the whole of the parish of L., and part of another parish. The majority of rate-payers of the parish of L. adopted the Local Government Act, 1858, and an appeal by some of the rate-payers was made to the secretary of state,



who dismissed the appeal, and confirmed the adoption of the act throughout the parish:—Held, that the parliamentary borough, including within its limits a less place, viz., the parish, was not a place authorized to adopt the act; that the parish was a place authorized to adopt the act, including within its limits a less place, viz., the corporate borough, which, if not so included, would of itself be authorized to adopt the act; and, therefore, the adoption by the parish and the order of the secretary of state were valid. *Reg. v. Hardy*, 4 L. R. Q. B. 117; 9 B. & S. 926; 38 L. J., Q. B. 9; 19 L. T., N. S. 352; 17 W. R. 173.

When a meeting of rate-payers and owners of a place having a known and defined boundary is called for the purpose of adopting the provisions of the act, the chairman is the person to take the sense of such meeting, unless a poll is demanded. But if a poll is demanded, the functions of the chairman will thereupon cease, and such poll should be taken, and all things connected therewith be carried out by the summoning officer. *Littleborough Local Board, Ex parte*, 22 L. T., N. S. 437—Q. B.

By the Local Government Act, 1858, 21 & 22 Vict. c. 98, the act may be adopted in corporate boroughs and places under the jurisdiction of a board of competent commissioners, and in all other places having a known or defined boundary, by a resolution of the owners and rate-payers, subject to appeal to the local government board:—Held, that interpreting the words "place having a known or defined boundary" in the statute, the word "place" is to be received with the widest possible signification, and is not restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships or parishes, and may, therefore, consist of portions of different townships or parishes, and a place so composed has a "known or defined boundary," which has a physical, visible and notorious boundary, so that there can be no mistake as to its limits. *Reg. v. Grasmere Local Board*, 42 L. J., Q. B. 131; S. C., nom. *Reg. v. Local Government Board*, 8 L. R., Q. B. 227.

Therefore, where the township of Grasmere contained certain small detached portions of the neighboring townships of Rydal and Loughrigg, wholly surrounded by portions of the township of Grasmere, and included within the boundary of that township, the district so composed was held to be a place having a known or defined boundary within the statute, and an order of the local government board made under s. 17 of that act, and 34 & 35 Vict. c. 70, s. 2, for the adoption of the first-mentioned act by such district, was valid. *Id.*

**Rates and expenses.**—By 21 & 22 Vict. c. 98, s. 55, the district rate shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor. The guardians of the

poor of an extra-parochial place maintaining its own poor, and situated partly within and partly without a borough, occupied a workhouse in the part without the borough, which part was a separate district for the purpose of levying district rates:—Held, that they were liable to a district rate for works in the part without the borough, as occupying a kind of property assessable to the poor-rate within section 55. *Toxteth Park (Guardians) v. Toxteth Park Local Board of Health*, 7 Jur., N. S. 860; 30 L. J., M. C. 154; 9 W. R. 691; 4 L. T., N. S. 283; 1 B. & S. 167.

By 21 & 22 Vict. c. 98, s. 65, memorials under s. 120 of the Public Health Act, 1848, shall be addressed to one of her Majesty's principal secretaries of state, and by s. 81, all orders made by such secretary shall be binding and conclusive:—Held, that the interest upon expenses incurred by a local board of health ran from the time the amount due was ascertained, and not from the time of the first demanding, and that the decision of the secretary of state as to the amount of the claim for the expenses and interest thereon was final. *Wallington v. Willes*, 16 C. B., N. S. 797; 10 Jur., N. S. 906; 33 L. J., C. P. 233; 12 W. R. 917; 10 L. T., N. S. 784.

By 21 & 22 Vict. c. 98, s. 55, the occupier of any land covered with water, or used only as a railway constructed under the powers of any act of parliament for public conveyance, is to be assessed to the district rate at one-fourth only of the net annual value, as ascertained by the last poor-rate:—Held, that a wet dock was "land covered with water" within the provision; and that a railway, which had been constructed by a dock company in connection with their dock and joining a public railway and canal, under the powers of their private act, by which the company was bound to complete the railway for the use of the public on the payment of tolls, was a railway within the provision, although it was not constructed to carry passengers. *Reg. v. Newport Dock Company*, 31 L. J., M. C. 266; 6 L. T., N. S. 456; 9 Jur., N. S. 73—Q. B.

Notice to one who receives the rent of land de facto, without right thereto, satisfies the provision requiring notice to the owner, contained in 21 & 22 Vict. c. 98, s. 62. *Peek v. Waterloo with Seaforth Local Board of Health*, 9 Jur., N. S. 1344; 33 L. J., M. C. 11; 2 H. & C. 700; 11 W. R. 252; 9 L. T., N. S. 338.

General district rates, made under the Local Government Act, are not required within the Union Assessment Act, 25 & 26 Vict. c. 103, s. 28, to be based on the poor-rate by reason of the option given to the local board by 21 & 22 Vict. c. 98, s. 56; and, therefore, they may still be based on a valuation made by order of the local board, if in their judgment the poor law valuation list under the Union Assessment Act is an unfit criterion for making them. *North Eastern Railway Company v. Scarborough Local Board*, 4 L. R. Q. B. 163; 38 L. J., M. C. 65; 17 W. R. 574.

A railway constructed without any parlia-



tary powers, eventually sold, enlarged used, by act of parliament, for public revenue, does not come within s. 55, as a way constructed under the powers of any act of parliament, and is therefore ratable in full net annual value. *North Eastern Railway Company v. Leudgate Local Board*, 18 R. 691; 5 L. R., Q. B. 157; 39 L. J., M. 65; 22 L. T., N. S. 63.

**Provisional orders.**—By 21 & 22 Vict. c. 1, which incorporates the Lands Clauses Act 1845, powers are given whereby local boards of health may compulsorily purchase lands for certain purposes; but such powers can only be acquired by certain notices being given, and obtaining a provisional order from the secretary of state, which order, however, is not to be of any validity unless confirmed by an act of parliament, and which act parties aggrieved are to be at liberty to petition against and oppose:—Held, that such provisional order of the secretary of state is not one that can be removed for the purpose of being quashed. *Frewen v. Hastings Local Board of Health*, 12 L. T., N. S. 340; 13 W. R. 678; 11 Jur., N. S. 670; 34 L. J., Q. B. 159; 6 B. & S. 401.

## Lodger.

- I. RIGHTS. See BOARDING AND LODGING HOUSE KEEPER; INNKEEPER; LANDLORD AND TENANT.
- II. PROTECTION AGAINST DISTRESS. See DISTRESS.
- III. FRANCHISE. See ELECTION LAW.
- IV. LARCENY BY LODGERS. See CRIMINAL LAW.

## Lodging-Houses.

**Statutes.**—14 & 15 Vict. c. 28, extended by 16 & 17 Vict. c. 41, and 11 & 12 Vict. c. 63, s. 66, regulate common lodging-houses; and 14 & 15 Vict. c. 34, amended by 29 & 30 Vict. c. 28, and 30 & 31 Vict. c. 28, the laboring classes lodging-houses.

**Registration.**—A lodging-house, where hawkers and persons of a similar class are received, staying for various periods, having their meals in one room, and paying sixpence a night, is a common lodging-house within the meaning of the Public Health Act, 1875, and therefore requires registration. *Langdon v. Broulbert*, 87 L. T., N. S. 434—C. P. Div.

## Lloyd's.

- I. COFFEE HOUSE. See INSURANCE.
- II. BONDS. See BOND; PUBLIC COMPANY.

## London.

- I. THE CORPORATION; FREEMEN AND OFFICERS; RIGHTS AND POWERS, 8684.
- II. ALDERMEN. See CORPORATION; JUSTICE OF THE PEACE.
- III. BROKERS IN. See BROKER.
- IV. COURTS OF. See COUNTY COURTS; INFERIOR COURTS.
- V. CUSTOMS OF. See CUSTOM AND PRESCRIPTION.
- VI. FOREIGN ATTACHMENT. See INFERIOR COURTS.
- VII. ANCIENT WINDOWS. See LIGHT AND AIR.
- VIII. MARKETS. See MARKETS AND FAIRS.
- IX. TITHES. See TITHES.
- X. POLICE. See POLICE.
- XI. SHERIFFS. See SHERIFF.
- XII. METROPOLIS. See METROPOLIS.

- I. THE CORPORATION; FREEMEN AND OFFICERS; RIGHTS AND POWERS.

**Freemen.**—[19 & 20 Vict. c. 81, s. 4, exempts from stamp duty the admission of persons to the freedom of the city of London by redemption.

19 & 20 Vict. c. 81, s. 94, repeals the city custom as to the distribution of the property of freemen dying intestate on and after the 1st of January, 1857, and distribution of their personal estate is to be as if no such custom had ever existed. See *Chappell v. Haynes*, 4 Kay & J. 163; 27 L. J., Chanc. 336; *Blunt v. Jack*, 3 Jur., N. S. 195; 26 L. J., Chanc. 148, as to previous law.]

**Attorney.**—No municipal corporation but that of London can appoint an attorney, except under the corporate seal. *Arnold v. Poole*, 4 M. & G. 860; 5 Scott, N. R. 761; 2 D., N. S. 574; 7 Jur. 653; 12 L. J., C. P. 97.

**Water-bailiff.**—There is no custom in London giving the water-bailiff power to cut unlawful nets or seize fish. *Bulbroke v. Goodlove*, 1 W. Bl. 569.

**Sale of hay and straw.**—[19 & 20 Vict. c. 114, prohibits mixing hay or straw with foreign matters fraudulently, to increase the weight, within the city of London, or thirty miles thereof.]

**Coal and wine duties.**—[By 31 & 32 Vict. c. 17, 24 & 25 Vict. c. 42, and 26 & 27 Vict. c. 46, are continued, and the London coal and wine duties are continued and appropriated for a further period of seven years from 1872.]

**Porterage, pilotage, &c.**—The rights of the city of London, and of the parties appointed by them, to the unshipping and porterage of aliens' goods imported into London, are wholly abolished by 3 & 4 Will. 4, c. 66, whether these goods are consigned to British merchants or to aliens resident there. *Collyer v. Stennet*, 5 Scott, N. R. 34; 4 M. & G. 676; 12 L. J., C. P. 73.

The port of London, for the purposes of pilotage, extends to Yantlet creek. *General Steam Navigation Company v. British Colonial Steam Ship Company*, 19 L. T., N. S. 357; 87 L. J., Exch. 194; 3 L. R., Exch. 330; affirmed, 88 L. J., Exch. 97; 4 L. R., Exch. 238—Exch. Cham.

**Oyster-meters.**—The deputy day-meters of the city of London are entitled, by immemorial custom, to the exclusive right, by themselves and their servants, of measuring, shoveling, unloading and delivering all oysters brought in any boat or vessel for sale, along the river Thames, to any place within the limits of the port of London, and to receive a reasonable compensation for so doing; and a jury found that 8s. for every score for the first 100 bushels, and 4s. for every score of bushels of the remainder of a cargo, was a reasonable recompense to them for the labor of shoveling, unloading and delivering out the oysters, exclusive of the sums paid to the corporation of London for metage, under 11 Will. 3, c. 24, s. 7. The meters are not therefore bound to perform in their own persons the manual labor of shoveling, &c., but are bound to provide sufficient men for the purpose, and are liable to an action in default of doing so. *Laybourne v. Crisp*, 4 M. & W. 320; 8 C. & P. 897.

Upon a bill by some against the others of the deputy day oyster-meters having the exclusive right of shoveling, unloading, and delivering oysters within the port of London, for an account and equal apportionment among the meters of the scorage dues received by them, a decree was made, founded on the immemorial existence of the body of meters, which was held to be proved, notwithstanding the meters were originally laborers, and that they habitually described themselves as servants of the corporation of London. *Thompson v. Daniel*, 10 Hare, 296; 17 Jur. 773; 22 L. J., Chanc. 507.

## Lord Chancellor.

**Statutes.**—[By 14 & 15 Vict. c. 83, s. 17, and 15 & 16 Vict. c. 87, s. 16, *net yearly salary is 10,000l.*

By 15 & 16 Vict. c. 80, s. 60, *retiring Lord Chancellor may deliver written judgments within six weeks after resigning the Great Seal.*

**Powers in Scotland.**—The Lord Chancellor, though Chancellor of Great Britain, has only certain statutory powers in Scotland, which are not of a judicial nature. *Stuart v. Bute*, 9 J. L. Cas. 440; *S. C.*, *Stuart v. Moore*, 7 Jur., N. S. 1129; 4 Macq. H. L. Cas. 49.

## Lords' Act.

See PRISONER.

## Lord's Day.

See SUNDAY.

## Lords (House of).

See PARLIAMENT; PEER AND PEERAGE.

## Loss.

See INSURANCE.

## Lost Securities.

See TROVER; BILLS OF EXCHANGE AND PROMISSORY NOTES; MONEY COUNTS.

## Lottery.

**Statutes.**—[6 & 7 Will. 4, c. 66, *prohibits the advertising foreign and other illegal lotteries in England.*

By 9 & 10 Vict. c. 48, *associations for the distribution of works of art by lot are legalized if charters are obtained.*

**What lotteries illegal within the statute.**—A horse-race being about to be run, the plaintiff and one hundred and fifty-four other persons subscribed 12l. apiece, which was deposited with the defendant on the terms that the name of each subscriber should be written on a card, and the name of each of the horses written on another, and then the two sets of cards placed in a box, and the cards should be drawn by chance from each of the boxes, and the person whose name should be drawn next after the name of the winning horse, should be entitled to receive 100l. from the entire fund.—Held, an illegal lottery within 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119. *Allport v. Nutt*, 3 D. & L. 233; 1 C. B. 974; 9 Jur. 900; 14 L. J., C. P. 272. S. P., *Gatty v. Field* 9 Q. B. 431; 10 Jur. 980; 15 L. J., Q. B. 408.

A company consisting of a number of persons subscribing small sums was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended

on the result of a ballot. Quære, whether was illegal as being contrary to the Lottery Acts, or whether it fell within 12 Geo. 2, c. 3, s. 11? *O'Connor v. Bradshaw*, 5 Exch. 2; 20 L. J., Exch. 26.

The programme of an entertainment stated that at its conclusion the proprietor "would distribute among his audience a shower of gold and silver treasures on a scale utterly without parallel, besides a shower of smaller presents, all of which would be impartially divided among the audience and given away." The public was admitted on purchasing tickets, which were not numbered. The seats of the audience were numbered. At the conclusion of the entertainment the proprietor called out a number on a seat, and delivered one of the articles to the person occupying that seat, and in that way distributed all the articles among the audience:—Held, a lottery, within 42 Geo. 3, c. 119, s. 2. *Morris v. Blackman*, 2 H. & C. 912; 10 Jur., N. S. 520.

**Effect upon validity of agreements.**—An agreement to sell and convey land for the purpose of being resold by lottery is in contravention of the 12 Geo. 2, c. 28, and a deed afterwards executed to secure the payment of the price of the land so conveyed is void. *Fisher v. Bridges* (in error), 3 El. & Bl. 642; 1 Jur., N. S. 157; 24 L. J., Q. B. 165; 2 C. L. R. 928—Exch. Chanc.

In an action for money had and received, a plea that the money was the amount of a prize in an illegal lottery held by defendant, and that he paid over the amount to one whom he conceived to be the winner, and who was entitled to receive and retain the money, is bad for duplicity. *Holmes v. Lock*, 1 C. B. 524.

**Indictment; evidence; conviction.**—By 10 & 11 Will. 3, c. 17, s. 1, lotteries are declared to be common and public nuisances; s. 2, which came into operation on a subsequent day, rendered persons keeping lotteries liable to a penalty, to be sued for by information or action. The 42 Geo. 3, c. 119, contains similar enactments with regard to lotteries, called "Little Goes."—Held, on an indictment, containing counts for keeping a lottery, framed upon these statutes, that the counts were good and the offense indictable. *Reg. v. Crawshaw*, Bell C. C. 303; 8 Cox C. C. 375; 30 L. J., Mag. Cas. 58; 9 W. R. 68; 3 L. T., N. S. 510.

C. kept an eating-house, and sold tickets for what was called the Great Eastern Money Club, in respect of which prizes were drawn; and the holders of the tickets, whose numbers were drawn for prizes, received the same, and C. delivered out the prizes to such ticket-holders:—Held, that this evidence was sufficient to support a conviction against him for keeping a lottery, but was not sufficient to support a conviction for keeping a room for betting upon horse-racing, under 16 & 17 Vict. c. 119. *Id.*

**Proceedings for penalties.**—Proceedings for the recovery of penalties, relating to lot-

teries, contrary to 42 Geo. 3, c. 119, must, since the 46 Geo. 3, c. 48, s. 59, be sued for in the name of the attorney-general, and not before magistrates, whether the lotteries are private or state lotteries. *Reg. v. Tuddenham*, 9 D. P. C. 937; 5 Jur. 871—B. C.

The printer of a newspaper, publishing an illegal proposal for gambling in the lottery, incurred a penalty under 22 Geo. 3, c. 47, s. 13. *King q. t. v. Smith*, 4 T. R. 414.

As to prohibition and punishment of illegal gaming,—see GAMING AND WAGERING.

## Luggage.

See CARRIER.

## Lunatic.

- I. INQUISITIONS; COMMISSIONS DE LUNATICO INQUIRENDO, 8688.
- II. CONFINEMENT AND RESTRAINT; ASYLUMS, 8691.
- III. PROPERTY; MAINTENANCE, 8699.
- IV. CONTRACTS AND DEALINGS, 8705.
- V. ACTIONS BY AND AGAINST, 8710.
- VI. COMPETENCY AS WITNESSES. See EVIDENCE.
- VII. TESTAMENTARY CAPACITY. See WILL.
- VIII. MARRIAGE. See HUSBAND AND WIFE.
- IX. PAUPERS. See POOR LAW.
- X. IMPRISONMENT FOR DEBT. See PRISONER.
- XI. CRIMINAL RESPONSIBILITY. See CRIMINAL LAW.

### I. INQUISITIONS; COMMISSIONS DE LUNATICO INQUIRENDO.

**Statutes.**—[16 & 17 Vict. c. 70 (The Lunacy Regulation Act, 1853, see s. 5), regulates the proceedings under a commission of lunacy, and consolidates and amends all acts respecting lunatics so found by inquisition, and their property.

By 17 & 18 Vict. c. 13, s. 2, amending 16 & 17 Vict. c. 70, the Lord Chancellor may empower the committee of the estate of any lunatic to grant leases binding on the issue in tail and remainder-man.

25 & 26 Vict. c. 86 (The Lunacy Regulation Act, 1862), further amends the law of commissions of lunacy, and for visiting lunatics, and charging their property with the costs and debts of their maintainances.]

**Jurisdiction; and when commission may issue.**—When a person had been tried upon a criminal charge, and acquitted on the ground of his insanity, and was thereupon confined in a lunatic asylum under 39 & 40 Geo. 3, c. 94, the Chancellor, upon the application of a creditor, issued a commission of



lunacy, the party being entitled to property of the value of 800*l*. *Pearce, In re*, 8 Jur. 89—C.

A commission of lunacy may issue against an alien. *Bariatski, In re*, 1 Ph. 375; 8 Jur. 157; 13 L. J., Chanc. 69.

A Portuguese gentleman whose domicile was in Portugal, whose property, with a very trifling exception, was in Portugal, and whose wife and only child were residing there, became lunatic in England, and had been so for some years. A petition was presented by his relations in England for an inquiry as to his state of mind. Proceedings in lunacy were at the same time taken in Portugal by his wife, and the Portuguese court issued a request to the English courts to inquire into his state of mind. The wife applied in England to have an inquiry as to the time when the lunacy commenced, it being desired by the Portuguese court that such inquiry should be made in England:—Held, that the 25 & 26 Vict. c. 86, s. 3, does not take away the power of the court to direct such an inquiry where special circumstances render it desirable. *Sotomaior, In re*, 9 L. R., Ch. 677.

Held, that, under the circumstances of the case, such an inquiry ought not to be directed, as it was not required for any purpose of the proceedings in England, and the finding might affect other parties who could not effectually intervene in the inquiry, and yet would probably be treated in Portugal as concluded by it. *Id*.

Upon a petition for inquiry into the alleged lunacy of S., who was resident in Australia, but whose property was wholly situate in England, the court ordered an inquiry before a jury in Middlesex, and gave permission to the petitioners to take proper steps to bring him to England. *Scott, In re*, 22 W. R. 748—L. JJ.

The Chancery Division has jurisdiction to give directions as to the guardianship and maintenance of a person of unsound mind not so found, but will not exercise it unless the property is small and proceedings are not intended to be taken in lunacy. *Vane v. Vane*, 2 L. R., Ch. Div. 124; 45 L. J., Ch. Div. 381; 24 W. R. 603; 34 L. T., N. S. 613—R.

**Proceedings.**—On application to the Lord Chancellor for that purpose by a person found lunatic under a commission, leave to traverse the inquisition is a matter of right. *Cumming, In re*, 1 De G., M. & G. 537; 16 Jur. 483; 21 L. J., Chanc. 753, 758.

A stranger in blood to a lunatic, who is interested under a will made by the lunatic before the commencement of the lunacy, will not be allowed to attend the proceedings in the lunacy. *Scarlett, In re*, 29 L. T., N. S. 232; 21 W. R. 717; 8 L. R., Ch. 739.

According to the practice in lunacy no person except the parties and those claiming under them may as a right inspect the proceedings; other persons claiming the right to do so must make a case for the purpose. *Wood, In re*, 4 De G., J. & S. 134.

Between the presentation of a petition for an inquiry in the case of an alleged lunatic and the official finding, he may be restrained by the court from leaving the jurisdiction, and his property may be protected from any disposition or misuse by which the purpose of the inquiry might be frustrated, but this interference, being provisional, and only allowed as subservient to the investigation, cannot co-exist with an order prohibiting the prosecution of the latter. *Lawler, In re, Walsh, Ex parte*, 8 Ir. R., Eq. 506—Ch. App.

As to proof of insanity,—see this title, IV.

**Costs.**—Costs, properly taxed, of suing out a commission of lunacy, are a debt as against the assets left by a lunatic, although at the death of the lunatic a traverse of the lunacy, leave for which had been obtained upon the lunatic's own application, was pending. *Cumming, In re*, 18 Jur. 181; 23 L. J., Chanc. 261—L. J.

When an inquiry as to the lunacy of a supposed lunatic had been based upon the report of the commissioners in lunacy, and had resulted in his being declared of sound mind, the court ordered the costs of the proceedings in lunacy and of the inquiry to be paid out of the supposed lunatic's estate. *C—, In re*, 10 L. R., Ch. 75; 23 W. R. 377.

On a petition for an inquiry in lunacy, the medical visitor was directed to visit the alleged lunatic, and on his report an inquiry was directed, on which the alleged lunatic was found sane. The petitioner was only a neighbor of the alleged lunatic, and it appeared that he was indemnified by his solicitor against costs. On an application by the petitioner for a payment of his costs out of the estate, and a cross application to charge the petitioner with all the costs:—Held, under the circumstances, that no order should be made as to costs. *S., In re*, 46 L. J., Chanc. Div. 233; 4 L. R., Ch. Div. 301; 35 L. T., N. S. 828; 25 W. R. 133—C. A.

As to allowance of costs out of estate of lunatic,—see this title, III.

**Effect of inquisition; finding, in general.**—Where, to an action against executors on the bond of their testator, they pleaded non est factum, and set up lunacy as a defense at the trial; an inquisition taken under the commission of lunacy against the testator, after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible. *Poulter v. Silk*, 3 Camp. 126—Ellenborough.

On a bill in equity to set aside deeds and recoveries, on the ground of the lunacy of the party at the time he executed them:—Held, that the finding of the jury on an inquisition, which over-reached that period, afforded a presumption that he was then insane; but there being some evidence that, after the time when the lunacy was stated to have commenced, the party was not of unsound mind, an issue was directed to inquire whether

he was of unsound mind at the time of executing the deeds. *French v. Mainwaring*, 2 Beav. 115.

Though the finding of a person's insanity, by an inquisition, upon a commission of lunacy, is not binding on third parties, still it destroys the natural presumption in favor of sanity, and casts the burden of proving the person's sanity on the party alleging it. *Snook v. Wills*, 11 Beav. 105; 12 Jur. 444.

A deed, though over-reached by the finding of an inquisition in lunacy, is not, therefore, necessarily *primâ facie* void. *Jacobs v. Richards*, 18 Beav. 300; 18 Jur. 527; 23 L. J. Chanc. 557.

On a claim by a vendor for specific performance by the vendee, found by inquisition to have been lunatic at the time of the contract, a court of equity declared the contract to have been null and void, and ordered the residue of the deposit, after deducting the vendor's costs, charges and expenses, to be repaid to the committee of the lunatic's estate. *Frost v. Bravan*, 17 Jur. 360; 22 L. J., Chanc. 638—Wood, V. C.

An inquisition finding a person lunatic is *primâ facie* evidence of insanity, but where leave has been granted to traverse the same, this, in part, rebuts the evidence, and entitles a creditor to an issue to try the question of the party's sanity on a day on which a deed, subsequent to the finding, and objected to as invalid by reason of insanity, has been executed by the lunatic. *Elliott v. Ince*, 3 Jur., N. S. 597; 20 L. J., Chanc. 881; 7 De G., M. & G. 475.

— of foreign inquisitions.]—A person found a lunatic by a competent jurisdiction in a foreign country, may be considered a lunatic in England. *Gillam, Ex parte*, 2 Ves. jun. 588.

As to rights of curators appointed by foreign courts,—see this title, III.

**Superseding commission.**—The Lord Chancellor will not in general supersede a commission of lunacy after verdict without seeing the lunatic. *Gordon, In re*, 2 Ph. 242.

The court never supersedes a commission without the clearest evidence of the lunatic's restoration to soundness of mind; and, ordinarily, it is the practice and the duty of the court to satisfy itself in this respect by a personal examination of him. *Id.*

## II. CONFINEMENT AND RESTRAINT; ASYLUMS.

### Right to restrain lunatics, when dangerous.]

—Any man may justify an assault, when it is to restrain the fury of a lunatic and prevent mischief. *Brookshaw v. Hopkins*, Loft, 243.

At common law a medical man may justify measures necessary to restrain a dangerous lunatic. So also, if he is called in to attend a person suffering under delirium tremens, he may justify such measures as are reasonably necessary, either to cure him or to restrain him from doing mischief, so long as the fit

lasts, or it is likely to return. *Scott v. Wakem*, 3 F. & F. 328—Bramwell.

In an action against two medical men, for having, with other persons, unlawfully entered the house of the plaintiff, and assaulted and imprisoned her therein, they pleading only not guilty, and leave and license; and the case being that she had called them both in as her medical attendants, and had asked them to send a nurse, and that they, at the desire of her friends, sent not only a female nurse, but also a male attendant, who were both engaged by the plaintiff's friends, but to whom the defendants gave directions, and against whom the plaintiff alleged certain acts of violent restraint and coercion; the defense being that she was suffering under delirium tremens, and that there was no more restraint than necessary as a part of medical treatment:—Held, that if this was so, even assuming that the defendants were responsible for the acts of the attendants, there was a justification in law, had it been so pleaded. *Symm v. Fraser*, 3 F. & F. 859—Cockburn.

By an act regulating the relief and employment of the poor of a parish, and for other local purposes, it was enacted, that no action should be commenced against any person for anything done in pursuance of that act, until after twenty-one days' notice. In an action against parish officers appointed under the act, for imprisoning a party in the workhouse upon a supposition that he was in a dangerous state of insanity:—Held, that they, not having pursued the course pointed out to parish officers by 9 Geo. 4, c. 40, with regard to pauper lunatics, and therefore not being protected by that statute, were not entitled to notice of action under the local act. *Eliot v. Allen*, 1 C. B. 18.

— under medical certificates.]—A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody, and confine him, unless he is satisfied, from those statements, that such a step is necessary to prevent some immediate injury from being done by the individual, either to himself or to other persons. *Anderdon v. Burrows*, 4 C. & P. 210—Tenterden. See 5 Vict. c. 4, s. 3.

To an action for imprisonment of the plaintiff, a plea, that he conducted himself as a person of unsound mind, and incompetent to take care of himself, and proper to be taken charge of and detained under due care and treatment; that two medical certificates had been given by persons authorized, according to the provisions of the 8 & 9 Vict. c. 100, and 16 & 17 Vict. c. 93, certifying that he was of unsound mind and proper to be taken charge of and detained; that the defendant had notice of the certificates, and had reasonable and probable grounds for believing, and did believe them to be true; and that the plaintiff was of unsound mind; and that the defendant, being his uncle, and a proper person to cause him to be taken in charge and



detained, did for the causes aforesaid, cause him to be taken charge of and detained as a person of unsound mind, is a bad plea, inasmuch as, at common law, the defendant would be justified only if the plaintiff was actually insane at the time, which the plea did not allege, and the protection given by 8 & 9 Vict. c. 100, s. 99, to parties duly and bona fide acting under certificates and an order for confinement, does not extend to the party making the order. *Fletcher v. Fletcher*, 1 El. & El. 420; 5 Jur., N. S. 678; 28 L. J., Q. B. 184.

Even assuming that a person is of sound mind when conveyed, under proper authority, to a lunatic asylum, it would not be illegal on the part of the keepers of the asylum to detain him until they had proper authority for his discharge. *Mackintosh v. Smith*, 4 Macq. H. L. Cas. 918.

A medical man, who has merely signed a certificate, and has done nothing more towards causing the confinement of a lunatic, is not liable in trespass. Nor, if he has merely consulted another medical man who has signed the other certificate, and told him his own idea of the case, is he liable for causing the other to sign such certificate. But if he signs such a certificate without taking due care and making due inquiries, he is liable for the consequences which ensue. And if on his own personal examination he is not satisfied, he is bound to make due inquiries. Nor is he the less liable for the want of such due care and inquiries because he has acted bona fide. *Hall v. Semple*, 8 F. & F. 337—Crompton.

The prohibition in 8 & 9 Vict. c. 100, s. 45, as to receiving insane persons into licensed houses or hospitals without such medical certificate as the act requires, is not general, but relates only to the keepers of licensed houses; the confinement of lunatics in all other cases being left as it was at common law. *Shuttleworth, In re*, 9 Q. B. 651; 2 New Sess. Cas. 470; 11 Jur. 41; 16 L. J., M. C. 18.

An indictment charged that a surgeon, knowingly, and with intention to deceive, signed a certificate required by 9 Geo. 4, c. 41, s. 30, without having visited and personally examined the patient, contrary to the statute: the jury negatived the intention to deceive, and found him guilty:—Held, that in the description of the offense the averment of intention was surplusage, and that such unnecessary matter might be rejected, as well in an indictment on a penal statute as at common law. *Rez v. Jones*, 2 B. & Ad. 611.

The 16 & 17 Vict. c. 96, s. 4, which enacts that no person (not a pauper) is to be received as a lunatic into any licensed house or hospital without the medical certificate according to the form in schedule A, No. 2, of two persons, being physicians, surgeons or apothecaries, is not merely directory, but compulsory. *Greenwood, Ex parte*, 1 Jur., N. S. 522; 24 L. J., Q. B. 148—B. C.—Coleridge.

It appeared upon return to a habeas corpus, that the certificates, under which a person had

been received into a private asylum as a lunatic, omitted to state the name of the street and the number of the house where the examination took place, in accordance with the form in schedule A, No. 2; and it further appeared by affidavit, that the examination did in fact take place in a house in a street, and that the alleged lunatic was not dangerous either to the public or himself:—Held, that the certificates were defective in a material particular, and the lunatic was ordered to be discharged from custody. *Ib.*

—under orders of confinement.]—In justification for the detention or recapture by the proprietor or superintendent of a licensed house or registered hospital, or other authorized person, of a person who has been received into such asylum under an order, and certificates required by 8 & 9 Vict. c. 100, it is not necessary to aver that such person is a lunatic, as s. 99 affords a complete defense for such detention or recapture. *Norris v. Seal*, 3 Exch. 782; 13 Jur. 830; 18 L. J., Exch. 300.

Such order and certificates are equally a justification for taking a wife from her husband. *Ib.*

The clergyman of a parish in which a lunatic is living, who has had opportunities of observing his conduct, is competent to issue an order under 8 & 9 Vict. c. 100, s. 45, for his admission into an asylum and detention there. *Shuttleworth, In re*, 2 New Sess. Cas. 470; 9 Q. B. 651; 11 Jur. 41; 16 L. J., M. C. 18.

In such an order, it is not imperative that all the particulars enumerated in the appendix, schedule B, to the form of the order for receiving a lunatic into an asylum, should be set out, if the act is substantially complied with. *Ib.*

The form of a medical certificate given in schedule C is directory only, and an equivalent will suffice. *Ib.*

A general statement in a certificate that a lunatic "labors under delusions of various kinds, and is dirty and indecent in the extreme," is a sufficient statement, within s. 16, of the fact from which a medical man forms his opinion of existing insanity; so also is his statement that he forms his opinions from conversations with the lunatic, without describing their purport. *Ib.*

A return to a habeas corpus, directing a keeper of a lunatic asylum to bring up the body of R. F., certified that he was, on a certain day, received under 2 & 3 Will. 4, c. 107, and that, on the day and year aforesaid, the keeper received an order and medical certificates, in the form directed by that act (setting them out). It then further certified, that, on the 22d of November, 1845, an order and two medical certificates, under 8 & 9 Vict. c. 100 (setting them out), were delivered to the keeper, and concluded, "that R. F. is now detained under our custody, under and by virtue of the last-mentioned act of parliament:"—Held, that the return was sufficient under 2 & 3 Will. 4, c. 107, as it



ufficiently appeared that the order and certificates returned were received at the same time with the lunatic, and that they were those under which he was received. *Fell, In re*, 3 D. & L. 373; 15 L. J., M. C. 25—B. C.—Paiteson.

The 8 & 9 Vict. c. 100, s. 1, which repeals the 2 & 3 Will. 4, c. 107, leaves orders made under the latter act so far valid as to amount to a justification of a detainer in an asylum. *Id.*

**Proceedings for release by habeas corpus.]**

—A person may be discharged from a madhouse by habeas corpus. *Re v. Turlington*, 2 Burr. 1115.

But where it appeared that a person confined was a lunatic, and not fit to be produced in court, and that the relations were applying for a commission of lunacy, the court enlarged the time for making a return to a habeas corpus, directed to a keeper of a private madhouse. *Re v. Clarke*, 3 Burr. 1362.

If an alleged lunatic is detained under an improper or invalid certificate, he will be discharged on a writ of habeas corpus, on the ground that the detention is illegal, unless it is shown that it would be injurious to himself or others to set him at liberty. *Greenwood, Ex parte*, 1 Jur., N. S. 522; 24 L. J., Q. B. 148—B. C.—Coleridge.

A rule having been obtained for a habeas corpus to bring up a lunatic confined in an asylum in England under Irish medical certificates, the court discharged the rule with costs, there being no evidence to show that the party promoting the application was duly authorized by the lunatic. *Child, Ex parte*, 15 C. B. 238.

A lunatic might be brought up by habeas corpus from St. Luke's Hospital, to be surrendered in discharge of his bail. *Pilloy v. Sexton*, 3 B. & P. 550.

**Acts of persons under restraint.]**—A deed was set aside as obtained by fraud and undue influence, by a keeper of a house for lunatics, from a person under his care, as within the general principle arising from the relation of guardian and ward, attorney and client. *Wright v. Proud*, 13 Ves. 138.

The jurat of an affidavit sworn by a person suffering from monomania, and confined in a lunatic asylum, should state the fact that it was sworn in an asylum, otherwise it is irregular, and will be taken off the file. *Sprittle v. Walton*, 40 L. J., Chanc. 308—V. C. B.

Before the evidence of a lunatic, subject to insane hallucinations, can be received, there must be an inquiry as to his mental condition. *Id.*

As to competency of insane person to testify,—see EVIDENCE.

**Licensing and regulation of private asylums.]**—[8 & 9 Vict. c. 100, amended by 10 & 17 Vict. c. 96, 18 & 19 Vict. c. 105, ss. 15, 16, 17, and by 25 & 26 Vict. c. 111, regulates the licensing and visiting houses for the reception,

care, confinement and treatment of lunatics, not being paupers, in England.]

Before 14 Geo. 3, c. 40, s. 1, private madhouses were not authorized by law, but the keepers were excused in their conduct when it was exercised properly. *Re v. Coate*, Loft, 73, 78.

A person put to superintend an unlicensed house for the reception of lunatics was liable to the penalties of that statute, though he did not receive any of the profits of the establishment. *Budd v. Houlks*, 3 Camp. 404—Ellenborough.

The 8 & 9 Vict. c. 100, requires every person receiving a single lunatic into his or her care to obtain and transmit to the lunacy commissioners certain orders and certificates, which are upon receipt at their office entered and filed. In the books in which the receipt of such orders and certificates was entered, no notice was found of any such having been received from the defendant. Notice was given to him to produce any orders or certificates he might have received, entitling him to take charge of the alleged lunatic:—Held, that although, as a general rule, a defendant must have his guilt proved, and not be called upon to establish his innocence, yet, seeing that the proof was in the nature of a negative proof, and that, if he had received the documents and not transmitted them they would be in his possession, and that after notice to produce them had been given he had not produced them, there was a sufficient case to go to the jury. *Reg. v. Harris*, 10 Cox C. C. 541—Channell.

C. was placed in the house of a medical man as an invalid; the house not being licensed or registered for the reception of lunatic patients. C.'s mind was quite imbecile, and he allowed himself to be kept in a state of revolting filthiness; but it did not appear that he labored under any delusion or mental aberration, nor was he subject to fits of frenzy or violence:—Held, that he was a lunatic within the meaning of 8 & 9 Vict. c. 100, s. 90, and that the medical man was liable to the charge of receiving C. to board and lodge in an unlicensed house. *Reg. v. Shavo*, 18 L. T., N. S. 583; 16 W. R. 913; 37 L. J., M. C. 112; 11 Cox, C. C. 109—C. C. R.

**Regulation of public or pauper asylums.]**—

[16 & 17 Vict. c. 97, "The Lunatic Asylums Act, 1853" (s. 136), amended by 18 & 19 Vict. c. 105, 19 & 20 Vict. c. 87, 24 & 25 Vict. c. 55, ss. 6 and 7, 25 & 26 Vict. c. 111, 28 & 27 Vict. c. 110, s. 1, and by 28 & 29 Vict. c. 80, "The Lunacy Amendment Act, 1865," consolidates the laws regulating the building of lunatic asylums for counties and boroughs, and the maintenance and care of pauper lunatics, in England, and repeals 8 & 9 Vict. c. 126, 9 & 10 Vict. c. 84, and 10 & 11 Vict. c. 43.]

In an action against the clerk to a committee of justices appointed to superintend the erecting of lunatic asylums, the declaration stated an agreement between the plaintiff

iff (an architect) and the committee, by which, in consideration that he would render his services as an architect in examining the site of a proposed pauper lunatic asylum, and preparing the requisite probationary drawings for the approval of the committee, and all other drawings required to be submitted to the commissioners in lunacy, and afterwards to the secretary of state, according to 8 & 9 Vict. c. 123, and subsequently would prepare the whole of the working drawings, estimates and specifications for the asylum, the committee agreed with him that 437*l.* 10*s.* should be paid to him. The declaration averred that he rendered his services, and prepared the requisite probationary drawings for the approval of the committee, and had always been ready to prepare all other drawings required to be submitted to the commissioners, and afterwards to the secretary of state; and alleged, as a breach, that the committee would not permit him to proceed to complete the agreement, and wrongfully discharged him from performance. The defendant pleaded that a reasonable time had elapsed within which the plaintiff might have prepared the requisite probationary drawings for the approval of the committee; that he prepared drawings for the approval of the committee, which were not approved of by them, but, on the contrary, were disapproved of and rejected by them:—Held, that the plea was an answer to the action, as the contract, construed with reference to the duty of the committee, under 8 & 9 Vict. c. 123, meant that the plaintiff should prepare such probationary drawings as the committee should approve of, and that the plaintiff, having failed in obtaining such approval, had no cause of action. *Moffatt v. Dickson*, 13 C. B. 543; 17 Jur. 1009; 23 L. J., C. P. 265.

By 8 & 9 Vict. c. 123, s. 17, a select number of justices for a county or borough, called the committee of visitors, was empowered to contract for plans for the erection of a lunatic asylum for the county, and, by s. 16, they were enabled to sue and be sued in the name of their clerk:—Held, that an action might be maintained against the committee of visitors in the name of their clerk, in respect of a contract so entered into by them, although the plaintiff might have no means of enforcing his judgment when obtained. *Kenull v. King*, 17 C. B. 483; 25 L. J., C. P. 132.

The committee of a lunatic asylum appropriated for their chaplain a residence on ground purchased since the passing of the 16 & 17 Vict. c. 97, but detached from the asylum buildings; and appropriated for their medical superintendent a house, reasonably fit for a person in his station of life, and his family, being on land purchased when the asylum was first erected, adjoining to it, but not being within the curtilage, and he discharged a portion of his official duties in that house:—Held, that the chaplain was rateable to the relief of the poor like any other occupant; but that, by force of s. 35, the medical superintendent was liable to be rated only

according to the value or rent of the land at the time it was purchased. *Congree v. Upton (Overseers)*, 4 B. & S. 857; 10 Jur., N. S. 538; 13 W. R. 403.

A contract for the sale of land to the committee of visitors of a lunatic asylum may be approved of by the court of quarter sessions before being actually signed by the parties, if it can be identified as the contract which was afterwards entered into. *Deenish v. Brown*, 2 Jur., N. S. 1043; 26 L. J., Chanc. 23—V. C. W.

The 16 & 17 Vict. c. 97, s. 36, incorporating the Lands Clauses Act, 1845, with respect to the purchase money or compensation coming to parties having limited interests, enables parties having limited interests to contract with the committee of visitors for the sale of land, although the committee of visitors has no compulsory powers of purchasing. *Ib.*

A county lunatic asylum, built upon land acquired under 8 & 9 Vict. c. 123, and 16 & 17 Vict. c. 97, consisted of buildings and of land, twenty acres of which were laid out as a garden, and thirty acres were under cultivation as a farm. The farm and garden were cultivated by gardeners, who were part of the establishment, assisted by the patients, and the result was a source of profit arising from the sale of produce not required for the establishment. The committee of visitors, acting under the powers contained in 16 & 17 Vict. c. 97, ss. 42, 43, admitted other pauper lunatics than those belonging to their county, and also private lunatics, thereby realizing considerable profit:—Held, first, that this was an asylum within 16 & 17 Vict. c. 97, s. 35, and therefore rateable only at the value at which the land was assessed at the time of the purchase. *Reg. v. Fulbourn (Overseers)*, 6 B. & S. 451; 11 Jur., N. S. 620; 34 L. J., M. C. 106; 13 W. R. 713; 12 L. T., N. S. 344.

Held, secondly, that the building and land were used for the purposes of an asylum within s. 35, the primary object of the farm and garden being the sanitary occupation of the patients with a view to their cure. *Ib.*

Held, thirdly, that the committee of visitors was not rateable in respect of the profits. *Ib.*

By 9 Geo. 4, c. 40, ss. 30 & 32, the visiting justices have the power of appointing and dismissing the chaplain of the asylum. *Reg. v. Middlesex Lunatic Asylum (Justices)*, 2 G. & D. 300; 2 Q. B. 433; 6 Jur. 682.

**Punishment of ill-treatment or neglect.**—[By 16 & 17 Vict. c. 96, s. 9, if any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse, or ill-treat, or wilfully neglect any patient in such hospital or house, or such single patient, or if any person detaining, or taking or having the care or charge, concerned or taking part in the custody, care, or treatment of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged

**Lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offense, or to forfeit for every such offense, on a summary conviction thereof before two justices, any sum not exceeding 20l.]**

A husband having the care and charge of his wife, is not a person having the care or charge of a lunatic within this statute, the provisions of which do not apply to persons whose care or charge of a lunatic is purely of a domestic nature. *Reg. v. Rundle, Dears. C. C. 482; 1 Jur., N. S. 430; 24 L. J., M. C. 129.*

But when a person took upon himself, and had the care and charge of a lunatic brother, and he was indicted and convicted of willfully neglecting the lunatic:—Held, that, notwithstanding the relationship between himself and the lunatic, he was a person having the care or charge of a lunatic within the meaning of the statute, and therefore might be convicted of the misdemeanor. *Reg. v. Porter, L. & C. 394; 10 Jur., N. S. 547; 33 L. J., M. C. 126.*

**Malicious proceedings in lunacy.]**—To sustain an action for a conspiracy in issuing a commission of lunacy, malice and a want of probable cause must be proved; but on proof of a total want of probable cause, malice may be implied; and although express malice is proved, some slight evidence of a want of probable cause must be given. *Turner v. Turaer, Gow, 50.*

### III. PROPERTY; MAINTENANCE.

**Powers of committee to deal with property of lunatic; sales, leases, settlements and other dispositions of such property.]**—The committee of a lunatic cannot, without statutory authority, make a lease of the lunatic's lands, and if he does, cannot bring an action of covenant on such lease. *Knipe v. Palmer, 2 Wils. 130.*

Where a committee of a lunatic, against whom judgment had been obtained but not duly docketed, paid over rents to a mortgagee of a date subsequent to the judgment:—Held, that he was not liable as for money had and received to the use of one who claimed as tenant by elegit under the judgment; for it was his first duty as committee to keep down the interest on the mortgage. *Braithwaite v. Watts, 2 Tyr. 293; 2 C. & J. 818.*

An action was brought by the agent of the committee of a lunatic against an auctioneer, for moneys come to his hands, part of the lunatic's estate; the auctioneer pleaded that he had paid some of these moneys, by the order of the committee's agent, for the use of the lunatic. The fact of such payment, in manner pleaded, was disputed:—Held, that the principal question was the question of fact, whether the plea could be proved or not; that without deciding whether the plea, if proved, afforded either a legal or an equitable defense, a court of equity would not (having regard to the 17 & 18 Vict. c. 125), restrain the action.

*Farebrother v. Welchman, 8 Drew. 122; 24 L. J., Chanc. 410. See 1 Jur., N. S. 120.*

A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the master in lunacy applied for, but the tenant was let into possession, and expended a considerable sum in repairs and in improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by petition to have the terms of his arrangement with the agent carried into effect:—Held, that the court had jurisdiction to make an order giving effect to that arrangement. *Wynne, In re, 7 L. R., Ch. 229; 20 W. R. 848; 26 L. T., N. S. 406.*

The Lunacy Regulation Acts of 1853 and 1862 contain no machinery by means of which a conveyance of the legal estate of a married woman of unsound mind in freehold property can be obtained; and in a case where this was sought, an order was made simply directing a sale, and declaring all beneficial interest of the married woman bound by the order. *Stables, In re, 4 De G., J. & S. 257.*

Under the 16 & 17 Vict. c. 70, ss. 124 and 125, a married co-heiress of a deceased insane lunatic can consent in court to the payment of her share of the proceeds of the lunatic's real estate to her husband, and an acknowledged deed is unnecessary. *Wheeler, In re, 4 De G., F. & J. 540.*

A gentleman made a settlement of nearly the whole of his property in trust for himself for life, and then for four of his five children and their issue. About two years afterwards he was found lunatic. A son who took no benefit under the settlement desired to have it impeached, and adduced evidence showing that there was reasonable ground for contending that the settlor was of unsound mind when he executed it. The income of the lunatic was amply sufficient for his wants:—Held, that no proceedings ought to be directed at the expense of the lunatic's estate, but that the excluded son ought to be allowed to file a bill, as next friend of the lunatic, without giving security for costs, to impeach the settlement. *Gordon, In re, 10 L. R., Ch. 192; 44 L. J., Chanc. 208; 23 W. R. 760; 32 L. T., N. S. 348.*

A., B. and C. were tenants in common in fee of land. C. became of unsound mind. A. and B. sold part of the land, and conveyed their shares to a purchaser. They also granted a lease of the minerals under other parts, and demised their shares to the lessee, in consideration of a gross sum of money payable by installments, called in the lease rent, within a limited time. In both deeds they covenanted that C. should concur, and that they would hold her share of the moneys payable in trust for her. B. afterwards became also of unsound mind, and A. sold other parts of the land, and granted leases of minerals under other parts for a like consideration, covenant-



ing in like manner that B. and C. should concur, and that he would hold their shares of the moneys payable in trust for them. B. and C. were both found lunatic by inquisition; and the court confirmed the sales and leases, and ordered the committee to execute the deeds. C. died, leaving B. her heir-at-law and sole next of kin. Afterwards B. died also:—Held, that the leases were in the nature of absolute sales of portions of the real estate; that the confirmation of the sales and leases were sales under the Lunacy Regulation Act, 1853, s. 124, and that as between the real and personal representatives of B. the proceeds both of the sales and the leases effected after B. became of unsound mind belonged to her heir-at-law as real estate. *Smith, In re*, 10 L. R., Ch. 79; 23 W. R. 297.

Held, also, that as to the shares both of B. and C. in the proceeds of the sale and lease in which B. concurred, they were converted into personalty, and belonged to B.'s next of kin. *Ib.*

A lunatic was tenant for life of real estates, including the advowson of a rectory. A lease of this property had been granted by order of the court for ninety-nine years, if the lunatic should so long live. This lease had become vested in a person who was also first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was over eighty years of age, and had never had any issue. The first tenant in tail in remainder, wishing to sell the next presentation to the rectory, presented a petition praying the court, as protector of the settlement, to consent to the barring of the entail of the advowson:—Held, that the court ought not to interfere, as the application was not made for the benefit of the lunatic's estate. *Thorp or Tharp, In re*, 35 L. T., N. S. 293; 3 L. R., Ch. Div. 59—C. A.

When land belonging to a lunatic has been taken by a railway company under its statutory powers, the court will, on the petition of the committee and next of kin of the lunatic, order the purchase-money to be invested and carried to the account of the lunatic and the company, without its first being paid into court under the Lands Clauses Act, 1845, s. 69. *Milnes, In re*, 34 L. T., N. S. 46; 1 L. R., Ch. Div. 28—C. A.

Such a petition should be entitled not only in the Lunacy, but also in the Chancery Division of the High Court. *Ib.*

A lunatic was tenant in tail of an estate, subject to a charge for portions. In a suit in the Court of Chancery a decree had been made ordering the charge to be raised by a sale or mortgage of the estate. On a petition by the committee, asking that he might execute a disentailing deed on behalf of the lunatic for the purpose of raising the charge by a mortgage:—Held, that the interest of the remainder-man ought not to be barred further than was necessary, and that the mortgage should be made for a term of years, and without a power of sale. *Pares, In re*, 2 L. R., Ch. Div. 61—C. A.

The court will not make an order in the nature of a stop-order on the estate of a lunatic in favor of an assignee of the next of kin. *Wilkinson, In re*, 10 L. R., Ch. 73; 44 L. J., Chanc. 328; 23 W. R. 51.

**Allowance for maintenance out of property of lunatic.**—The word "property" in the Lunacy Regulation Act, 1862, 25 & 26 Vict. c. 86, s. 12, which empowers the lord chancellor to make a summary order for rendering the property of an alleged lunatic available for maintenance, where such property does not exceed 1,000*l.*, means beneficial property, or property clear of debt; and where this did not satisfactorily appear to be a case, a reference was directed to the master in lunacy to inquire whether the fact was as stated, and also whether a proposed compromise affecting part of the property was proper to be carried into effect. *Adams, In re*, 4 De G., J. & S. 182.

When a person of unsound mind, not found lunatic by inquisition, had been maintained in a lunatic asylum by his parish, the whole of the capital of a fund belonging to him, which had been paid into court under the Trustee Relief Act, was ordered to be applied, so far as it would extend, in discharge of the past charges of the parish for maintenance. *Phelps, In re*, 28 L. T., N. S. 350—V. C. M.

Payment of a sum of money for the maintenance of a lunatic in the asylum where he was lodged was ordered, although it had been ascertained since the date of the master's report that his estate would be insolvent. *Leese, In re*, 19 W. R. 963—C.

A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1838 to 1859, at a total expense of more than 700*l.* The brothers having suffered losses in trade, and being unable further to support her, she was kept in a county asylum, at the expense of the county, from 1859 to 1871, the total expense exceeding 300*l.* In 1871, a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers undertaking to maintain her in future. *Gibson, In re*, 7 L. R., Ch. 52; 25 L. T., N. S. 551; 20 W. R. 107.

Accrued and future dividends of a fund settled on a married woman for her life for her separate use, without power of anticipation, were ordered to be paid to the officer charged with the care of lunatics in the colony of Victoria, to provide for her past and future maintenance as a pauper lunatic in a colony. *Baker, In re*, 41 L. J., Chanc. 162; 13 L. R., Eq. 168; 20 W. R. 325; 25 L. T., N. S. 783—V. C. W.

A person died lunatic and intestate, having been maintained since 1862 in the county lunatic asylum at the cost of the Totnes Union; he was nevertheless entitled to 440*l.* His only next of kin was a lunatic sister:—

The court granted administration to the nominee of the guardians of the Totnes Union, as being creditors under 12 & 13 Vict. c. 103, s. 10, the grant to be for the use and benefit of the lunatic sister during her lunacy. *Windett v. Sharland, Sharland, In goods of*, 20 W. R. 211—P.

On the petition of a person of weak mind, by his mother as next friend, who was entitled to 838*l.* 15*s.* 9*d.* consols, the court ordered the dividends to be paid to the next friend, to be applied in his maintenance. *Perry, In re*, 31 L. T., N. S. 775—V. C. B.

Where there are two funds, both of them applicable to the maintenance of a lunatic, under the management of the Court of Chancery, to one of which the lunatic would be absolutely entitled as her own property, the other of which, so far as she might not benefit by it, would pass away to different persons, the court might direct her maintenance to be provided for out of the latter fund. But where such latter fund is provided by a will which vests the fund in trustees, and gives them an absolute discretion and "uncontrollable authority" over its application, the court will not exercise its ordinary power. The fund so specially provided will be left to the exercise, bona fide, of the discretion of the trustees. *Gisborne v. Gisborne*, 2 L. R., App. Cas. 300—H. L.; affirming *S. C.*, 32 L. T., N. S. 40; 23 W. R. 410; which reversed the decision of Hall, V. C., 31 L. T., N. S. 472; 23 W. R. 151.

A testator (whose wife had, in her own right, property which was not referred to in his will) devised his real and personal estates to trustees upon various trusts, one of which was that "my trustees in their discretion, and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income of my real and personal estate and investments, as they shall think expedient, to or for the clothing, board, &c., for the personal and peculiar benefit and comfort of my dear wife." One of the trustees was the testator's brother, and he was made the residuary legatee.—Held, that the trustees were entitled to exercise an absolute discretion in the application of the fund thus provided by the will. *Id.*

**Improvements of lunatic's estate.]—**Repairs and permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in court a sufficient fund of personalty to which the lunatic was absolutely entitled, and his income was much more than sufficient for his requirements. The amount required for repairs and improvements was ordered to be raised by mortgage or charge of the settled estate. *Gist, In re*, 5 L. R., Ch. Div. 881; 26 W. R. 22—C. A.

**Payment of costs of legal proceedings regarding the estate.]—**A lunatic, so found by inquisition, had made two wills before the finding. Upon the petition of the committee of the estate, it was ordered that such costs as

the master should think proper, of a suit to perpetuate testimony as to the wills, should be paid out of the lunatic's estate, the suit being instituted with the approbation of the master. *Taylor, In re*, 19 W. R. 462—L. J.

A trustee having advanced money on mortgage became lunatic. Upon redemption of the estate and a petition to appoint a person to reconvey, it appearing that the mortgagor had no knowledge that the money was trust money, the costs of the application were ordered to be paid out of the trust estate. *Jones, In re*, 45 L. J., Chanc. Div. 688; 24 W. R. 377; 34 L. T., N. S. 470; 1 L. R., Ch. Div. 70—C. A.

**Gifts, subscriptions to charities, &c.]—**Weekly allowances were ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. *Frost, In re*, 5 L. R., Ch. 609; 39 L. J., Chanc. 808; 18 W. R. 986; 23 L. T., N. S. 233.

A lunatic was tenant for life of seventy houses in London, situate in the same neighborhood, and producing a gross rental of 2,410*l.* His surplus income, after providing him with every comfort, was about 900*l.* a year. Three of the houses were sold to a church building committee as a site for a church to a new district parish, and the incumbent and the church committee solicited subscriptions for building the church and parochial schools in connection with it. Leave was given to the committee of the estate, who was also heiress-at-law and sole next of kin, to contribute out of the lunatic's income 250*l.* towards building the church, and a like sum for the schools. *Strickland, In re*, 6 L. R., Ch. 226; 24 L. T., N. S. 530; 19 W. R. 515.

**Appointment of new trustees in place of trustee become insane.]—**The lords justices sitting in lunacy have jurisdiction, under the trustee acts, to appoint a new trustee of a creditors' deed registered under the Bankruptcy Act, 1861, in the place of a trustee who has become of unsound mind. *Donisthorpe, In re, Thompson, In re*, 44 L. J., Chanc. 536.

A petition for the appointment of new trustees, and a vesting order, where the trust estate has become vested in a lunatic who has not been properly appointed a trustee, should be presented in lunacy as well as in chancery. *Mason, In re*, 44 L. J., Chanc. 678.

Where a new trustee of a settlement had been appointed in the place of a trustee who had become of unsound mind, a petition for an order appointing the new trustee by the court and vesting the real estate, and the right to call for a transfer of the personal property in the new trustee, together with the continuing trustee, was directed by the court to be entitled in Chancery as well as in Lunacy. *Pearson, In re*, 46 L. J., Chanc. Div. 670; 37 L. T., N. S. 290—C. A.



The surviving trustee of property, consisting partly of land in Ireland, having become lunatic, an order was made, upon a petition instituted both in Lunacy and in the Chancery division, appointing new trustees and vesting the Irish land in them. *Lamotte, In re*, 4 L. R., Ch. Div. 325; 25 W. R. 149; 30 L. T., N. S. 231—C. A.

**Rights and powers of curator appointed by foreign court.**—Where a creditor had been found lunatic in Scotland, and a curator bonorum appointed there:—Held, that such curator bonorum had alone a right to sue and give discharges for personal estate of the lunatic in England. *Scott v. Beniley*, 1 Kay & J. 281; 1 Jur., N. S. 304; 24 L. J., Chanc. 244.

An Englishman while resident in France was found a lunatic by the law of that country, and a curator bonis was appointed by the French court. The fund in England to which the lunatic became entitled was paid into court under the Trustees Relief Act:—Held, upon petition by the curator bonis for payment of the fund to him as a matter of right, that the court could exercise a discretion; and it appearing that the lunatic was sufficiently provided for, an order was made for retaining the corpus of the fund in court, and the payment of the dividends only to the curator. *Gurnier, In re*, 13 L. R., Eq. 532; 41 L. J., Chanc. 419; 20 W. R. 298—V. C. M.

On the petition of a curator ad bona, appointed by a foreign court to administer the estate of a lunatic, to have transferred to him as such curator the share of the lunatic in the proceeds of real estate in England sold in a partition suit by direction of the court:—Held, that, as the fund retained its character of realty, the curator was not entitled to call for a transfer thereof. *Grimwood v. Bartels*, 25 W. R. 843; 46 L. J., Chanc. Div. 788—V. C. H.

#### IV. CONTRACTS AND DEALINGS.

**Validity, in general.**—Unsoundness of mind will not vacate a contract if unknown to the other contracting party, and no advantage was taken of the lunatic, especially where the contract is executed in whole or in part, so that the parties cannot be restored to their original position. *Molton v. Camroux (in error)*, 4 Exch. 17; 18 L. J., Exch. 856—Exch. Chanc.; S. C. in court below, 2 Exch. 487; 12 Jur. 800; 18 L. J., Exch. 68, affirmed.

Therefore, where a lunatic purchased annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of human affairs, and fair and bona fide on the part of the society:—Held, that, after the death of the lunatic, his personal representatives could not recover from the society the premiums paid for the annuities. *Id.*

A. kept cash with B., a banker, and the balances to his credit were stated from time to time in a passbook. A. became a lunatic, but the account continued to be kept with his family, and in the passbook, the entries in which were in B.'s handwriting, a balance was stated to the credit of A.:—Held, that this was not evidence to support an account stated with A., in an action brought by his representative against B. to recover the amount of such balance. *Tarbut v. Bispham*, 2 M. & W. 2.

The plaintiff contracted to purchase an estate from the defendant, and paid a deposit, on the terms that unless he objected to the title within a certain time, the same should be considered as accepted. No objection was made by him to the title. The plaintiff, at the time of the contract, and of the payment of the deposit, was a lunatic, incapable of understanding the meaning of a contract or of managing his affairs, and derived no benefit from the contract, but these facts were unknown to the defendant, who made the contract with him fairly and bona fide, believing him capable of understanding the same:—Held, that as the contract was entered into by the defendant, and the money received fairly and in good faith and without knowledge of the lunacy, and, so far as concerned the deposit, the transaction was completely executed, the plaintiff was not entitled to a return of the money so deposited. *Beavan v. McDonnell*, 9 Exch. 309; 23 L. J., Exch. 94; 2 C. L. R. 474.

The insanity of a mortgagor at the date of the mortgage will not annul the right of a mortgagee to a foreclosure decree in equity, unless the mortgagee knew of the mortgagor's insanity, and took advantage of it. *Campbell v. Hooper*, 3 Sm. & G. 153; 3 Eq. R. 727; 1 Jur., N. S. 670; 24 L. J., Chanc. 644.

To constitute a defense to an action for use and occupation of a house, taken by a defendant under a written agreement at a stipulated sum per annum, it is not enough to show that she was a lunatic, and that the house was unnecessary for her; but it must also be shown that the plaintiff knew this, and took advantage of her situation, and if that is shown the jury should find for her; and they cannot on these facts find a verdict for the plaintiff for any smaller sum than that specified in the agreement. *Davis v. Kirkwall*, 8 C. & P. 679—Patteson.

Dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding; but this doctrine is inapplicable to a case where the question is whether the deed of a lunatic, altering the provisions of a settlement, is void. *Elliott v. Ince*, 7 De G., M. & G. 475; 3 Jur., N. S. 597; 26 L. J., Chanc. 821.

A previous covenant by a person of sound mind, must prevail against any subsequent



mental incapacity. *Affleck v. Affleck*, 8 Sm. & G. 394.

In an action for work by an attorney, for a defendant, who pleaded lunacy:—Held, that this was no defense unless the plaintiff knew it; and it appearing that the defendant had been duly placed in an asylum while he suffered under delirium tremens, and was mad from time to time when under the influence of drink, but that the plaintiff did not do business with him at those times, it was for the jury, whether, when he took his instructions, the defendant was insane to his knowledge. *Moss v. Tribe*, 3 F. & F. 297—Martin.

No person can, in defending an action, be allowed to stultify himself; and therefore a defendant cannot, in an action for work and labor, set up his own insanity as a defense, unless he has been imposed upon by the plaintiff in consequence of his mental imbecility. *Brown v. Jodrell*, 3 C. & P. 30; M. & M. 105. S. P., *Levy v. Baker*, M. & M. 106, n.—Tenterden.

After a promise of marriage the man discovered that the woman had, before the promise, been a lunatic, and confined as such, and on that ground he refused to marry:—Held, that these facts formed no answer to an action for breach of the promise. *Baker v. Cartwright*, 7 Jur., N. S. 1247; 30 L. J., C. P. 864; 10 C. B. N. S. 124.

A policy of insurance is not rendered void by the suicide of the assured, while in a state of insanity. *Horn v. Anglo-Australian and Universal Family Life Insurance Company*, 7 Jur., N. S. 673; 30 L. J., Chanc. 511; 9 W. R. 359; 4 L. T. N. S. 142—V. C. W.

The rule both of law and of equity, as to a contract entered into by a person apparently of sound mind, and not known by the other contracting party to be insane, is, that such a contract, if fair, bona fide, and completely executed, is valid; and, even though such a contract might be void at law, it will only be set aside in equity for fraud. *Hassard v. Smith*, 6 Ir. R., Eq. 429—V. C.

The ordinary presumption of sanity is removed by an inquisition finding a person to be of unsound mind; and, in the case of a contract subsequently entered into by him, the burden of proof is shifted; but the finding, being usually ex parte, is not conclusive, and the court has jurisdiction (which, however, it will be slow in exercising) to arrive at a contrary conclusion without the aid of another party. *Ib.*

To vitiate a contract, the knowledge of the lunacy or incapacity must be, not merely actual, but presumably sufficient—from circumstances known to the other contracting party—to lead him to a reasonable conclusion that the person with whom he is dealing is of unsound mind. *Ib.*

As to effect of inquisition and finding, in general,—see this title, I.

As to effect of insanity in cases of life insurance,—see INSURANCE.

**Liability for necessaries.**—A lunatic may contract for necessaries suitable to his degree, and an action will lie against him, notwithstanding an inquisition of lunacy, for the amount. *Bagster v. Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; 2 C. & P. 178.

Therefore, where a person of rank ordered carriages suitable to his condition, and the coachmaker supplied them bona fide and without fraud, and they were actually used by the party:—Held, that an action would lie upon the contract, notwithstanding an inquisition of lunacy finding the party to be of unsound mind at the time the carriages were ordered. *Ib.*

An action of debt for necessaries supplied will lie against a lunatic: *Stedman v. Hart*, 1 Kay, 607; 18 Jur. 744; 23 L. J., Chanc. 908.

A husband is liable for necessaries supplied to his wife during the period of his lunacy. *Reul v. Legard*, 6 Exch. 637; 15 Jur. 494; 20 L. J., Exch. 309.

The law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate, for moneys expended for the necessary protection of his person and estate. *Williams v. Wentworth*, 5 Beav. 325.

Proof was allowed in equity against the estate of a testator, for money advanced to his wife during his lunacy, and applied by her in payment of her necessary expenses, though she had a separate income. *Wood, In re*, 1 De G., J. & S. 465; 9 Jur., N. S. 589.

A person who was a lunatic, but had not been found to be so by inquisition, died seized of a small freehold estate, but not possessed of any personal property. His stepfather had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic: he also paid the lunatic's funeral expenses:—Held, that he was not entitled under 3 & 4 Will. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate. *Carter v. Beard*, 10 Sim. 7.

**Pleading and proof of insanity, as affecting validity of contracts.**—Evidence of the general reputation of the insanity of a person in the neighborhood in which he resides, is inadmissible to prove that a person was cognizant of that fact. *Greenlade v. Dare*, 20 Beav. 284; 1 Jur., N. S. 294; 24 L. J., Chanc. 490.

Fits of mania extending for twenty years anterior to, and down to the year in which deeds were executed by a man, found some years afterwards, by commission de lunatico, to have been all along insane, are not an answer to a prima facie case on an issue as to his sanity at the time of executing the deeds. *Ferguson v. Borrett*, 1 F. & F. 613—Erie.

On a plea of insanity, at the time of making a contract, the opinion of the medical men who gave certificates on which the defendant was confined as insane, at or about the time, is only evidence for the jury, who must judge

of the grounds on which it was formed. *Lovatt v. Tribe*, 3 F. & F. 9—Erie.

Where the plaintiff himself, according to his own evidence, was in personal communication with the defendant at the time, that, in itself, is some evidence that the plaintiff knew of the insanity, supposing the jury find the fact of insanity established. *Id.*

A contract having been made between the plaintiff, who was insane, and the defendant, which it was sought to set aside:—Held, upon an issue whether the defendant had notice of such insanity, that evidence was admissible of the plaintiff's conduct both before and after the signing of the contract, in order to show that the character of his disease was such that it must have developed itself to one having the opportunity of observation afforded to the defendant, though a stranger. *Bouvan v. M'Donnell*, 10 Exch. 184; 23 L. J., Exch. 336; 2 C. L. R. 1293.

A party claiming under a deed is not bound to prove the sanity of the person executing it; the burden of proof lies on the other side. *Jacobs v. Richards*, 18 Beav. 300; 18 Jur. 527; 23 L. J., Chanc. 557.

The plaintiff being confined in a lunatic asylum, and an inquisition under a commission of lunacy being held upon her, and attended by her counsel, before any verdict was given an agreement was signed by her counsel, and counsel attending for the promoters of the commission, that she should be released from confinement, that certain arrangements should be made as to property which she claimed, that the title deeds relating thereto, which had been taken from her when she was confined, and now were in the hands of the promoters, should be given up and placed in the hands of H., and that the commission should be superseded. Accordingly, the plaintiff was released, and the deeds handed over to H. The plaintiff then brought detinue against H. for the deeds; an interpleader rule was obtained on the claim of the promoters, by which the proceedings were stayed, and a feigned issue brought by the plaintiff against the promoters, to try whether she was entitled to the deeds notwithstanding the arrangement:—Held, first, that on the trial of such issue it was not necessary that the plaintiff should prove her title to the deeds, the question being only whether the agreement prevented her from insisting on her title. *Cumming v. Ince*, 11 Q. B. 112; 12 Jur. 331; 17 L. J., Q. B. 105.

Held, secondly, that it was rightly left to the jury, on evidence of the state of the plaintiff's mind and health at the time of the agreement being made, to say whether the consent of her counsel was obtained by constraint, and without her free will, and the jury having so found, that the plaintiff was entitled to the verdict, and that the legality of the restraint, assuming it to have been legal, and the consent of counsel, furnished no conclusive proof that the agreement was not void by duress. *Id.*

#### V. ACTIONS BY AND AGAINST.

What actions and proceedings may be brought or maintained by or against lunatics, their committees or guardians.]—It seems that if a defendant in quare impedit is a lunatic, the action is properly brought against him and not against his committee. *Tyrell v. Jenn*, 3 M. & P. 648; 6 Bing. 283.

A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralyzed by a change in his status. *Beall v. Smith*, 43 L. J., Chanc. 245; 9 L. R., Ch. 85; 29 L. T., N. S. 625; 22 W. R. 121; reversing the decision of *Wickens v. C.*, 28 L. T., N. S. 834; 21 W. R. 784.

If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the crown, the suit should be continued only with the sanction of the court in lunacy. *Id.*

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void, and a contempt of the court in lunacy. *Id.*

It is irregular for a bill to be filed by a person of unsound mind, not so found by inquisition, by his next friend, for the purpose of dealing with the real estate of the person of unsound mind. *Halfhide v. Robinson*, 9 L. R., Ch. 373; 43 L. J., Chanc. 398; 22 W. R. 448; 30 L. T., N. S. 216.

A bill was filed by a person of unsound mind not so found, by his next friend, for a partition or sale of real estate, and a decree for sale was made. A petition was afterwards presented under the Trustee Act, 1852, for an order vesting the estate of the plaintiff in the purchaser. The court refused to make the order, considering that the suit was irregular, but as the plaintiff's share was only 200*l.*, and she had no other property, the court directed an application to be made in lunacy, under the Lunacy Regulation Act, 1862, s. 13, for a sale, and permitted the petition to be amended for that purpose. *Id.*

A partner who has become incurably insane may obtain a decree for dissolution of the partnership on this ground, and although he has not been found lunatic by inquisition, may institute a suit for dissolution by his next friend, alleging that the lunatic is incurably insane, and that the dissolution is for the benefit of the lunatic; the court will entertain the suit, in order to protect the property of the lunatic. *Jones v. Lloyd*, 43 L. J., Chanc. 826; 18 L. R., Eq. 265; 30 L. T., N. S. 487—R.

When one of the defendants in a suit was alleged to be of unsound mind, but had not been found to be so by commission, on an application by the plaintiff to appoint a guardian ad litem:—Held, that an affidavit of the plaintiff was insufficient which only referred to a statement in the answer of the other defendants in the suit, alleging that the

defendant to whom it was sought to appoint a guardian was "imbecile." *Watson v. Knitans*, 22 W. R. 639—Ir. R.

The defendant being of unsound mind, though not so found by inquisition, the court, on motion, ex parte, appointed his son guardian ad litem, upon an affidavit averring that there was no conflict of interest between the father and son. *Dobbin v. Billing*, 6 Ir. R., Eq. 623—V. C.

**Service of process upon lunatics.]**—When a defendant is a lunatic the court has no power under the 15 & 16 Vict. c. 76, s. 17, to allow the plaintiff to proceed as if personal service of the writ of summons had been effected, unless it can be made to appear that the writ has come to his knowledge, and that he willfully evades service. *Holmes v. Service*, 15 C. B. 293; 1 Jur., N. S. 258; 24 L. J., C. P. 24.

When a lunatic cannot be served with a writ of summons, leave cannot be granted to proceed without service. *Williamson v. Maggs*, 28 L. J., Exch. 5.

But the court has power to allow a plaintiff to proceed, in an action as if personal service of the writ of summons had been effected, although the defendant is a lunatic, and will so order, if satisfied that reasonable efforts have been made to effect personal service, and that the writ has come to his knowledge. *Kimberley v. Alleyne*, 2 H. & C. 223.

When the medical officer of an asylum refused to allow service of a bill in equity on a lunatic who was not so found by inquisition, the court allowed substituted service on the medical officer. *Raine v. Wilson*, 48 L. J., Chanc. 469—V. C. B.

**Arrest and bail.]**—The court would not discharge a defendant out of custody on filing common bail, on the ground that he was insane at the time of the arrest. *Nutt v. Verney*, 4 T. R. 121.

Nor that he had since become so. *Kernot v. Norman*, 2 T. R. 390. S. P., *Ibbotson v. Galway*, 6 T. R. 133.

Even where there had been a commission of lunacy. *Steel v. Alan*, 2 B. & P. 362.

**Payment of money out of court.]**—An action having been brought by a wife of a lunatic (not so declared by commission) in his name, for the recovery of a debt due to him, the defendant paid the amount into court. The court made absolute a rule for payment of the money out of court to the wife. *Gleddon v. Trebble*, 9 C. B., N. S. 367.

As to proceedings upon inquisitions of lunacy,—see this title, I.; in actions involving property of lunatics,—see this title, III.; in actions on contracts of lunatics,—see this title, IV.

As to testimony of insane persons,—see EVIDENCE.

## M.

### Machinery.

- I. SALE OF. See BILLS OF SALE.
- II. RIGHT TO REMOVE. See FIXTURES.
- III. INJURIES BY OPERATION OF. See MASTER AND SERVANT; NEGLIGENCE.
- IV. DESTRUCTION OR INJURY TO. See CRIMINAL LAW.
- V. TAKING IN EXECUTION. See EXECUTION.
- VI. DISTRAINING. See DISTRESS.
- VII. OPERATION OF BANKRUPTCY. See INSOLVENCY AND BANKRUPTCY.
- VIII. PATENTS FOR INVENTIONS. See PATENT.
- IX. INSPECTION OF PATENTED MACHINERY. See PATENT.

### Madhouse.

See LUNATIC.

### Magistrate.

See JUSTICE OF THE PEACE.

### Maintenance.

- I. OF SUITS. See CONTRACT OR AGREEMENT.
- II. OF WIFE. See HUSBAND AND WIFE.
- III. OF INFANT. See INFANT.
- IV. OF LUNATIC. See LUNATIC.
- V. OF PAUPERS. See POOR LAW.



## Malice.

- I. IN GENERAL. See TRESPASS.
- II. IN LIBEL AND SLANDER. See DEFAMATION.
- III. IN ARRESTS, EXECUTIONS, PROSECUTIONS, AND OTHER PROCEEDINGS. See MALICIOUS ARREST, EXECUTION AND PROSECUTION.
- IV. CRIMINAL INTENT. See CRIMINAL LAW.

## Malicious Arrest, Execution and Prosecution.

### I. WHEN AN ACTION LIES; AND DEFENSES, 8713.

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### III. FALSE IMPRISONMENT. See TRESPASS.

#### I. WHEN AN ACTION LIES; AND DEFENSES.

1. *What Proceedings constitute Ground of Action, in General.*

**Merely bringing or aiding an action, claim, or recovery.**—An action on the case to recover damages against the lessor of the plaintiff, in a vexatious ejectment, is not maintainable. *Purton v. Honnor*, 1 B. & P. 205.

If special damage results from a claim made to goods, an action against the claimant may be maintained, if he makes the claim maliciously, and without any reasonable or probable cause. *Green v. Button*, 1 Gale, 349; 2 C. M. & R. 707; 1 Tyr. & G. 118.

It is a sufficient special damage that the party with whom a contract has been made for the sale of the goods refuses to deliver them in consequence of the claim, he not being under a perfect obligation to deliver the goods. *Id.*

A declaration stated that the defendant had been employed by the plaintiff to edit the Court Journal for reward, and that he did not perform the duties of editing the same in a proper manner; but, without the knowledge, leave, authority, or consent of the plaintiff, falsely, maliciously, and negligently inserted and published in the same a false and malicious libel; that an information was exhibited against the plaintiff for the falsely and maliciously printing and publishing the libel, and such proceedings were thereupon had that the plaintiff was convicted of that offense and fined. After verdict for the plaintiff, the judgment was arrested, on the ground that the injury sustained was not connected with the breach of duty averred, it not appearing that the printing and publishing of which the plaintiff was convicted was the same act as that with which the defendant was charged, viz., the inserting and publishing. *Colburn v. Patmore*, 1 C. M. & R. 72; 4 Tyr. 677.

A declaration stated that the defendant was an attorney, that a writ of summons had been issued against the plaintiff at the suit of A., but no further proceedings had been had, nor would the plaintiff have defended the same, nor had the defendant been retained by the plaintiff to defend the action, or take any step therein or in relation thereto, yet the defendant wrongfully, and without the consent of the plaintiff, entered an appearance for the plaintiff in the action, and defended the same, and such proceedings were had thereupon that A. recovered judgment against the plaintiff for 83l. 9s., and thereupon execution issued against him, and he was forced to pay the sum recovered, and 9l. 8s. 6d. for costs of the execution:—Held, bad, in arrest of judgment. *Westaway v. Frost*, 12 Jur. 698; 11 L. J., Q. B. 698.

As to what parties are liable,—see this title, I., 4.

**Arrest and execution, in actions, generally.**—If a plaintiff maliciously takes a defendant in execution for a debt, in respect of which he has been discharged under the Irish Insolvent Act, he is liable to an action on the case. *Ewart v. Jones*, 3 D. & L. 252; 14 M. & W. 774.

But trespass will not lie against a plaintiff or his attorney for suing out execution, and arresting thereon a defendant who has obtained an order for protection from process under 5 & 6 Vict. c. 116. *Yearsley v. Houns*, 5 D. & L. 265; 14 M. & W. 322.

No action lies against a sheriff or his officer for arresting a person attending court as a witness, although alleged that the defendant knew that he was privileged, and arrested him maliciously. *Magnay v. Burt (in error)*, D. & M. 652; 5 Q. B. 381—Exch. Cham.

No action lies against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payments, unless malice

and want of probable cause are alleged in the declaration, and proved. *De Molins v. Grove*, 10 Q. B. 152; 10 Jur. 420; 15 L. J., Q. B. 41; 8 C., affirmed, 10 Q. B. 152; 11 Jur. 15; 17 L. J., C. P. 321—Exch. Cham.

But an action lies at the suit of a debtor taken in execution under a ca. sa. upon a judgment, against an execution creditor who maliciously, and without any reasonable or probable cause, causes and procures a warrant to be issued upon such writ, indorsed to levy a larger sum than remains due upon the judgment, and the debtor to be taken to satisfy such sum, there being no difference between an arrest on mesne process and an arrest under a ca. sa. on a judgment. *Churchill v. Siggers*, 3 El. & Bl. 929; 2 C. L. R. 1509; 18 Jur. 773; 23 L. J., Q. B. 308.

A. having issued a writ of summons against B. specially indorsed for 28*l.*, B., without appearing to the writ, paid 10*l.* to A. on account of the debt. A. afterwards signed judgment, for default of appearance, for the full amount of 28*l.* and costs, and issued a ca. sa. indorsed for that amount, under which B. was arrested, and paid the sum demanded. B. having brought an action against A. for maliciously, and without probable cause, signing judgment and issuing execution:—Held, that while the judgment stood for the whole amount, it stopped the plaintiff from denying the correctness of the judgment or of the execution. *Huffer v. Allen*, 2 L. R., Exch. 15; 12 Jur. N. S. 930; 33 L. J., Exch. 17; 15 L. T., N. S. 225; 4 C. & C. 634.

By a cognovit A. confessed the action, and that B. had sustained damage to the amount of 3,000*l.*, and agreed, that, in case A. should make default in payment of 259*l.* on the 7th of May, B. should be at liberty to enter up judgment for 3,000*l.*, and sue out execution for 259*l.* and costs, which would have left a principal sum of 1,650*l.* due to B. A. not having paid the 259*l.* on the 7th of May, B. entered up judgment, and sued out execution for 3,011*l.* indorsed with a direction to the sheriff, requiring him to levy 1,967*l.*, and A. was arrested and detained in prison for that sum:—Held, that A. might maintain an action against B. for having caused him to be arrested for a larger sum than he ought. *Wentworth v. Bullen*, 9 B. & C. 840.

An officer, who had a writ against a man, sent to him to say so, and asked him to appoint a time to come to his office and execute a bail-bond, which he did:—Held, not to constitute an arrest, so as to support an action for a malicious arrest, although the original plaintiff had no cause of action. *Berry v. Adamson*, 6 B. & C. 528; 9 D. & R. 558; 2 C. & P. 503.

**Arrest under a judge's order.**—An action for maliciously arresting on a capias issued by a judge under 1 & 2 Vict. c. 110, s. 3, lies only where the party obtaining the order for the capias has imposed on the judge by some false statement or suggestio falsi, and thereby satisfied him of the existence of the debt to

the requisite amount, and that there was reasonable ground for supposing that the debtor was about to quit the country. *Daniels v. Fielding*, 16 M. & W. 200; 4 D. & L. 329; 10 Jur. 1061; 16 L. J., Exch. 153.

In an action for maliciously and without reasonable or probable cause obtaining a judge's order to hold the plaintiff to bail, and, without reasonable or probable cause for believing, and not believing, that the plaintiff was about to quit England, suing out a capias, and wrongfully and maliciously causing the plaintiff to be arrested under such writ, and to be thereupon imprisoned, the evidence was, that the defendants obtained the order, and caused a capias to be issued thereupon; that the plaintiff was afterwards found in the custody of the sheriff; that one of the defendants being informed (in the presence of the other) that the plaintiff was in custody at their suit, observed that they had got him fast and meant to keep him; that an application by the plaintiff to a judge for his discharge from custody was opposed by the defendants; and that, on the order for his discharge as to that writ being left with the officer in whose custody he was, he was released:—Held, that this was sufficient to sustain the action without proof of any warrant. *Petrie v. Lamont*, 4 Scott, N. R. 335; 3 M. & G. 702.

It will be evidence of malice in an arrest on mesne process that the plaintiff has taken a bill for the debt, and it will also negative reasonable and probable cause. And though the party has been discharged on the condition of bringing no action for trespass, that does not preclude an action on the case. *Macfarlane v. Ellis*, 1 F. & F. 288—Campbell.

**Arrest in inferior courts.**—An action was held to lie for holding to bail in an inferior court, when no more than 30*s.* was due. *Smith v. Cuttel*, 2 Wils. 376.

So, when an inferior court had no jurisdiction over the cause. *Goslin v. Wilcock*, 2 Wils. 302.

In actions commenced in any of the superior courts the plaintiff may, since the R. H. T. 2 Will. 4, l. 35, declare at any time before the end of the year from the return of the writ, unless the defendant shall have signed judgment of non pros. for want of the plaintiff's declaring before the end of the second term; and this, whether the action be commenced by serviceable or bailable process. This applies also to causes removed by the defendant from inferior courts by habeas corpus (though the case was commenced below, and removed before the rule came into operation), except that, as judgment of non pros. cannot be signed in such causes, the plaintiff cannot be out of court till the expiration of the year; and consequently, an action for malicious arrest cannot be commenced in any of the above cases till a year has elapsed from the return of the writ. *Norriah v. Richards*, 3 A. & E. 733; 5 N. & M. 269; 1 H. & W. 437.





*Toore v. Gardner*, 16 M.

A count for distraining for is due is bad, although it has been done maliciously, for it does not amount to a legal injury actionable, because it is done without intent. *Stevenson v. Newnham*, 13 Q. B. 600; 22 L. J., C. P. 110—Cham.

**Proceedings in bankruptcy.**—An action for maliciously suing out a commission in bankruptcy, notwithstanding the specific authority given by 5 Geo. 2. c. 30, s. 23. *Brown v. Chapman*, 3 Burr. 1418; 1 W. Bl. 427. Although the commission was afterwards superseded. *Chapman v. Pickersgill*, 2 Wils. 145.

A declaration alleged that the defendant falsely and maliciously, and without any reasonable or probable cause, filed a petition for adjudication of bankruptcy against the plaintiff, and falsely and maliciously, and without reasonable or probable cause, caused and procured him to be declared a bankrupt:—Held, that this charge was established by proof that the defendant petitioned for the adjudication, and, by depositions, false in fact, and maliciously made, induced the commissioner to adjudicate the bankruptcy, although it appeared that, even if the depositions had been true, the adjudication could not have been supported in law. *Farley v. Danks*, 4 El. & Bl. 493; 1 Jur., N. S. 331; 24 L. J., Q. B. 244.

An action is maintainable for maliciously presenting a petition in bankruptcy and procuring the plaintiff to be adjudicated bankrupt for non-payment of a debt under a debtor's summons. *Johnson v. Emerson*, 25 L. T., N. S. 337. See BANKRUPTCY.

**Proceedings in lunacy.**—An action lies for a conspiracy in issuing a commission of lunacy. *Turner v. Turner*, Gow, 50—Dallas.

**Prosecution before court martial.**—An action will not lie for a malicious prosecution of a court martial by a captain in the navy against his commander-in-chief. *Sutton v. Johnstone*, 1 Bro. P. C. 76; 1 T. R. 493, 784.

**Rejecting elector's vote.**—Action for maliciously rejecting the plaintiff's vote at an election of vestrymen and auditors, under 18 & 19 Vict. c. 120. Plea, that the plaintiff was rated to a church rate more than six months before the election, and at the time of the election the rate was due and unpaid. Replication, that the rate was void in this, that it was made for defraying expenses for which a rate could not be made. Rejoinder, that the rate was good on the face of it, and had never been quashed:—Held, that the plaintiff having no means of questioning the rate, the rejoinder was not good. But that the replication was good, as it showed that the rate was not due, therefore that the plaintiff was entitled to vote; and that the action lay, malice being admitted on these

pleadings. *Tozer v. Child*, 6 El. & Bl. 289; 2 Jur., N. S. 928; 25 L. J., Q. B. 337.

On the trial of the action for maliciously rejecting his vote, it appeared that the defendants, who presided at the election as churchwardens, rejected it on the ground of the plaintiff not having paid a church rate due more than six months prior to the election. The legality of the rate was disputed, but the vestry clerk had advised the defendants that the church rate was valid, and that they would be justified in rejecting the votes of those who had not paid it:—Held, that it was incumbent on the plaintiff to make out that the defendants acted maliciously in rejecting his vote, and that if they acted bona fide upon advice which they believed sound, they were not liable. *Tozer v. Child* (in error), 7 El. & Bl. 377; 3 Jur., N. S. 409; 26 L. J., Q. B. 151—Exch. Cham.

**Preventing issue of letters patent.**—A count alleged that the plaintiff was the first and true inventor of "improvements in the manufacture of fire-arms, also of cartridges, of priming, and of wads or wadding for fire-arms," and had petitioned for a patent; that his petition had been referred to the solicitor-general, who had required and allowed the title of his invention to be amended as an invention for "improvements in the manufacture of cartridges and of wads or wadding for fire-arms," and given a certificate of allowance; yet the defendant, well knowing the premises, but maliciously intending to injure the plaintiff, and to prevent him from obtaining letters patent for his invention, falsely, fraudulently, maliciously and wrongfully, and without any reasonable or probable cause, represented to the solicitor-general that he had an interest in opposing a grant of letters patent to the plaintiff, and gave notice that he had applied for a patent, and obtained provisional protection for an invention for "improvements in cartridges," and that in consequence of the alteration in the title of the plaintiff's patent, he had reason to apprehend that such alteration in the title might admit of his invention being embraced in the plaintiff's patent; whereas, in truth, the alleged invention for which the defendant had obtained provisional protection was not his invention, but a fraudulent imitation of the plaintiff's invention, and the defendant had no interest in opposing a grant of letters patent to the plaintiff; and the count concluded with an allegation of special damage, that, by means of the premises, the solicitor-general refused to allow the plaintiff's application for letters patent to proceed, and he was thereby prevented from obtaining, and failed to obtain, a patent for his invention, and was put to expense in opposing a grant of letters patent to the defendant:—Held, that the special damage alleged did not naturally flow from the grievances charged, and that, without it, the count disclosed no cause of action. *Hadden v. Lott*, 15 C. B. 411; 24 L. J., C. P. 49; 3 C. L. R. 144.

2. *Existence of Malice, and Want of Probable and Reasonable Cause.*

(a) *In Respect of Civil Actions and Proceedings.*

**When an element of the cause of action.]—**Malice must be proved in an action for a malicious arrest. *George v. Radford*, 3 C. & P. 464—Tenterden.

An action will not lie against a party suing out a writ if he neglects to countermand it after payment of the debt, at least, unless malice is averred. *Scheibel v. Fairbairn*, 1 B. & P. 388.

And if the costs are paid as well as the debt. *Page v. Wipke*, 3 East, 314.

An action for maliciously arresting on a capias issued by a judge under 1 & 2 Vict. c. 110, s. 3, cannot be supported on the mere fact, that the defendant, when he procured the order and arrest, had no reasonable or probable cause for believing that the plaintiff was going abroad. *Daniels v. Fielding*, 16 M. & W. 200; 4 D. & L. 829; 10 Jur. 1061; 16 L. J., Exch. 153.

In an act on for maliciously and without the authority of the bail causing the defendant to be rendered in discharge of his bail, it is necessary to prove express malice as well as want of authority. *Porter v. Weston*, 5 Bing. N. C. 715; 8 Scott, 25; 3 Jur. 507.

To sustain an action for a conspiracy in issuing a commission of lunacy, malice and a want of probable cause must be proved; but on proof of a total want of probable cause, malice may be implied; and although express malice is proved, some slight evidence of a want of probable cause must be given. *Turner v. Turner*, Gow, 50.

**What constitutes malice, and want of reasonable or probable cause.]—**In an action against an attorney for a malicious arrest, the jury must be satisfied of the absence of any just demand on the part of his client, and also, that the attorney knew that there was not any such demand; and, applying the law for some purpose of his own, or for some other ill purpose, which the law calls malicious, committed the injury complained of by the plaintiff. In such case it is not necessary to prove malice in the ordinary sense of the word; any improper or sinister motive will be sufficient. *Stokley v. Harnidge*, 8 C. & P. 11—Tindal.

E. having obtained a judgment against F. and T., he, by H., his attorney, sued out concurrent writs of ca. sa. into London and Surrey. F. was taken on the former writ, and on giving to H. a promissory note jointly with B., as his surety, was discharged. No notice of this was given to the sheriff of Surrey, and he took T. on the other writ of ca. sa. In an action against H., for maliciously omitting to give notice to the sheriff of Surrey, that the judgment had been satisfied by the arrangement with F.:—Held, that, to support this action, the jury must be satisfied that there was malice; but that, to constitute

malice, it was not necessary that H. should have acted from any spite or ill-will, or the like; but that if he acted as he did from an indirect motive, such as to get the debt paid by his client from T., or to get more costs himself, that would be malice for this purpose. *Tebbutt v. Holt*, 1 C. & K. 29—Parke.

Held, also, that the mere fact of H. giving notice to the sheriff of Surrey, that the judgment had been satisfied, was one from which alone the jury might infer malice; but that, if they thought H. had been defrauded when he received the promissory note, or had taken it on a representation that the parties were solvent when they were not so, that would go to negative the malice. *Ib.*

A creditor receiving information from a person that his debtor is going abroad, and obtaining an order to arrest him on an affidavit which is afterwards held to be insufficient and to some extent untrue, is not therefore liable to an action for maliciously obtaining the arrest without reasonable cause, there being enough to justify the belief that the debtor was going abroad, and the payment into court of a sum over 20*l.* is a sufficient admission of a debt to justify the application. *Neale v. Loadman*, 2 F. & F. 313—Pollock.

In an action against a builder, his attorney and the attorney's clerk, for maliciously and without reasonable or probable cause procuring an order for the arrest of the plaintiff in an action of debt, it appeared that he, being a Roman Catholic priest, had entered into a contract with the builder for the erection of a church, the contract containing a condition for payment only on an architect's certificates and all the money originally due upon it having been paid, and a further claim made by the builder for extras, which the architect refused to allow, thereupon the builder consulted his attorney, who sent his clerk to serve the plaintiff, and see what he would say; and on the clerk's statement as to what he said, the attorney (viz., that the plaintiff had said he was going abroad at some time, the precise words being in dispute), caused his clerk to make an affidavit thereof, and his client to make an affidavit of debt and of belief that the plaintiff was going abroad, upon which a judge made the order, the affidavit not making mention of the contract and its condition, or of the architect's refusal to certify, or of the plaintiff's permanent office:—Held, first, that there was no reasonable or probable cause for the proceeding, as there was no reason to suppose that the plaintiff was going abroad for any lengthened time, or to avoid the action. *Melia v. Neate*, 3 F. & F. 757.

Held, secondly, that if the proceeding was for any improper purpose, as to coerce the plaintiff into more speedy payment, it would be malicious. *Ib.*

Held, thirdly, that in such case the attorney would be liable, but that its merely being an improper proceeding, and without reason-

ble cause, was not per se evidence of malice, assuming bona fides. *Id.*

G., who had advertised his farming stock and effects for sale, was arrested, at the suit of B., on a judge's order to hold to bail, made upon an affidavit of C., that G. had stated his intention to go to Jersey to avoid his creditors, but he was at once discharged upon paying the amount to the officer. On the following day he was arrested at the suit of the defendants, upon a like order made upon the affidavit of their London agent, that he had read and believed the statement in the affidavit of C. to be true. It eventually appeared that C.'s statement was untrue, and G. was discharged by a judge's order. At the trial of the action against the defendants for arresting him maliciously, and without reasonable and probable cause, the agent was called on their part, and he swore that he believed, without further inquiry, the statement in C.'s affidavit to be true at the time that he applied for and obtained the order to hold to bail, and thereupon the judge directed the verdict to be entered for the defendants on the ground that there was reasonable and probable cause for the arrest, and that the action could only be maintained on proof, first, of malice on the part of the defendants, and secondly, of want of reasonable and probable cause:—Held, that there was reasonable and probable cause for the arrest, and that there was no duty on the defendants or their agent to make inquiry into the truth of the facts stated in C.'s affidavit before making an application based thereon for an order to hold the plaintiff to bail. *Gibson v. Veasey*, 15 L. T., N. S. 586—Exch.

A trader gave B. a judge's order for payment of debt and costs to be taxed; the costs were duly taxed, and the amount of debt and costs paid; and afterwards, and within twenty-one days from the order, B. caused it to be filed:—Held, that, whether the 12 & 13 Vict. c. 106, s. 137, made the filing of the order, under the circumstances, imperative or not, no action would lie against B. for filing it, inasmuch as it could not be said to have been done without reasonable or probable cause. *Dimmack v. Bowley*, 2 C. B., N. S. 542; 8 Jur., N. S. 1050; 26 L. J., C. P. 231.

In an action for maliciously, and without reasonable or probable cause, procuring the plaintiff to be outlawed, the declaration stated that he was not in anywise subject or liable to be outlawed at the suit of the defendant; that the defendant made an affidavit of debt, whereby he deposed that the plaintiff was indebted to him in 8,550*l.*, and that the plaintiff, upon the prosecution of the defendant, under color and pretense of owing that sum, was declared an outlaw; assigning for special damage, that the plaintiff was put to costs in and about reversing the outlawry. The existence of the alleged debt (the non-existence of which was the only gravamen charged in the declaration) being admitted:—Held, that there was reasonable and probable cause for proceeding to outlawry, not-

withstanding the defendant was aware at the time of issuing the exigent that the plaintiff was abroad, and had an agent in London. *Drummond v. Pigou*, 7 C. & P. 228; 2 Bing. N. C. 114; 1 Hodges, 190.

As to evidence of malice, and of absence of probable cause,—see this title, II., 2.

#### (b) In Respect of Criminal Prosecutions.

**When malice and absence of probable cause necessary to sustain action.**—If an indictment has not been found, an action cannot be supported without evidence of express malice, as well as the want of probable cause. *Byne v. Moore*, 1 Marsh. 12; 5 Taunt. 187.

An action for a malicious prosecution cannot be maintained, though the accusation turns out to be unfounded, if the prosecutor can show probable cause for the prosecution. *Arbuckle v. Taylor*, 8 Dow. 160.

Malice and the want of probable cause must both concur. *Farmer v. Darling*, 4 Burr. 1971.

There is a material distinction, as to the liability for a malicious prosecution, between the institution of the prosecution and its continuance after it has been already instituted, without authority, by an agent. *Weston v. Beeman*, 27 L. J., Exch. 57.

In an action against a magistrate for a malicious conviction, it is not sufficient for the plaintiff to show that he was innocent of the offense of which he was convicted; but he must also prove, from what passed before the magistrate, that there was a want of probable cause. *Burley v. Bethune*, 1 Marsh. 220; 5 Taunt. 580.

**What constitutes malice, and want of probable and reasonable cause.**—If C. is intrusted to receive money for A., with a written direction for its application, and C. writes a letter to A., stating that he has not received it, when in fact he has, this is sufficient evidence of probable cause to render a prosecution of C. under the 7 & 8 Geo. 4, c. 29, s. 49, not malicious. *Eagar v. Dyott*, 5 C. & P. 4—Tenterden.

In an action for maliciously indicting the plaintiff for an assault on the defendant, the following facts were proved: The defendant came to the plaintiff's house, which was let out as chambers, to inquire for a Mr. S., and on being informed that no such person lived there, uttered abusive language, and, on the plaintiff requesting him to go away, laid hands on him, whereupon he forced him out. There was conflicting testimony as to the degree of violence used by plaintiff. The plaintiff was indicted by the defendant for the assault, and acquitted. On the trial the judge directed the jury, that, if the defendant preferred the indictment with a consciousness that he was in the wrong, there was no reasonable or probable cause for the indictment:—Held, that the mere fact of the plaintiff having assaulted the defendant did



not of itself constitute reasonable and probable cause without reference to the other circumstances of the case, and that the direction of the judge was substantially correct. *Hinton v. Heather*, 14 M. & W. 181; 15 L. J., Exch. 39.

The plaintiff, having become tenant to the defendant, who resided in Wiltshire, of a house and lands in Carmarthenshire, together with the exclusive right of sporting over lands adjacent, belonging to the defendant, fished one of the ponds by cutting down the dam, and, but few fish having been caught, D., who was the defendant's local agent, suggested to the plaintiff that he might fish a certain pond on the estate by cutting down the bank and placing a net to catch the fish, which the plaintiff accordingly afterwards did during the tenancy, and a few fish were taken. Disputes having afterwards arisen between the plaintiff and defendant, D. laid an information before magistrates against the plaintiff for unlawfully and maliciously breaking down the dam and destroying the fish, under 7 & 8 Geo. 4, c. 80, s. 15; and D. having been examined, the magistrates required the plaintiff to find bail to appear to an indictment for that offense at the assizes, where a bill was preferred, but ignored. The defendant was not present at the hearing of the information, nor was there any evidence to show that he knew that D. had given the plaintiff permission. At the trial, the judge asked the jury whether, in their opinion, D. had given permission, and they found that he had; they also found that D. acted under the defendant's authority in instituting the proceedings, and the judge having expressed his opinion that there was absence of reasonable and probable cause:—Held, that he was correct in so deciding, and that, independently of the permission given by D., there was no reasonable or probable cause for instituting the proceedings. *Mitchell v. Williams*, 11 M. & W. 205; 12 L. J., Exch. 193.

In an action for a malicious prosecution for sheep-stealing, it appeared at the trial that the plaintiff was possessed of a sheep which the defendant claimed as one of a lot stolen from him. The plaintiff gave an account of the way he became possessed of it, which, if the sheep was the defendant's, must have been willfully false. The defendant took away the sheep. The plaintiff sued him for so doing in the county court. To stop the action, the defendant indicted the plaintiff, who was acquitted. There was evidence both ways, but it appeared that the sheep really never was the defendant's, though he *bonâ fide* believed it was. The judge, assuming these facts to be true, asked the jury if the defendant had reasonable grounds for his belief. On their finding that he had, he ruled that there was reasonable and probable cause for the indictment:—Held, by Coleridge and Crompton, JJ., that the finding of the jury on that one point, in addition to the facts beyond dispute, made out a complete case of reasonable and probable cause, and therefore, that the judge was right. Erle, J. dissen-

tiente. *Douglas v. Corbett*, 6 El. & Bl. 52 Jur., N. S. 1247.

In an action for maliciously causing a plaintiff to be arrested, it appeared that he was employed to work up some timber in spars, under a contract with H., by which he was to be paid 48*l.*, by weekly instalments during the progress of the work, and the balance on the completion of it. Before the work was completed H. assigned all his goods to the defendant and others, for the benefit of his creditors generally. At the time about 19*l.* remained due to the plaintiff as the value of the work done up to that time. The plaintiff went to the defendant's yard where the spars were, and asked for them, and on the defendant's foreman refusing to give them up, he took them the next morning at four o'clock a. m. His attorney then wrote to the defendant's attorney to say that he claimed a lien on the spars. The defendant demanded them back, but the plaintiff refused to give them up. The plaintiff was then taken into custody for stealing the spars on the information and complaint of the defendant. He asked the defendant why he gave him into custody; to which the defendant replied, "You had no right to take the spars away; I think you merely fetched them away to get what was your due."—Held, that there was evidence of the absence of reasonable and probable cause for the charge. *Huntly v. Simon*, 2 H. & N. 600; 27 L. J., Exch. 13.

A defendant in an action for maliciously and without reasonable or probable cause procuring the plaintiff to be apprehended on charge of felony, cannot rely on circumstance of mere suspicion as evidence of reasonable and probable cause for a defense to the action. *Bust v. Gibbons*, 30 L. J., Exch. 75.

A robbery had been committed by A., who immediately absconded. The plaintiff, who had been a fellow-workman with A., had been heard to say that he (the plaintiff) had heard, a few hours after the robbery, that A. had absconded, and that A. had previously told him (the plaintiff) that he intended to go to Australia. A. had also been seen, early in the morning after the robbery, coming from a public entry leading to the back door of the plaintiff's house. The defendant, the plaintiff's master, having been informed of these circumstances, caused the plaintiff to be apprehended and charged before magistrates with the robbery:—Held, no evidence of reasonable or probable cause, justifying the plaintiff in making the charge. *Ib.*

Reasonable and probable cause may be shown by evidence which would make *prima facie* case such as would justify a criminal charge, although it might be insufficient to convict, and although it might require confirmation by further evidence, not disclosed or discovered by the prosecutor until after he had given the plaintiff into custody. *Davson v. Vansandau*, 11 W. R. 516—Q. B.

Evidence of an accomplice, that he had been tampered with by the attorney for the defense, coupled with a letter found on the

erson of the attorney, after his arrest on the criminal charge, is evidence of reasonable cause for its prosecution. *Id.*

Similarity of handwriting is not, per se, and without other circumstances, probable cause for preferring a charge of forgery against a person whose handwriting is like that of a forged instrument. *Clements v. Ohrlly*, 2 C. & K. 686—Denman.

Information received from persons apparently respectable, and believed to be credible, is sufficient evidence of reasonable and probable cause for a prosecution. *Chatfield v. Comeford*, 4 F. & F. 1008—Cockburn.

In an action for malicious prosecution, the charge having been for stealing a horse left with a servant to show with a view to a sale, and the horse having been bought honestly and openly:—Held, that there was no reasonable cause. *Stewart v. Beaumont*, 4 F. & F. 1034—Erie.

Held, also, that the facts not having been fully and fairly stated, and there being apparently some anger on the part of the prosecutor, there was evidence of malice. *Id.*

The defendant, a miller, saw a number of sacks, partly covered with a tarpaulin, lying on a quay alongside a vessel: seeing his mark on one of the sacks, he cut it open, and found it contained pieces of sacks, some new and some old. He removed the tarpaulin, and saw some sacks on which was his mark, and on others it was cut away. Being informed that the sacks were about to be shipped by the plaintiff for the manufacture of paper, he laid an information before a magistrate that he had reason to suspect and did suspect, that some sacks, his property, had been stolen, and were then in the possession of the plaintiff. Thereupon the magistrate issued a warrant to search for the goods, and if they should be found, to bring them and the plaintiff before him, to be dealt with according to law. The plaintiff was accordingly apprehended, and taken before the magistrate, who dismissed the charge. In an action for maliciously causing the search warrant to be issued, and the plaintiff apprehended:—Held, first, that the magistrate was justified in issuing a warrant in that form, since the application for a search warrant involved an application to arrest. *Wyatt v. White*, 5 H. & N. 371; 29 L. J., Exch. 193; 8 W. R. 307.

Held, secondly, that there was no absence of reasonable and probable cause for the information, and consequently the defendant was not liable either in respect of the search warrant or arrest. *Id.*

In an action for maliciously, and without reasonable or probable cause, charging the plaintiff with, and causing him to be apprehended on a warrant for unlawfully running away, and leaving his wife and children chargeable to a parish, it appeared that the plaintiff had left his wife and children with her father, and went, as he alleged, in search of work. The defendant, the brother of the plaintiff's wife, at her request, and with the consent of the father, who was

unable to support his daughter, applied to the magistrate's clerk, and by his advice a warrant was issued, and the plaintiff apprehended, by the defendant's instructions. Before the hearing, the defendant took the plaintiff's wife to the overseer and obtained some relief, and she was taken to the workhouse, but there was some evidence that this was a colorable chargeability, and was done with a view to support the information. The justices dismissed the case, and thereupon the action was brought:—Held, that the judge was right in telling the jury that there was no reasonable or probable cause for the arrest, and that, although the defendant acted under a mistake, the jury might infer malice from his subsequently endeavoring to set up a colorable chargeability. *Heath v. Heape*, 1 H. & N. 478; 26 L. J., M. C. 49.

A bankrupt (who had obtained an order for protection under 12 & 18 Vict. c. 100, s. 112), at the time of his bankruptcy, was in arrear for two poor-rates, and had been assessed to a third rate, which, however, was not allowed or published until after his bankruptcy. The overseers, pending the protection, summoned him for the non-payment of the three rates; he did not attend before the justices, but returned the summons to the assistant overseer, stating in writing on it, the fact of his having a protection order, and the assistant overseer saw the messenger of the Court of Bankruptcy in possession of his goods, which were afterwards sold. The justices, on the application of the overseers, then issued a distress warrant on his goods for the amount of the three rates, which warrant was returned nulla bona, and a warrant of commitment issued, under which he was arrested and imprisoned, until released by an order of a commissioner in bankruptcy. The bankrupt then brought an action against the overseers, for maliciously, and without reasonable or probable cause, procuring and obtaining from the justices a warrant of commitment against him, and under that arresting and imprisoning him, and also for assaulting him, and giving him into custody:—Held, first, that there was no absence of reasonable or probable cause for assuming the Court of Bankruptcy not to have the power of protecting the bankrupt from arrest in respect of the rate made before, but not allowed till after the bankruptcy. *Phillips v. Naylor*, 4 H. & N. 565; 5 Jur., N. S. 966; 28 L. J., Exch. 225—Exch. Cham.

Held, secondly, that there was no absence of reasonable or probable cause for supposing that the protection order was not good against the warrant of commitment in respect of the aggregate of all the rates. *Id.*

Held, thirdly, that there was no evidence of malice. *Id.*

Held, fourthly, that trespass would not lie against the overseers for causing the bankrupt to be arrested under the warrant of commitment. *Id.*

In an action for malicious prosecution, it appeared that the defendant's traveler applied to P. for payment, that P. showed him a re-



ceipt of the plaintiff (who had formerly been the defendant's traveler) for 20*l.*, which he never accounted for; that the defendant on learning this communicated with P., who sent the receipt and re-affirmed the payment; that the defendant then consulted his attorney, and charged the plaintiff with embezzlement before a magistrate, who dismissed the charge; it also appeared that there were other cases which, if known to the defendant, would clearly have justified him in making the charge, but it was not shown whether he knew of them when he made it:—Held, that the plaintiff had failed to show the absence of reasonable and probable cause, because (per Bovill, C. J.) the facts of P.'s case showed reasonable and probable cause, or because, at all events (per Byles, J., and Brett, J.), as the plaintiff did not show the contrary, the defendant was to be assumed to have known of the other matters. *Brooks v. Blain*, 39 L. J., C. P. 1.

The mere fact that a report and balance-sheet prepared and published by the secretary of a public company, contain errors or mis-statements, does not afford reasonable and probable cause for charging him criminally under 24 & 25 Vict. c. 96, s. 84, and will be no defense to an action for malicious prosecution brought by him if he has been so charged, unless some proof be given that he made and circulated the report and balance-sheet as a willful falsehood and with a fraudulent intent. *Ayres v. Elborough*, 22 L. T., N. S. 106—Blackburn.

In actions against a railway company for malicious prosecution, it appeared that there had been a disturbance and struggle at one of the company's stations, between their servants and some passengers, and that after the struggle was over and W., who had been one of such passengers, had left the station and was walking away, A., one of the company's servants, who had been engaged in such struggle, and who was a sworn constable, took W. into custody on the charge, first, of being drunk, and on the sergeant at the police station refusing to take that charge, then for assaulting A. in the discharge of his duty. During the struggle and before it was over, the plaintiff S., another of such passengers who had taken part in the struggle, was given into custody by A., and removed to the police station and there charged, in the first instance, with being drunk and refusing to quit the company's premises, and afterwards with assaulting the company's officers in the execution of their duty. The instructions issued by the company to their servants, who were sworn constables, were that they might, when on duty, take into custody any one whom they might see commit an assault at any of the stations, "and for the purpose of putting an end to any fight or affray," but that such power was to be used with extreme caution, and not if the fight or affray was at an end before they interfered. The attorney for the company appeared before the magistrates to prosecute, and both plaintiffs were committed for trial, and afterwards prose-

cuted by the company at the sessions, and acquitted. In order to show the absence of reasonable and probable cause, the depositions of the servants of the company before the magistrate were put in evidence, but they contained evidence of assaults upon such servants, and particularly of an assault on A. in the execution of his duty as constable. Held, that inasmuch as, if the facts stated in the depositions of the company's servants had been communicated to the company's attorney before appearing to prosecute, and there was no evidence that they had not been, he might reasonably have considered there was probable cause for the prosecution, there was no evidence of the absence of probable cause, and the onus being with the plaintiffs to show such absence, it was not for the company to show that they undertook the prosecution with a knowledge of the testimony their servants were prepared to give. *Walker v. South-Eastern Railway Company*, 39 L. J., C. P. 346; 5 L. R., C. P. 640; 18 W. R. 103; 23 L. T., N. S. 14.

In an action for a malicious prosecution, although the question of reasonable and probable cause is an inference to be drawn by the judge from facts undisputed or found, yet the test is, not what impression the circumstances would make on the mind of a lawyer, but whether the circumstances warranted a discreet man in instituting and following up the proceedings. *Kelly v. Midland Great Western Railway of Ireland Company*, 7 Ir. R., C. L. —Q. B.

The evidence in support of the plaintiff's case was, that he had been a foreman porter in the employment of a railway company, his duty being to charge for extra luggage and to give receipts for the sums received by him on that account; that he was informed by the manager of the company, in the presence of the chairman, one of the directors and the solicitor, that a passenger had accused him of having charged and received double the amount for which he had given a receipt, and was coming up from the country to swear informations against him; that he was subsequently arrested on informations sworn against him by the passenger; that he was afterwards tried, and the passenger and his wife swore to the truth of their accusation notwithstanding which, the jury acquitted him:—Held, that the plaintiff failed to show want of reasonable and probable cause, and that the judge ought to have nonsuited him or directed a verdict against him. *Id.*

The railway company produced their solicitor, who deposed that the passenger wrote a letter to the manager making the accusation; that the matter was put into his (the solicitor's) hands; that he had the passenger brought up from the country, took down his statement in writing, and closed it, sifted him as to the truth of it; that his answers were satisfactory; that he (the solicitor) believed the statement, and then directed informations to be prepared and the criminal prosecution to be proceeded with. This evi-



lence having been in nowise impeached:—Held, that the judge ought to have inferred from it reasonable and probable cause, and directed a verdict for the company. *Id.*

L., being entitled to the possession of premises, entered upon them, but was afterwards ejected by T. and W. He then indicted them for a forcible entry, but they were acquitted. They then brought an action against him for malicious prosecution:—Held, that the action could not be maintained, as the facts showed that L. had a right to the possession, and had actually obtained possession, and there was, therefore, reasonable and probable cause for the indictment. *Louis v. Telford*, 35 L. T., N. S. 69; 45 L. J., Exch. Div. 613; 1 L. R., App. Cas. 414—H. L.; reversing the judgment of the Exchequer Chamber, 31 L. T., N. S. 90.

Semble, that T. and W. had not a joint cause of action. *Id.*

As to proof of malice, and of want of probable cause, and when and how the question should be left to the jury,—see this title, II., 2.

### 3. Termination of Suit, Prosecution or Proceedings favorably to Plaintiff.

**When necessary to sustain action for malicious proceedings in actions generally.]—**

An action for a malicious arrest cannot be maintained where the former cause was terminated by a stet processus, by the consent of the parties. *Wilkinson v. Howel*, M. & M. 495—Tenterden.

An action may be brought to recover damages for a malicious arrest, where the suit is terminated by a rule of court; and that rule is evidence of the termination of the suit. *Brook v. Carpenter*, 3 Bing. 297; 11 Moore, 59.

Where a cause (in which the defendant has been arrested) is referred to arbitration, and the award is given in favor of the defendant, he cannot, on that ground, maintain an action against the plaintiff for a malicious arrest. *Habershon v. Crosby*, Peake Add. Cas. 181; 3 Esp. 33—Kenyon.

In an action for abusing the process of the court, in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined, or to aver that the process was sued out without reasonable or proper cause. *Granger v. Hill*, 3 Scott, 561; 4 Bing. N. C. 212; 2 Jur. 235; 1 Arn. 43.

An action lies for maliciously, and without reasonable or probable cause, arresting the plaintiff, and detaining him until discharged by a judge's order, pending a former suit by the defendant for the same cause of action, in which the plaintiff had been arrested and discharged out of custody by reason of the defendant's delay in declaring. *Heywood v. Collinge*, 9 A. & E. 208; 1 P. & D. 202; 1 W., W. & H. 703; 2 Jur. 1038.

To such action it is no defense that the second suit is still pending. *Id.*

A declaration stated that the defendants (the one, A., acting as attorney for B., the

other) recovered a judgment against the plaintiff for 30*l.* 7*s.* 4*d.*, that the plaintiff paid and satisfied to B. the debt recovered by such judgment, except 15*s.* 8*d.*, and that they sued out a ca. sa. upon the judgment, and wrongfully and maliciously, and without any reasonable or probable cause, indorsed the writ with directions to levy 5*l.* 14*s.* 8*d.*, and interest, and 1*l.* 7*s.* for the costs of execution; that the plaintiff tendered and offered to pay to the defendants 3*l.* 8*s.*, which was sufficient to pay and discharge all that was recoverable against the plaintiff upon the judgment and writ, together with the costs of the writ of execution, and all other legal and incidental expenses; and that they wrongfully and maliciously, and without any reasonable or probable cause, procured the sheriff to arrest the plaintiff, and detain him until he paid 7*l.* 6*s.* 9*d.*, whereas the sum of 3*l.* 8*s.* and no more was due and owing from and recoverable against the plaintiff upon the judgment:—Held, that the declaration disclosed a good cause of action, and that it was not necessary to allege that the plaintiff had obtained his discharge by order of the court, or a judge, so as to show that the proceedings had terminated in his favor. *Gilding v. Eyre*, 10 C. B., N. S. 592; 9 W. R. 946; 5 L. T., N. S. 136; 31 L. J., C. P. 174.

A declaration stated that A. issued against B. a writ of summons, specially indorsed, for 28*l.*; that B. paid A. 10*l.* on account; that A. afterwards, maliciously, and without reasonable or probable cause, signed judgment for default of appearance, for 28*l.*, and arrested B. under a ca. sa. for that amount, and compelled him, in order to obtain his discharge, to pay 30*l.*:—Held, that the action was not maintainable, inasmuch as the judgment operated as an estoppel, and precluded the plaintiff from averring that the sum of 28*l.* was not due. *Huffer v. Allen*, 4 H. & C. 634; 36 L. J., Exch. 17.

The proper course would have been to apply to the court or a judge to reduce the judgment to the amount actually due. *Id.*

In a declaration for maliciously and without reasonable or probable cause issuing out of the mayor's court, London, an attachment of a debt owing from third persons to the plaintiff, it must appear that the action in which the attachment issued was terminated. *Parton v. Hill*, 12 W. R. 753; 10 L. T., N. S. 414—Q. B.

A plaintiff, to recover in an action for the malicious issue of process, must have had judgment in his favor in that process. *Taylor v. Ford*, 22 W. R. 47; 29 L. T., N. S. 392—Q. B.

**—for malicious criminal prosecution.]—**An action for malicious prosecution cannot be maintained till the prosecution is terminated, which must appear upon the declaration. *Fisher v. Bristol*, 1 Dougl. 215.

A declaration in an action for a malicious prosecution for felony, must state that the prosecution is at an end; and alleging that

the plaintiff was discharged from his imprisonment is not sufficient. *Morgan v. Hughes*, 2 T. R. 225.

If it alleges that he was discharged by the grand jury not finding the bill, it will show a legal end to the prosecution. *Ib.*

An action lies for a malicious prosecution, though the plaintiff is acquitted on a defect in the indictment. *Wicks v. Pentham*, 4 T. R. 247.

So, for the malicious prosecution of a bad indictment for perjury. *Pippet v. Hearn*, 1 D. & R. 266; 5 B. & A. 634.

If a party is indicted for a felony, though he is acquitted without calling witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, and the evidence was sufficient to cause the jury to pause. *Smith v. Macdonald*, 3 Esp. 7—Kenyon.

The principle that in an action for maliciously and without reasonable and probable cause setting the law in motion to the damage of the plaintiff, it is essential to show that the proceeding alleged to be instituted maliciously, and without reasonable and probable cause, has terminated in favor of the plaintiff, if from its nature it is capable of such a termination, applies where an action is brought for falsely and fraudulently causing a proceeding to be taken in a foreign court to the damage of the plaintiff. *Castrique v. Behrens*, 3 El. & El. 709; 30 L. J., Q. B. 163; 7 Jur., N. S. 1028.

The rule, that in an action for a malicious prosecution the plaintiff is bound to show a termination of the proceedings in his favor, does not apply where the proceedings, in respect of which the action is brought, are ex parte, and must of necessity terminate unfavorably to the plaintiff; as where the defendant maliciously exhibits articles or demands sureties of the peace against the plaintiff, in which cases the latter has no opportunity of controverting the oath of the defendant. *Stewart v. Gromett*, 29 L. J., C. P. 170; 7 C. B., N. S. 101; 6 Jur., N. S. 776.

A person convicted of a trespass under the Game Act, 1 & 2 Will. 4, c. 32, underwent the sentence of imprisonment under that conviction, and did not appeal against it:—Held, that that conviction was an answer to an action against the informer for a malicious prosecution. *Mellor v. Baddley*, 2 C. & M. 675; 4 Tyr. 962; 6 C. & P. 374.

Quære, whether an action is maintainable against a justice of the peace for willfully and maliciously, and without reasonable and probable cause, convicting a person in a penalty in a matter in which the justice has jurisdiction, and which penalty is paid, but the conviction has been subsequently quashed? *Gelen or Gelan v. Hall*, 2 H. & N. 379; 27 L. J., M. C. 78.

An action for a malicious prosecution will not lie if the proceeding complained of terminated in the conviction of the plaintiff, which has not been quashed; and it makes no

difference that there is no appeal from such conviction. *Basé v. Matthews*, 36 L. J., M. C. 93; 2 L. R., C. P. 684; 15 W. R. 839; 1 L. T., N. S. 417.

—for malicious proceedings in bankruptcy.—It must be averred and proved, if traversed, that the commission was superseded before the commencement of the action; and if the fact is not proved, the plaintiff ought to be nonsuited, though it was not averred in the declaration, and though the defendant, who might have demurred for the omission, did not do so. *Whitworth v. Hall*, 2 B. & Ad. 695.

It is not sufficient to prove merely that the commission was superseded, as a superseded commission may proceed upon strict legal grounds, and does not, therefore, furnish evidence of the want of probable cause. *Hay v. Weakley*, 1 C. & P. 361—Tindal.

A declaration, for maliciously suing out a fiat in bankruptcy, contained an allegation that it was ordered by the Court of Review "that the fiat should be annulled, and the same was accordingly annulled, and the proceedings on the fiat were thereupon ended and determined." The order of the Court of Review was, that the fiat "be annulled, if the Right Hon. the Lord Chancellor shall think fit;" and at the foot of it was a confirmation of it, signed by the Lord Chancellor:—Held, that the allegation was substantially proved. *Kemp v. King*, Car. & M. 396—Denman.

As to evidence of termination of the former proceedings,—see this title, II., 3.

#### 4. Parties Liable.

**Against whom action lies, generally.]**—In an action for malicious prosecution against A. and B., if it appears that both A. and B. entered into a joint recognizance to prosecute and give evidence; but that A. only employed the attorney, and that B. attended before the magistrate and the grand jury at the request of the attorney, the judge will direct the acquittal of B. *Eagar v. Dyott*, 5 C. & P. —Tenterden.

A declaration for maliciously indicting, and procuring the plaintiff to be indicted, is sustained, although it appears that the defendant preferred the indictment unwillingly and solely because he was bound over to do so, if it appears that he was himself the cause of his being bound over by originally making a malicious charge before the magistrate. *Dubois v. Keates*, 3 P. & D. 306; 4 Jur. 148; 11 A. & E. 329.

A rule for a criminal information obtained by the plaintiff in an action for the malicious prosecution of an indictment, and made absolute, is no bar to such action, although the indictment was against the plaintiff and another person. *Caddy v. Barlow*, 1 M. & R. 275.

In an action against parish officers, for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of

in act of vagrancy, and imprisoned and kept to hard labor, the conviction being afterwards quashed, it is not necessary that the convicting magistrate should be made a defendant. *Simpkin v. French*, 12 Price, 394.

If A., in the name of B., prosecutes an action against C. maliciously, and without reasonable and probable cause, C. has no action against A. unless he has thereby sustained legal damage. *Cotterell v. Jones*, 11 C. B. 713; 16 Jur. 88; 21 L. J., C. P. 2.

If C. has thereby sustained legal damage, an action lies. *Id.*

In an action in a county court, A., by means of perjured evidence, led the judge to believe that B., also a witness in the court on the same decision, had committed perjury; whereupon the judge directed that B. should be indicted, and bound over A. to prosecute him at the assizes, where B. was acquitted:—Held, that an action for malicious prosecution lay against A., at the suit of B. *Fitzjohn v. Mackinder*, 9 C. B., N. S. 505; 7 Jur., N. S. 1283; 30 L. J., C. P. 257; 9 W. R. 477; 4 L. T., N. S. 149—Exch. Cham.

In an action for malicious prosecution, a person is liable who gives evidence in support of the charge, and who represents himself as preferring it, although it is preferred at some other persons' expense, and such other persons have told him that he shall be a witness only, and they employ the counsel and solicitor; and if it is shown, that, during the examination on the charge, such person is, in his hearing, repeatedly alluded to as prosecutor, and does not deny that character, that is evidence from which a jury may infer that he represented himself as the person preferring the charge. *Clements v. Ohrlly*, 2 C. & K. 686—Denman.

An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of probable cause. *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 L. R., App. Cas. 186—P. C.

**Married women.**—A married woman is liable to be taken in execution under a ca. sa. issued upon a judgment for the defendant in an action for libel brought by her husband, in which she is joined; and therefore an action will not lie by husband and wife against the defendant for maliciously and without reasonable and probable cause suing out a ca. sa. against the wife upon the judgment in the action of libel. *Newton v. Boodle*, 9 Q. B. 948; 11 Jur. 628.

**Corporations; public companies.**—An incorporated railway company is not liable for a malicious prosecution, in respect of a criminal proceeding instituted by their servant without their knowledge or direction. *Stevens v. Midland Counties Railway Company*, 2 C. L. R. 1800; 10 Exch. 352; 18 Jur. 932; 23 L. J., Exch. 328.

A man was arrested on a warrant issued on the sworn information of an officer employed

by a railway company on a charge of theft; he was taken before a magistrate and remanded for a week at the request of an attorney employed by the company, and was ultimately discharged. At the trial of an action for malicious prosecution against the railway company, he denied that he was guilty of the theft, and the judge nonsuited:—Held (per Kelly, C. B., and Cleasby, B.), that the nonsuit was wrong; but per Bramwell, B., that the nonsuit was right; and that no action for malicious prosecution will lie against a railway company, for a corporation aggregate is in law incapable of acting maliciously. *Henderson v. Midland Railway Company*, 20 W. R. 23; 25 L. T., N. S. 881—Exch.

## II. PROCEDURE.

### 1. Pleading.

**Declarations in actions for malicious civil proceedings.**—In an action for malicious arrest, the declaration is bad after verdict, for stating that the defendant "wrongfully and injuriously" procured the writ to issue, and caused the plaintiff to be arrested, without the addition of the word "maliciously." *Saxon v. Castle*, 1 N. & P. 661; 6 A. & E. 652; W. & D. 305.

A declaration alleged that the defendant arrested the plaintiff, and that the plaintiff had been detained in custody until he was discharged by reason of the defendant's not having declared against him; that the defendant might have procured judgment in that suit if he had thought fit, but that he afterwards, without any reasonable or probable cause, maliciously arrested him a second time for the same cause of action, without the leave of any judge of the court:—Held, that the declaration was good, as it must be taken that the second arrest was maliciously made by the defendant without the contemplation of any benefit to himself. *Heywood v. Collinge*, 1 P. & D. 202; 9 A. & E. 268; 1 W., W. & H. 702; 2 Jur. 1038.

A declaration stated that plaintiff being indebted to H. L., in 36*l.*, H. L., by the defendant, as his attorney, for the recovery thereof, sued out a writ of summons, and declared against the plaintiff; that afterwards the plaintiff presented a petition to the court of Bankruptcy, and obtained an order for protection from process, whereof the defendant had notice; yet the defendant, well knowing that he was protected from process, but willfully and maliciously intending to injure him, procured a judgment to be signed against him in the action, and willfully and maliciously sued out a testatum ca. sa., under which the sheriff arrested the plaintiff:—Held, that the declaration was bad, in omitting to state that the defendant arrested the plaintiff without reasonable or probable cause. *Rout or Roret v. Lewis*, 5 D. & L. 371; 17 L. J., Exch. 98.

A count, alleging that the defendant caused the plaintiff to be arrested and imprisoned without reasonable or probable cause, on a



false and malicious charge of felony, is a count in trespass for an assault and false imprisonment, and not an informal count for a malicious prosecution; and therefore requires no evidence of malice, or want of reasonable and probable cause. *Brandt v. Cruddock*, 27 L. J., Exch. 315.

A declaration alleged, that defendant, not having reasonable or probable cause to believe that the plaintiff was about to quit England, falsely and maliciously, and without reasonable or probable cause, caused and procured a judge to make an order for a capias against the plaintiff, indorsed to hold him to bail for a sum exceeding 20*l.*; and that the defendant, by color of that order, sued out a capias, and caused the plaintiff to be arrested and kept in custody until he gave bail to procure his release. The declaration averred that defendant never had, nor was there at any time any reasonable or probable cause for believing that the plaintiff was about to quit England, nor had he any such intention; and that the order for the capias was afterwards rescinded, and the capias set aside:—Held, that, although this declaration would have been bad on special demurrer, for not setting out what the false evidence was on which the order had been obtained, it was good after verdict, as the allegation that the defendant falsely procured an order must be understood with reference to the context, as meaning that he procured an order by false evidence or by means of falsehood; and the allegation as to the defendant not having had reasonable or probable cause for supposing that plaintiff was about to quit the country might be rejected as surplusage. *Daniels v. Fielding*, 16 M. & W. 200; 4 D. & L. 329; 10 Jur. 1061; 16 L. J., Exch. 153.

A declaration alleging that the defendant, not having any reasonable or probable cause of action against the plaintiff, or for causing him to be arrested, wrongfully, falsely, maliciously, and vexatiously procured an order for the arrest of the plaintiff, and caused him to be arrested on a capias issued thereupon, was bad on special demurrer, before 15 & 16 Vict. c. 76, for not showing the false charge or statement by which the judge was induced to make the order. *Bryant v. Bobbett*, 11 Jur. 1020—Exch.

A declaration stated that the defendant, not having any reasonable or probable cause of action against the plaintiff, to the amount for which he maliciously caused the plaintiff to be arrested, falsely, maliciously, and unjustly procured from a judge an order for a capias, by falsely and maliciously representing to the judge that the plaintiff was justly and truly indebted to the defendant in a certain sum, by means of a false affidavit shown and uttered by the defendant before the judge, thereupon maliciously caused a capias to be issued, and without any reasonable or probable cause of action, caused the plaintiff to be arrested:—Held, that the declaration was sufficient, and that it need not more particularly set out the false statement, by which

the judge was induced to make the order, nor show that the facts were false within the defendant's knowledge, or that he had not reasonable or probable cause for believing them to be true. *Ross v. Norman*, 5 Exch. 359; 1 L., M. & P. 409; 19 L. J., Exch. 322.

A declaration, in an action by an execution debtor against his creditor for maliciously and without reasonable or probable cause arresting the plaintiff for more than was due on the judgment, alleged as damage that the plaintiff was always, during his detention, able and willing, and offered, to pay, and was finally discharged from imprisonment by paying the smaller sum; and that by reason of the premises he was put to costs and expenses in and about his maintenance during his detention, and in and about obtaining his discharge:—Held, that the declaration sufficiently showed special damage resulting to the plaintiff from the arrest, inasmuch as to entitle him to a verdict he must show, not merely that he was arrested and detained for a greater amount than was due, however improperly indorsed, but also that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased. *Jenings v. Florence*, 2 C. B., N. S. 467; 3 Jur., N. S. 774; 26 L. J., C. P. 277.

An allegation that the defendant maliciously caused the plaintiff to be arrested, and to be detained in prison, until, in order to procure his release, he was forced to procure bail, is not a divisible allegation; and if there was a giving of bail proved, but no evidence of any arrest, it is not sufficient. *Berry v. Adamson*, 6 B. & C. 528; 9 D. & R. 558; 2 C. & P. 503.

But on an averment in an action for a malicious arrest, that the defendant detained the plaintiff until he found bail, if some detention is proved, it is sufficient to support the action, although no bail was put in. *Bristow v. Haywood*, 1 Stark. 48; 4 Camp. 213—Ellenborough.

A declaration for maliciously setting in motion a court of competent jurisdiction is not bad, because it does not aver that the proceedings terminated in favor of the plaintiff. *Redway v. McAndrew*, 9 L. R., Q. B. 74; 22 W. R. 60; 29 L. T., N. S. 421—Q. B.

A declaration alleged that the defendant maliciously and without reasonable or probable cause caused the plaintiff's ship to be arrested for necessities supplied by H., under a warrant from a county court, and to be detained until the proceedings in the court were determined and the ship released:—Held, that it appeared by reasonable intendment that the proceedings were determined in the plaintiff's favor, and that the declaration was therefore good. *Ib.*

A declaration stated that the defendant, maliciously and without reasonable or probable cause, caused to be issued out of the Court of Exchequer a writ, on which an inquisition was held, and the debt deposited to by the defendant was found to be due from the plaintiff to

the crown; that afterwards the defendant, maliciously and without reasonable or probable cause, caused to be sued out a writ of extent against the plaintiff, directed to the sheriff, who levied thereupon and held the goods until the writ of extent was superseded by the court. Plea, that the writ of supersedeas was issued as matter of grace and favor of the crown:—Held, first, that the causing the writ of extent to be sued out was the gist of the action, and that the declaration was sufficient, inasmuch as it showed the discharge of that writ; and, secondly, that the plea was bad. *Craig v. Hasel*, 3 G. & D. 209; 4 Q. B. 481; 7 Jur. 368; 12 L. J., Q. B. 181.

— for malicious indictments and other criminal proceedings.]—It is necessary to state in a declaration every allegation proper to support the action; namely, that the defendant falsely, maliciously, and without any reasonable or probable cause, caused the plaintiff to be indicted, and to state the trial and acquittal. *Carman v. Truman*, 1 Bro. P. C. 101.

A declaration for maliciously indicting at the general quarter sessions, instead of general sessions, is good; the word "quarter" being only surplusage. *Bushby v. Watson*, 2 W. Bl. 1050.

After verdict, in an action for a malicious prosecution for perjury, it is no objection to the description of the court in which the indictment was found, that the names of the justices before whom the session of oyer and terminer was held, are not set out; and it will be sufficient to allege, that at such a session the defendant maliciously indicted the plaintiff for willful and corrupt perjury, without describing more particularly the circumstances under which the alleged perjury was supposed to have been committed. *Pippet v. Hearn*, 1 D. & R. 266; 5 B. & A. 634.

In an action against parish officers, for maliciously taking the plaintiff before a magistrate, and procuring him to be convicted of an act of vagrancy, and imprisoned and kept to hard labor, the conviction being afterwards quashed, it was averred in the declaration, that the conviction was quashed on the 22d day of April, at the general quarter sessions of the peace; and the proof by the order for quashing the conviction showed that it was not a general but an adjourned session: the variance was held not to be such as to furnish a ground for setting aside the verdict. *Simplin v. French*, 12 Price, 394.

In a declaration for a malicious prosecution, it is not necessary to state that there was an information. It is sufficient to state that the defendant procured a warrant to be issued; but if the declaration states that the defendant made information on oath, and that upon that information the magistrate granted the warrant, the information must be proved, and a recital of it in the warrant is not sufficient. *Gregory v. Derby*, 8 C. & P. 749—Patteson. *S. P. Stevens v. Clark*, Cur. & M. 500—Cresswell.

In an action for a malicious prosecution, in which the plaintiff charges the defendant with having imposed on him the crime of felony, by reason of which he was imprisoned; and on production of the information before the justice there is no charge of felony, though the warrant was to arrest the plaintiff for felony; the evidence does not support the declaration. *Leigh v. Webb*, 3 Esp. 165—Eldon.

A count was for causing and procuring a false and malicious charge to be made against the plaintiff before a magistrate, and proceedings to be taken thereon without any reasonable or probable cause. The defendant pleaded, that he caused and procured, &c., "upon and with a reasonable and probable cause," and alleged the several facts attending the transaction out of which the charge before the magistrate arose. To this plaintiff demurred specially, on the ground that the plea contained no allegation that the defendant, at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted upon those facts and circumstances:—Held, bad, it being consistent with this plea that the charge was made upon some ground altogether independent of the facts stated; and that the knowledge of what was sufficient to induce any reasonable person to believe the truth of the charge before he put the law in motion, did not exist in the defendant's mind at the time the charge was made. *Delegal v. Highley*, 3 Bing. N. C. 950; 5 Scott, 154; 3 Hodges, 158.

To an action for falsely, maliciously, and without any reasonable or probable cause, charging the plaintiff with larceny, before a justice of the peace, indicting the plaintiff, and causing him to be tried on such charge, on which he was afterwards acquitted; the defendant pleaded, that the plaintiff brought a former action against the defendant for assaulting and imprisoning him on a false assertion that he had committed felony; that to that action the defendant pleaded not guilty, and a justification of the assertion, and imprisonment in consequence thereof; on trial of which action, the judge directed the jury to take into their consideration the question whether the defendant had charged and accused the plaintiff with having stolen the goods mentioned in the declaration, and falsely and maliciously, and without any reasonable or probable cause, committed the grievances complained of in the present action; that the jury found for the plaintiff, and assessed damages accordingly, and that the plaintiff recovered judgment for the same, with costs; averring the identity of the imprisonments in the two actions, and that the grievances complained of were the same with those in respect of which damages had been given on the former occasion:—Held, first, that this plea was no answer to the action. *Guent v. Warren*, 9 Exch. 879; 2 C. L. R. 979; 18 Jur. 133; 23 L. J., Exch. 121.

Held, secondly, that the judge misdirected



the jury on the trial of the former action. *Id.*

A count alleged that the defendant, a justice of the peace, unlawfully and maliciously, and without reasonable or probable cause, took the information of A. against the plaintiff, and wrongfully, willfully, maliciously, and without reasonable or probable cause, as the defendant well knew, convicted the plaintiff, and he was thereby compelled to pay a sum of money, and that upon appeal to the quarter sessions the conviction was afterwards quashed. A verdict having been found for the plaintiff, the court refused to arrest the judgment. *Gelen v. Hall*, 2 H. & N. 370.

A declaration stated, that the defendant, intending to injure the plaintiff in his good name, and to cause his dwelling-house to be searched for stolen goods, and to procure him to be imprisoned, went before a magistrate, and falsely, maliciously, and without probable cause, charged that certain goods of his had been feloniously stolen, and that he suspected that the goods were concealed in the plaintiff's dwelling-house; and, upon such charge, the defendant procured the magistrate to grant a warrant, authorizing a constable, with necessary assistance, to enter the plaintiff's house, to search for the goods; and the defendant, with other persons, caused and procured the dwelling-house to be searched and rummaged for the goods by such persons, and the door of such house, and a pantry there, to be broken to pieces, and the plaintiff and his family to be disturbed in the possession, and his goods to be carried away:—Held, that the acts of violence alleged to have been committed in the house appeared sufficiently by the declaration to have been acts done in pursuance of the warrant, and in consequence of the charge made by the defendant, and that they were stated as mere matter of aggravation; and, consequently, that the whole count containing this statement was in case. *Hensworth v. Fowkes*, 4 B. & Ad. 449.

**Pleas.**—In actions for torts the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment, and no other defense than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration: e. g., in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. Reg. Gen., Q. B., C. P. and Exch., T. T., 16 Vict. r. 61; 1 El. & Bl., App. lxxxi.

In an action for a malicious prosecution, the court will not permit a defendant to plead

that he had probable cause to indict, together with not guilty. *Cotton v. Brown*, 4 N. & M. 831; 3 A. & E. 312.

The plea of not guilty to an action for a malicious prosecution, puts in issue the fact of prosecution, and the want of probable cause. *Id.*

In an action for maliciously, and without probable cause, refusing to accept debt and costs from a prisoner, evidence of probable cause may be given under not guilty. *Housfield v. Drury*, 3 P. & D. 127; 11 A. & E. 98; 4 Jur. 24.

In an action for maliciously, and without reasonable or probable cause, procuring the plaintiff to be outlawed, assigning for special damage that the plaintiff was put to costs in and about reversing the outlawry, under the plea of not guilty, the reversal of the outlawry is not put in issue. *Drummond v. Pigou*, 7 C. & P. 228; 2 Bing. N. C. 114; 1 Hodges, 190.

In an action for a malicious arrest, the declaration averred that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution, and that it was discontinued:—Held, that the plea of not guilty in such a case merely put in issue the wrongful act, viz., the malicious arrest, without probable cause, and not the discontinuance. *Watkins v. Lee*, 5 M. & W. 270; 7 D. P. C. 498; 3 Jur. 484.

On the trial of an action for a malicious prosecution for perjury, not guilty does not put in issue the determination of the prosecution. *Wren v. Heslop*, 12 Q. B. 267; 12 Jur. 600; 17 L. J., Q. B. 313.

In an action for maliciously suing out a fiat in bankruptcy, the allegation in the declaration, as to the annulling of the fiat, is not put in issue by not guilty. *Atkinson v. Raleigh*, 2 G. & D. 611; 3 Q. B. 79; 6 Jur. 731. See *Kemp v. King*, Car. & M. 396.

In an action by assignees of C., a bankrupt, the declaration stated, that before the bankruptcy C. executed to the defendant a warrant of attorney, subject to a defeasance stating that it was given to secure the payment to the defendant of 23*l.* 17*s.*, balance of account, and of any other sums which he might be called on to pay under guaranty for C.; and alleged, that, although at the time of executing the warrant of attorney, the defendant had not entered into any guaranty for C.; nor ever became liable to any sum of money on his behalf, and although, at the time of executing the warrant of attorney, a small sum of money, and no more, was due from C. to the defendant on the warrant of attorney and defeasance, and it was the defendant's duty to issue execution for that sum only, being such balance as aforesaid, with interest, and no more; yet, he wrongfully caused a fi. fa. to be issued, founded upon the judgment entered up on the warrant of attorney, indorsed to levy 103*l.* 10*s.* for debt, costs, &c., under which the goods of C. of value sufficient to satisfy that sum were seized and sold, before the bankruptcy, and thereby wholly lost to his assignees. The defendant pleaded not

guilty, and that, after the time of executing the warrant of attorney, and before the execution, 100*l.* was due from C. to the defendant upon the warrant of attorney and discharge, in addition to the balance of account in the declaration mentioned, on which issues were joined:—Held, that, on these pleadings, it was incumbent on the plaintiffs, in order to recover in the action, to prove that no more was due to the defendant than 23*l.* 17*s.*, the balance of account mentioned in the declaration. *Gough v. Crabb*, 11 M. & W. 497.

A plaintiff gave the defendants a warrant of attorney to enter up judgment, if certain costs should be unpaid within four days after the master should have taxed the same; the defendants procured a taxation *ex parte*, and by an incorrect representation to the master, obtained from him an allocatur for more costs than they were entitled to. By order of a judge, a new taxation was directed, pending which the defendants arrested the plaintiff; afterwards the new taxation was had, and the costs were reduced. The plaintiff declared for a wrongful arrest, and the defendants pleaded that the costs had been taxed, and a sum found due, for which they arrested:—Held, first, that the plaintiff might properly sue for a malicious arrest, and was not bound to declare for a deceitful representation to the master; secondly, that the plea was not supported, there having been, in effect, no taxation when the defendants arrested; and that the plaintiff was not bound to reply the facts specially which rendered the first taxation invalid. *Saxton v. Castle*, 6 A. & E. 652; 1 N. & P. 661.

When, in an action for maliciously giving the plaintiff into custody and for slander, the defendant pleaded to the latter cause of action a plea in justification, which would have been no answer to the former, and at the trial the plaintiff failed to prove the slander:—Held, that the jury ought to disregard this plea in considering the former cause of action. *Brooke v. Avrillon*, 42 L. J., C. P. 126; 21 W. R. 594.

2. *Proof of Malice, and of Want of Probable and Reasonable Cause; when the Question is one of Law or of Fact; and how determined.*

**Burden of proof; and admissibility and sufficiency of evidence, generally.**—The first action being non-prossed, is not of itself evidence of malice. *Sinclair v. Eldred*, 4 Taunt. 7.

It lies on the plaintiff to give evidence of malice in the defendant, either express, or to be collected from circumstances, showing plainly the want of probable cause; and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. *Purcell v. Maenamaru*, 9 East, 361; 1 Camp. 199.

In an action by A. for the malicious prosecution by C. of an indictment against A. and

B., evidence of the misconduct of C. towards B., after his apprehension, tending to show the bad motives of C., is admissible. *Cuddy v. Barlow*, 1 M. & R. 275.

Where the defendant gives evidence of probable cause, a witness may be asked whether the plaintiff was not a man of notoriously bad character. *Rodriguez v. Tadmire*, 2 Esp. 731—Kenyon.

In an action for maliciously procuring the plaintiff to be arrested on a charge of larceny, the defendant cannot give evidence to show that the plaintiff's character was suspicious, and that his house had been searched on former occasions. *Newsum v. Carr*, 2 Stark. 69—Wood.

The opinion of the jury on a former trial is not material. *Hibberd v. Charles*, 2 F. & F. 126—Keating.

A declaration, alleging that the defendant maliciously and without probable cause preferred an indictment against the plaintiff for perjury, is supported by proof that some of the assignments of perjury in the indictment, which was set out at length in the declaration, were preferred without probable cause. *Ellis v. Abraham*, 8 Q. B. 709; 10 Jur. 593; 15 L. J., Q. B. 221.

The plaintiff's counsel stated, that he should offer no evidence as to the transactions to which the other assignments of perjury related:—Held, that the defendant was not at liberty to give evidence to show that there was probable cause for those other assignments of perjury. *Id.*

On the trial of an action for a malicious prosecution for perjury, in making a charge against the defendant before a magistrate, evidence of what the magistrate said in his hearing on disposing of the charge is admissible, for the purpose of showing the existence of reasonable and probable cause. *Edden v. Thorniloe*, 6 Jur. 265—N. P. C.—Patteson.

In an action for maliciously indicting the plaintiff, the observations made by the judge on the trial of the indictment are not evidence for him. *Barker v. Angell*, 2 M. & Rob. 371—Denman. See contra, *Warne v. Terry*, Rosc. Evid. 409, 7th edit.—Littledale.

The plaintiff cannot give in evidence what the magistrate said on his discharge, as, if unfavorable to the plaintiff, he had no power of replying to it. *Wetzlar v. Zachariah*, 10 L. T., N. S. 432—Mellor.

The plaintiff is to give *prima facie* evidence of want of probable cause, which the defendant may rebut, if he can, by showing the existence of probable cause. The defendant presented two bills for perjury against the plaintiff, but did not appear himself before the grand jury, and the bills were ignored. He presented a third, and on his own testimony the bill was found. This prosecution he kept suspended for three years, till the plaintiff taking the record down to trial, the defendant declining to appear as a witness, although in court, and called on, plaintiff was acquitted:—Held, sufficient *prima facie* evidence of want of probable cause. *Taylor v.*



*Willans*, 2 B. & Ad. 845; *S. C.*, nom. *Willans v. Taylor*, 6 Bing. 183; 3 M. & P. 350, affirmed.

The disbelief of the party making a charge before a magistrate is some evidence of want of probable cause, notwithstanding other evidence may have shown that there was *prima facie* probable cause for making the charge. *Broad v. Ham or Howe*, 5 Bing. N. C. 722; 8 Scott, 40.

Evidence of facts upon which the act of bankruptcy was probably proved, but which facts do not amount to an act of bankruptcy, is sufficient to call upon the defendant to prove the affirmative of probable cause. *Cotton v. James*, 1 B. & Ad. 128.

The adjudication of the commissioners does not in itself negative the want of probable cause. *Ib.*

As to what constitutes malice, and what facts show absence of probable and reasonable cause,—see this title, I., 2.

**When malice may be inferred from absence of probable cause.**—In an action for a malicious arrest, the jury may imply malice from the absence of reasonable or probable cause. But this is an inference not of law but of fact, which the jury is not bound to draw. *Mitchell v. Jenkins*, 2 N. & M. 301; 5 B. & Ad. 588.

Presenting to the jury the absence of such cause as conclusive evidence of legal malice is a misdirection. *Ib.*

A. having by his laches lost all right of action on a note indorsed by B., arrested B., and afterwards discontinued the action:—Held, that these circumstances did not of themselves so exclude all probable cause as to afford a presumption of malice. *Bristow v. Heywood*, 1 Stark 48; 4 Camp. 213—Ellenborough.

There is a material distinction, as to the liability for a malicious prosecution, between the institution of the prosecution and its continuance after it has been already instituted, without authority by an agent. And the absence of reasonable and probable cause, which might be evidence of malice in the one case, will not be so in the other. *Weston v. Beeman*, 27 L. J., Exch. 57.

Where the party put in possession under a bill of sale issued a summons against the assignor for feloniously stealing some of the chattels assigned, and the assignees attended the hearing, and allowed the case to be opened on their behalf as prosecutors;—Held, that the absence of reasonable and probable cause would not be evidence of malice as against them. *Ib.*

**Questions of law and of fact; and functions of the judge and the jury, in general.**—The question of probable cause is a mixed proposition of law and fact; whether the circumstances alleged are true or not, is a question of fact for the jury; whether they amount to probable cause, is a question of law. *Johnstone v. Sutton*, 1 T. R. 545; 1 Bro. P. C. 70. And see *Caullell v. London*, 1 T. R. 520, n.

—The existence of reasonable or probable

cause is to be decided by the judge, and is a question for him and not for the jury. *Bast v. Gibbons*, 30 L. J., Exch. 75.

In an action for a malicious prosecution, the question, whether there is or is not reasonable or probable cause, may be entirely for the judge or for the jury, according to the evidence in each particular case. *Jama v. Phelps*, 11 A. & E. 483.

In an action for a malicious prosecution, though in it the question of reasonable or probable cause depends not upon few and simple facts, but upon facts which are numerous and complicated, and upon numerous and complicated inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. *Panton v. Williams*, 1 G. & D. 504; 2 Q. B. 169—Exch. Cham.

Though the question of reasonable and probable cause is to be determined on facts, the existence of which, in cases of doubt, can only be properly decided by the jury, yet it is not necessary for the judge, where there is a variety of facts, to leave each fact specifically to the jury, but to decide, on a general view of the circumstances, whether there is or is not reasonable and probable cause for the prosecution. *Roulunds v. Samuel*, 11 Q. B. 39; 17 L. J., Q. B. 65.

The facts material to the question of probable cause must be found by the jury, and the judge is then to decide, as a point of law, whether the facts so found establish probable cause or want of it. *Turner v. Ambler*, 10 Q. B. 252; 6 Jur. 346; 11 L. J., Q. B. 153.

Among these facts are the defendant's knowledge of the alleged ground of accusation at the time when he prosecuted, and his belief at the time that the conduct forming such ground of accusation amounted to the offense charged. *Ib.*

If the defendant did not so believe, the want of reasonable and probable cause is established, though the imputed offense appear *prima facie* to have been committed by the plaintiff, and the fact to have been known to the defendant before the charge was made. *Ib.*

The absence of belief must be proved by the plaintiff; and if it be not proved, the defect is not supplied (for the purpose of showing probable cause) by evidence that the defendant made use of the charge as a means of obtaining an unfair advantage over the plaintiff. *Ib.*

In an action for a malicious prosecution, the question of reasonable and probable cause is for the judge to determine; but before he can determine such question, the jury must find the facts. *Chapman v. Heslop* (in error), 2 C. L. R. 139; 18 Jur. 348; 23 L. J., Q. B. 49—Exch. Cham.; affirming judgment of

Queen's Bench, nom. *Haddrick v. Heslop*, 12 Q. B. 267; 12 Jur. 600; 17 L. J., Q. B. 818.

It is a rule of law that the jury must find the facts on which the question of reasonable and probable cause depends, but that the judge must then determine whether the facts found do constitute reasonable and probable cause. No definite rule can be laid down for the exercise of the judge's judgment. *Lister v. Perryman*, 30 L. J., Exch. 177; 4 L. R., H. L. Cas. 521; 19 W. R. 9; 23 L. T., N. S. 269; reversing judgments of Exchequer and Exchequer Chamber, nom. *Perryman v. Lister*, 3 L. R., Exch. 197; 37 L. J., Exch. 166; 18 L. T., N. S. 574.

**Instructions to jury, in particular cases of malicious arrests in actions.]**—In an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested on a *capias*, the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract, for the alleged breach of which the defendant was suing, the judge having stated that, in his opinion, the plaintiff had failed to make out a want of reasonable and probable cause, told the jury that, to entitle the plaintiff to a verdict, they must be satisfied that there was a total want of reasonable and probable cause, and that the defendant had acted with malice:—Held, a misdirection. *Gibbons v. Allison*, 3 C. B. 181.

Where A. arrested B. upon the advice of his special pleader that he had a good cause of action, but afterwards, upon being ruled to declare, discontinued proceedings, and B. brought an action for a malicious arrest, without any reasonable or probable cause:—Held, that the reasonableness or probability of the cause was a mixed question of law and fact for the jury to decide; and that they were rightly told by the judge that if they believed the defendant to have acted *bonâ fide* upon the advice he had received, he was entitled to a verdict; but if otherwise, they ought to find for the plaintiff. *Ravenga v. Macintosh*, 4 D. & R. 107; 2 B. & C. 693; 1 C. & P. 204.

To an action against the defendant, as the official assignee of a bankrupt, for a malicious arrest, the defendant pleaded not guilty, and traversed an averment in the declaration, that there was a difference between the plaintiff and the defendant, whether, in point of law, the plaintiff was liable to pay interest on a certain sum, but not as to the facts. The plaintiff had borrowed 60*l.* of the bankrupt; and the only question in dispute between him and the official assignee was, whether he was liable to pay interest on the sum borrowed. The plaintiff having refused to pay such interest, the defendant issued a summons for his appearance on the 24th April, in these terms:—"If your debt of 5*l.* 10*s.* 6*d.*, together with the expenses of this summons, be paid to the official assignee, on or before the 15th April instant, your appearance to the summons will not be enforced; but if you do not attend, a warrant will issue." This summons was not served

by the messenger until the 18th April; and the plaintiff, not having appeared thereto, was apprehended under a warrant issued by the defendant. The judge told the jury that there was reasonable and probable cause for the arrest, but he did not call their attention distinctly to the second issue, no request to that effect having been made to him by the plaintiff's counsel:—Held, first, that the question of reasonable and probable cause was matter of law for the judge, and that he had not misdirected the jury, as it was the plaintiff's duty to appear in pursuance of the summons. *Watson v. Whitmore*, 8 Jur. 764; 14 L. J., Exch. 41.

Held, secondly, that the omission of the judge to direct the jury specifically as to the second issue, which was an immaterial one, was no ground for a new trial. *Id.*

— **cases of malicious criminal proceedings.]**

—A defendant, having reasonable and probable cause for suspecting that A. had made an assault upon him with intent to rob, gave him in charge to a constable. The constable stated that A. was a very respectable man, and not likely to have committed the offense. The defendant, however, persisted in his charge, and he was taken before a magistrate. In an action for a malicious arrest:—Held, that it was a misdirection to tell the jury, that if the defendant believed the good character given by the constable, and persisted in his charge merely from obstinacy, it put an end to the reasonable or probable cause for taking A. into custody. *Musgrave v. Newell*, 1 M. & W. 582; 2 Gale, 91.

Upon the trial of an action for maliciously indicting the plaintiff, he proved a case, which in the opinion of the judge showed that there was no reasonable or probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, and that being proved, the judge was of opinion that there was:—Held, that there being no contradictory testimony as to that fact, and there being nothing in the demeanor of the witness who proved it to impeach his credit, the judge was not bound to leave it to the jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. *Davis v. Hardy*, 6 B. & C. 225; 9 D. & R. 380.

The defendant had indicted the plaintiff for felony, for maliciously obstructing the air-way of a mine, but which it appeared the plaintiff did *bonâ fide* under a claim of right. In an action by the plaintiff for a malicious prosecution:—Held, that it ought to have been left to the jury to say, whether the defendant knew that the obstruction had been done under a claim of right; for that, if so, there was no probable cause for the indictment. *James v. Phelps*, 3 P. & D. 231; 11 A. & E. 483.

In an action for a malicious prosecution, the question of malice was never in terms left to the jury. The court made a rule absolute for a new trial, although a rule nisi was not



obtained on the ground of misdirection. *Payne v. Reeves*, 9 W. R. 693—Q. B. See S. C. at nisi prius, 2 F. & F. 867.

In an action for charging the plaintiff with a felony maliciously, and without reason or probable cause:—Held, that the judge was warranted in leaving to the jury, instead of deciding himself, the existence of probable cause, upon the following state of facts:—The plaintiff, a servant, being discharged from service on a Friday, took away with her from her master's house a trunk and bag, the property of her master. The master wrote to her the next day, demanding his property, and threatening to proceed criminally on the Monday following if it was not restored: the servant being absent from home when the letter was delivered no answer was returned; whereupon the master, the same day, Saturday, had her taken into custody, but when she was brought before the magistrates on Monday, declined to make any charge. *M'Donald or M'Donnell v. Rooke or Brooke*, 2 Bing. N. C. 217; 2 Scott, 359; 1 Hodges, 314.

In an action against a defendant for taking the plaintiff to a police-office, and causing him to be imprisoned without reasonable or probable cause, on a charge that he uttered menaces against the defendant's life:—Held, that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left to the jury to determine whether the defendant believed the menaces, before the judge decided whether or not there was reasonable and probable cause for the charge. *Venafra v. Johnson*, 3 M. & Scott, 847; 10 Bing. 301; 6 C. & P. 50.

In an action by an attorney for maliciously, and without probable cause, indicting him for sending a threatening letter, it appeared that his clients having inquired of the defendants as to the truth of a representation made by a person who had offered to buy goods of them, the defendants replied, that they would not be responsible for the price of the goods, but believed the person had the employment he represented. The goods were then supplied to him. His representation turned out to be false, and the attorney, by direction of his clients, wrote a letter to the defendants, demanding payment of them for the price of the goods obtained from his clients through the defendants' representation, and stating that the circumstances made it incumbent on his clients to bring the matter under the notice of the public, if the defendants did not immediately discharge the amount; and that he had instructions to adopt proceedings, if the matter was not arranged in the course of the morrow; and that, as those measures would be of serious consequence to the defendants, he hoped they would prevent them by attention to his letter. The defendants were then summoned before a magistrate to answer a charge of obtaining goods under false pretences. The attorney served the summons, and attended for his clients, and the com-

plaint was dismissed. The defendants afterwards indicted the attorney for sending a threatening letter, contrary to 7 & 8 Geo. 4, c. 29, s. 8, and he was acquitted. On the trial in this action; the judge, without leaving any question to the jury, decided that there was reasonable and probable cause for preferring the indictment:—Held, that the decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants bona fide believed that they had a reasonable cause for indicting; but a pure question of law for the judge, whether the defendants had such reasonable cause. *Blackford v. Dod*, 2 B. & Ad. 179.

Action for maliciously, and without probable cause, indicting the plaintiff for perjury; averment, that he was tried and acquitted, and judgment given that he should depart without day, as by the record appeared. The evidence on which perjury was assigned was given against the defendant in an action in which he was the defendant, and in which the evidence for him contradicted that of the then plaintiff. The defendant, on being told of the now plaintiff's evidence, said he would indict him for perjury. The defendant's informant said, he thought there was no ground for such indictment, but the defendant replied that he should move for a new trial (in the then action), and the indictment would stop the mouths of the now plaintiff and the opposite party for a time:—Held, first, that the jury was properly asked whether the defendant believed there was reasonable and probable cause for the prosecution, and they having found that he did not, that the judge was right in ruling that there was no such cause. *Haddrick v. Heslop*, 12 Q. B. 267; 12 Jur. 600; 17 L. J., Q. B. 313; affirmed in the Exchequer Chamber. S. C., nom. *Heslop v. Chapman*, 18 Jur. 348; 23 L. J., Q. B. 49; 2 C. L. R. 139.

Held, secondly, that the jury was rightly told that, if upon the above evidence they believed that the defendant acted from an improper motive, they might infer malice. *Id.*

In an action for false imprisonment and malicious prosecution, to which the defense was a justification on the ground of embezzlement, it appeared that the plaintiff had been servant to the defendant, and was by him given into custody on a charge of embezzlement, and taken before magistrates, when a day-book kept by him was produced by the prosecution, and no entry found of the sum in question. The plaintiff was remanded, but bailed, and on a further hearing the book was again produced, and found to contain the entry, whereupon the charge was dismissed. At the trial of the action the defendant's counsel charged the plaintiff with having, when on bail, surreptitiously made that entry in the book. The judge, observing in court a barrister who had been counsel for the plaintiff on both occasions when he was before the magistrates, said he ought to be examined as to whether the entry was in the book at the first examination. He was ac-



cordingly examined by the defendant's counsel, and he deposed that in his belief it was not. The judge then summed up, telling the jury that if the plaintiff made that entry surreptitiously it was the strongest evidence of his guilt; adding, that he was ashamed to put it as matter of doubt, because they had the evidence of the counsel whose duty it was to make the investigation. The jury having found for the defendant:—Held, first, that the evidence was rightly received, as the fact deposed to by the counsel was not a privileged communication. *Brown v. Foster*, 1 H. & N. 730; 8 Jur., N. S. 245; 26 L. J., Exch. 249.

Held, secondly, that the judge had not improperly interfered with the conduct of the cause by calling him as a witness. *Ib.*

Held, thirdly, that the observations of the judge to the jury on his evidence were not a misdirection, or a ground for a new trial. *Ib.*

A trustworthy servant informed his master, whose gun had been stolen, that a credible person (one Robinson) had told him that he had seen the gun with a young man in the village; and went on to inform the master, as the fact was, that he had brought Robinson and the accused together, and had heard the accusation repeated in the presence of the accused; that they had then, at the proposal of the accused, gone together to the place where Robinson stated he had seen the gun, namely, a barn of the father of the accused; and that they there had found a gun which Robinson said was not the gun he had seen there on the former occasion. The master thereupon gave the accused into custody, and the latter having been tried and acquitted, brought an action for false imprisonment. The judge directed the jury that if the master had acted on the information of his servant without making inquiry of Robinson he must be taken to have acted on hearsay evidence, and without reasonable and probable cause. The jury found for the plaintiff:—Held, that the latter part of the information given by the servant was an original account and not merely a confirmation of the hearsay evidence contained in the first part of his information, and that it was a misdirection by the judge to direct the jury that there was no reasonable and probable cause for the arrest of the suspected person on the assumption that the information on which the arrest had been ordered was derived from hearsay evidence only. *Lister v. Perryman*, 4 L. R., II. L. Cas. 521; 39 L. J., Exch. 177; 23 L. T., N. S. 269; 19 W. R. 9; reversing judgments of Exchequer and Exchequer Chamber, *nom. Perryman v. Lister*, 3 L. R., Exch. 197; 37 L. J., Exch. 166; 18 L. T., N. S. 574.

### 3. Proof of the former Proceedings; and their Termination.

**Defendant's acts in procuring or prosecuting the proceedings.**—In an action against A. for maliciously causing an indictment for

a riot to be preferred against B., it was proved, on the part of A., by a solicitor, that he preferred the indictment by order of a city alderman:—Held, that A.'s counsel might ask the solicitor whether A. had desired him not to prosecute on his behalf, but could not ask him generally what A. had said to him on the subject of the prosecution. *Osterman v. Batesman*, 2 C. & K. 728—Erlc.

A declaration which alleges that the defendant charged the plaintiff with felony, is supported by evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and that he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them. *Davis v. Noake*, 6 M. & S. 29; 1 Stark. 317.

In an action against a party for causing the arrest of a person privileged from arrest (e. g., a witness attending on his subpoena, or a practicing attorney), thereby putting him to the expense of finding bail and procuring his discharge by order of a judge, the plaintiff must show that his imprisonment at the particular time in question took place by some act of the defendant, and that he knew or recognized the circumstances accompanying it, and also knew that the party arrested was privileged at that time. *Stokes v. White*, 4 Tyr. 786; 1 C., M. & R. 223.

In an action for a malicious indictment, the plaintiff may call one of the grand jury to prove that the defendant was the prosecutor of the indictment. *Freeman v. Arkell*, 3 D. & R. 669; 1 C. & P. 137.

**The former proceedings as evidence.**—Where, in an action for a malicious charge of felony, the plaintiff put in, to prove a formal part of his case, the defendant's and another person's depositions before the magistrate, the defendant has a right to use his own deposition as evidence in the cause, but not that of the other deponent. *Jackson v. Bull*, 2 M. & Rob. 176—Tindal.

In an action for a malicious arrest on a charge of felony, it is not necessary for the plaintiff to give in evidence the whole of the proceedings before the magistrates. *Biggs v. Clay*, 3 N. & M. 464.

In an action against a judgment creditor for maliciously suing out an alias *fi. fa.*, after a sufficient execution levied upon the plaintiff's goods under the first *fi. fa.*:—Held, that the sheriff's returns indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case), wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford v. Woodgate*, 11 East, 297; 2 Camp. 117.

A., the servant of B., stated before a magistrate that C. came into the yard of his employer, and took from a stable there two

geldings, the property of B., and rode them away, though he was told that he must not:—Held, that this information did not support a count in an action for malicious prosecution, which alleged that the information charged C. with having feloniously stolen and ridden away with two geldings. *Milton v. Elmore*, 4 C. & P. 456—Tindal.

**Termination of former proceedings.]—**Where, in an action for a malicious arrest, the declaration alleges certain facts "whereupon and whereby the suit was ended and determined," the plaintiff cannot show any other determination of the suit than the mode stated. *Combe v. Capron*, 1 M. & Rob. 398—Patteson.

The acceptance of the debt and costs, in satisfaction of the action, under a judge's order or rule of reference, is a sufficient determination of the suit. *Id.*

Proof that no declaration was filed or delivered within a year after the return of the writ, is sufficient to show a termination of the suit. *Pierce v. Street*, 3 B. & Ad. 397.

An averment that the suit is wholly ended and determined, is evidenced by proof of the rule to discontinue upon payment of costs, and that the costs were taxed and paid. *Bristow v. Heywood*, 1 Stark. 48; 4 Camp. 213—Ellenborough.

In an action for a malicious arrest, the declaration averred that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution, and thereupon it was considered by the court, that the defendant should take nothing by his writ. The defendant pleaded not guilty:—Held, that the averment of the discontinuance of the suit was a material allegation, which the defendant should have taken issue upon by his plea, and that, not having done so, the discontinuance was admitted on the record. *Watkins v. Lee*, 5 M. & W. 270; 7 D. P. C. 498; 3 Jur. 484.

Proof that a plaintiff had not declared in an action removed by habeas corpus within two terms, is not sufficient evidence of a determination of the suit to support an action for malicious arrest. *Norriah v. Richards*, 3 N. & M. 269; 1 H. & W. 437; 3 A. & E. 733.

#### 4. Proof of Damages; Measure of Damages.

**Evidence of injury sustained by defendant.]—**A count for maliciously indicting the plaintiff for an assault, cannot be supported without proof of some consequential injury sustained by him. *Freeman v. Arkell*, 3 D. & R. 669; 1 C. & P. 137.

If in a declaration for a malicious arrest it is averred that the plaintiff was arrested, that allegation is satisfied by proof of a detainer. *Whalley v. Pepper*, 7 C. & P. 506—Littledale.

**Recovery of costs of former suit or prosecution, as damages.]—**In the calculation of damages, in an action for maliciously holding to bail, the plaintiff is entitled to recover not

merely the taxed costs, but the costs as between attorney and client. *Sandback v. Thomas*, 1 Stark. 306—Ellenborough.

In an action for a malicious arrest the plaintiff is entitled to recover costs incurred in the former suit beyond the taxed costs in that suit. *Gould v. Barratt*, 2 M. & R. 171—Abinger.

The plaintiff can recover no damages for extra costs, nor any damages, unless malice is proved. *Sinclair v. Eldred*, 4 Taunt. 7. S. P., *Webber v. Nicholas*, R. & M. 419; 4 Bing. 10.

In an action for a malicious distress, the plaintiff cannot recover his extra costs as between attorney and client, incurred in an action of replevin which the plaintiff had brought to recover the goods distrained. *Grace v. Morgan*, 1 Hodges, 398.

Semble, that if one of two parties indicted, having a defense common to both, retains an attorney to defend them, and pays him the whole costs of defense, and they are acquitted, such party, in an action for malicious prosecution, may demand the costs so paid as part of his damages:—Held, that at all events he may so recover, if the costs of defense, being divisible, it has been expressly left to the jury to deduct any part of such costs which they thought not fairly incurred by the plaintiff, and they have found for him as to the whole. *Rowlands v. Samuel*, 11 Q. B. 39; 17 L. J., Q. B. 65.

## Malicious Injuries.

I. ACTIONS FOR. See TRESPASS; TORTS; and THE TITLES OF THE VARIOUS WRONGS.

II. PUNISHMENT OF. See CRIMINAL LAW.

## Malpractice.

See MEDICINE AND MEDICAL PRACTITIONER.

## Malta.

**Commercial laws.]—**Semble, that there is no difference between the law of Malta and the English law, regulating the construction of mercantile contracts and the remedies for breach of them. *Dimech v. Corlett*, 12 Moore P. C. C. 199.

**Distribution of estate.]—**According to the law of Malta, the real estate of an intestate is equally divisible among the co-heirs. *Bugeja v. Camilleri*, 3 L. R., P. C. 258; 23 L. T., N. S. 422.

By the ordinances and code in force in the island, where property possessed in common

cannot be "conveniently divided, and without disadvantage," the same must be sold by auction. *Ib.*

**Husband and wife; judicial separation.]—**By Article 40 of Ordinance No. 5, of 1867, of Malta, "grievous wrongs" (*ingurie gravi*) done to the complaining consort, or to his or her children, may give cause for a judicial separation, even if they do not amount to cruelty, as interpreted by the law of England. *Sant v. Sant*, 30 L. T., N. S. 415; 43 L. J., P. C. 73; 5 L. R., P. C. 542; 23 W. R. 718.

Where it was proved that the husband, a man of high rank, had for some years treated his wife with harshness and unkindness, and frequently insulted her in the grossest manner before her servants and children, and thereby kept her in a constant state of excitement and fear, and on one occasion had struck her grown-up daughter in her presence:—Held, that this treatment amounted to "grievous wrongs" within the meaning of Article 46. *Ib.*

**Seizure of property by way of pledge.]—**By the law of Malta a plaintiff may "secure his rights by the precautionary act" of seizing property of the defendant by way of pledge. *Nicosia v. Vallone*, 37 L. T., N. S. 106—P. C.

## Mandamus.

### I. WHEN GRANTED, 8755.

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### VI. IN OTHER CASES. See THE SEVERAL TITLES.

#### I. WHEN GRANTED.

1. *Nature of the Remedy; for what Purposes and in what Cases it is allowed, generally*.

**Existence of specific legal right without other legal remedy.]—**A mandamus is always granted when there is no other specific legal remedy. *Rez v. Wyndham, Cowp.* 378.

But not where a party has a specific legal remedy. *Rez v. Chester (Bishop)*, 1 T. R. 300.

It is not a writ grantable of right, but by prerogative; and it is the absence or want of a specific legal remedy which gives the court jurisdiction. *Rez v. Bristol Dock Company*, 12 East, 420.

Two circumstances must concur to authorize the issuing of a mandamus—a specific legal right and the absence of an effectual remedy. If it is doubtful whether there is a remedy, the court will issue a mandamus. *Rez v. Nottingham Waterworks Company*, 1 N. & P. 48e; 6 A. & E. 353; W., W. & D. 160.

**What other remedies sufficient to prevent granting mandamus.]—**It is no objection to granting a mandamus to do a particular act, that an indictment will also lie for the omission to do that act. *Rez v. Severn and Wye Railway Company*, 2 B. & A. 640.

A mandamus will not be granted to enforce the general law of the land, if an action will lie, although in some cases it will be granted, even where an indictment may be preferred. *Robins, Ex parte*, 7 D. P. C. 566; 1 W., W. & H. 578; 3 Jur. 103.

A railway act enacted, that the company established by it should, in a given event, pay another company a sum not exceeding a given amount, by way of compensation for the loss of tolls by the latter company. The given event having happened:—Held, that a mandamus was not the proper mode of compelling the payment of the compensation money, as an action would lie on the statutory obligation. *Reg. v. Hull and Selby Railway Company*, 3 Railw. Cas. 705; 6 Q. B. 70; 8 Jur. 491; 13 L. J., Q. B. 257.

A rule nisi having been obtained for a mandamus to a railway company to summon a jury to assess compensation for damage, the following agreement was entered into by their agent and the claimant:—"We hereby agree to accept of the company, in discharge of our claim against them for injury, &c., 425*l.*, and 8*l.* per week for the future so long as the present damages continue. (Signed) W. E., T. E." This was also signed by the agent of the company. Upon this agreement the proceedings for the mandamus were discontinued. The company paid the 425*l.*, and also the 8*l.* per week for several weeks, and then ceased, whereupon an application was made for a mandamus to them to pay the money according to the agreement, or to summon a jury to assess compensation, or to revive the former rule:—Held, that, as the agreement was not under the seal of the company, it could not be enforced by action, and the court granted the mandamus. *Reg. v. Bristol and Exeter Railway Company*, 3 Railw. Cas. 777—Q. B.

A dock company was required to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel:—Held, first, that a duty was cast upon the com-



pany to repair generally the banks of the new course. *Reg. v. Bristol Dock Company*, 1 G. & D. 286; 2 Q. B. 64.

Held, secondly, that a mandamus would lie to compel the company to repair, although there might be another remedy by indictment. *Ib.*

Where a party-wall had been pulled down and rebuilt under the Building Act, but the paper and decorations had not been replaced by the defendant:—Held, that a mandamus, at the instance of the tenant of the adjoining house, would not lie to replace the paper and decorations, but that the remedy must be by action. *Reg. v. Ponsford*, 1 D. & L. 116; 7 Jur. 767; 12 L. J., Q. B. 313—B. C.—Wightman.

The court will not grant a mandamus to compel the repair of a turnpike-road. *Reg. v. Oxford and Witney Turnpike Road (Trustees)*, 12 A. & E. 427; 4 P. & D. 154; 6 Jur. 216, n.

**Interest of parties; consent.**—Where by agreement between parties, an application was made for a mandamus merely with a view to obtain the opinion of the court, whether, on the construction of a private act, the proceeding by mandamus was proper; the court stopped the argument, and declined to give any decision. *Reg. v. Blackwall Railway*, 9 D. P. C. 558—Q. B.

The court is not justified in extending the remedy by mandamus to cases to which it does not by law extend, though the parties waive the objection. *Reg. v. Treasury*, 16 Q. B. 357; 15 Jur. 767; 20 L. J., Q. B. 305.

When a special case is stated for the opinion of the court, and the parties agree that, in the event of the court giving judgment for the plaintiff, a mandamus may issue against the defendant:—Held, that this must be understood to mean, if the court thinks fit that it shall do so. *Nicholl v. Allen*, 1 B. & S. 916.

So if the agreement had been that a mandamus shall issue. *Ib.*

The court in the exercise of its discretion as to issuing of a mandamus requires that the application should be made by one who has a real interest in requiring the duties to be performed. *Reg. v. Peterborough (Mayor)*, 44 L. J., Q. B. 85; 23 W. R. 343.

**Possibility of doing the act required.**—The court will not grant a mandamus, where issuing the writ would necessarily be inoperative, and could not be followed by any beneficial result, although it appears that the parties against whom it is sought had, upon the facts and circumstances before them, wrongfully refused to do the act required; but, in order to induce the court to withhold assistance on this ground, it must be satisfied that no benefit could possibly result from issuing the writ. *Reg. v. Bridgeman*, 2 New Sess. Cas. 232; 10 Jur. 159; 15 L. J., M. C. 44—B. C.—Williams.

The writ supposes the required act to be possible, and if it is shown that the party has not the power to do the act commanded, the writ is bad. *Reg. v. London and North*

*Western Railway Company*, 6 Railw. Cas. 634—Q. B.

**Demand of performance, and refusal.**—A mandamus will not be granted, unless it is clear that there has been a direct refusal to do that which it is the object of the mandamus to enforce, either in terms or by circumstances which distinctly show an intention in the party to withhold from doing the act required. *Reg. v. Brecknock and Abergavenny Canal Company*, 4 N. & M. 871; 3 A. & E. 217; 1 H. & W. 279.

The court will not grant a mandamus unless it has been preceded by a distinct demand of the specific thing the performance of which is the object of the mandamus, and by a refusal of performance, or conduct equivalent thereto. *Reg. v. Bristol Company*, 4 Q. B. 162; 3 G. & D. 384; 3 Railw. Cas. 433; 7 Jur. 233; 12 L. J., Q. B. 106.

When no demand has been made on the officer of a corporation to do an act, the performance of which is sought to be enforced by mandamus, the court will not allow the writ to issue, as a previous demand and refusal are necessary. *Reg. v. Sealey*, 8 Jur. 496—B. C.—Coleridge.

A rule for a mandamus was discharged, upon a preliminary objection that there had been no demand upon and refusal by the party against whom it was prayed, to do that which the mandamus directed; the court refused a second rule for the mandamus, founded on affidavits showing a demand and a refusal subsequently to the discharge of the former rule. *Thompson, Ex parte*, 6 Q. B. 721; 14 L. J., Q. B. 176.

If a local board of health, upon a claim being made against them for compensation, denies all liability, the claimant will be immediately entitled to a mandamus to enjoin them in general terms to cause compensation to be made; and it will not be necessary for him to claim any specific amount before applying for the writ. *Reg. v. Burslem Board of Health*, 6 Jur., N. S. 696; 29 L. J., Q. B. 242; 8 W. R. 584; 1 El. & El. 1077—Exch. Cham.

**When granted, to enforce performance of acts required by act of parliament.**—When a new right has been created by act of parliament, the proper method of enforcing it is by mandamus at common law. *Simpson v. Scottish Union Fire and Life Insurance Company*, 9 Jur., N. S. 711; 1 Hem. & M. 618; 32 L. J., Chanc. 329; 11 W. R. 459; 8 L. T., N. S. 112.

Under 14 Geo. 3, c. 78, s. 83, a landlord may apply, by mandamus, to a court of common law, before the insurers have settled with the tenant, to have the money secured by a policy of insurance on a house within the bills of mortality, destroyed by fire, applied to the rebuilding of such house. *Ib.*

Mandamus lies to two arbitrators to appoint an umpire under a canal act. *Reg. v. Goodrich*, 2 Smith, 388.

But not to execute first one particular part of

a power granted by act of parliament. *Rez v. Birmingham Canal Company*, 2 W. Bl. 708.

An act for repairing and amending a turnpike-road recited that the trustees under former acts had amended and repaired, and had expended and borrowed money for that purpose, but that the road could not be sufficiently amended and repaired, nor the debt paid, unless further powers were granted; it recited, also, that the public road would be benefited if powers were given to make new diversions from the former road: it (after repealing the prior acts) enacted that this statute should for an enlarged term be put in execution for repairing and amending the road, and for making and maintaining the new lines it authorized the trustees to continue the existing tollgates, and to take increased tolls, and required them to apply the tolls and the money already in their hands in amending the roads, paying off the debt, and otherwise putting this act into execution, as to them should seem expedient. It then authorized and required them to form the new lines, and for that purpose to enter upon and take lands and buildings, making compensation, but the compulsory power in this respect was to cease in five years from the passing of the act. The trustees entered into receipt of the increased tolls, but did not make the new lines. Seven years after the compulsory powers had expired, a person moved for a mandamus to the trustees to make the new lines, stating on an affidavit that he was an inhabitant of the neighborhood, and the making of them would be an advantage to him and other neighbors, and to the public, but he did not explain his delay in making the application. Affidavits, in answer, stated, that soon after the statute in question, another act passed for making a railway, which had accordingly been formed, running parallel to the turnpike road, greatly injuring the receipt by tolls, occupying part of the space intended for the new lines, making it impracticable to complete them, except at a very great expense, and rendered the construction of them unimportant. They also ascribed to the prosecutor a merely personal motive for making his application:—Held, that laying out of consideration the affidavits in answer (which might have been controverted on a return), the court, in its discretion, ought to refuse a mandamus. *Reg. v. Lockhart and Hatfield Turnpike Road (Trustees)*, 12 Q. B. 448.

It is no ground of objection to a mandamus that a requisition is made on parties in the alternative to do one of three things, if the duty enjoined by act of parliament forms one of them, and there has been a general refusal to comply with such requisition. *Reg. v. St. Margaret's, Leicester (Select Vestry)*, 1 P. & D. 116; 8 A. & E. 889; 1 W., W. & H. 673.

Where an act of parliament directs that, under certain circumstances, one or other of two things shall be done, the party to do the act has the option of doing which act he pleases; and a mandamus not giving such

option, or not stating a sufficient reason why such option no longer exists, is bad in law. *Reg. v. South-Eastern Railway Company*, 4 H. L. Cas. 471; 17 Jur. 901.

— to enforce performance of duties by ministerial officers.]—The guardians of the poor under an act of parliament ordered the treasurer to pay a sum of money for a purpose different from that mentioned in the act, against which an appeal was entered at the sessions, where that sum was disallowed in the account, and the treasurer who had paid it was ordered to repay it to the succeeding treasurer. The court refused to grant a mandamus to compel the late treasurer to pay over the money according to the order of sessions, because he was a ministerial officer, and bound to obey the order of the guardians. *Rez v. Shaw*, 5 T. R. 549.

A mandamus will not lie to a ministerial officer, as the treasurer of a county, to obey an order of the court of quarter sessions; the proper remedy in case of his refusal to obey such order is by indictment. *Rez v. Bristol*, 6 T. R. 168. S. P., *Rez v. Surrey (Treasurer)*, 1 Chit. 650. And see *Rez v. Johnson*, 4 M. & S. 515.

A mandamus will not lie to a treasurer of a borough to compel him to pay costs to witnesses under the order of a judge, founded on 7 Geo. 4, c. 64, the treasurer being a ministerial officer, and subject for his refusal to an indictment. *Rez v. Jeyes*, 5 N. & M. 101; 3 A. & E. 416; 1 H. & W. 325.

The general rule, that an indictment, and not a mandamus, is the proper mode of enforcing obedience by a ministerial officer to an order of sessions, does not prevail where the court sees that the ministerial officer is put forward merely as a nominal party, and that other persons are those who are to be compelled to perform the duty. *Reg. v. Wood Ditton (Highway Surveyors)*, 18 L. J., M. C. 218—Q. B.

The court will issue a mandamus to a treasurer of a county, to deposit with the clerk of the peace, in pursuance of 12 Geo. 2, c. 29, ss. 7, 8, books containing entries of the county expenditure, although the receipts, tradesmen's bills, the jailer's accounts, and copies of the county rate, had been already deposited with the clerk of the peace, and the books contain the discharges of the treasurer, and the discharges of the former treasurer by the justices in session. *Rez v. Payn*, 1 N. & P. 524; W., W. & D. 142; 1 Jur. 54; 6 A. & E. 892.

The rule, that the court will not grant a mandamus to a ministerial officer to obey an order of quarter sessions, does not apply where the ministerial officer is a nominal party. *Bottom, Ex parte*, 13 Jur. 680—Q. B.

As to mandamus to particular officers,—see this title, I., 2.

— to compel the exercise of discretionary or judicial functions.]—Under 25 Hen. 8, c. 20, s. 5, after an election of a bishop by the dean and chapter of a cathedral church, by



virtue of a *congé d'élire* and letters missive, the person so elected is to be reputed and taken by the name of the lord elected of the see, and the king is thereupon to issue letters patent to the archbishop, commanding him to confirm the election, and to invest and consecrate him, and if he fails to do so for twenty days, he is to incur the penalties of a *præmunire*:—Held, by Lord Denman, C. J., and Erle, J., that the archbishop, acting merely ministerially, is bound to confirm the bishop elect, and that he has no authority to hear any opposition advanced against the person so elected. Per Patteson, J., and Coleridge, J., that confirmation is a judicial act, which the archbishop is to conduct according to the principles of the canon law, and that parties opposing are entitled to appear in his court and enter their objections. *Reg. v. Canterbury (Archbishop), Hampden, In re*, 11 Q. B. 483; 12 Jur. 862; 17 L. J., Q. B. 252.

Held, also, per Patteson, J., and Coleridge, J., that the opposers not having been allowed to appear and be heard, there was a declining of jurisdiction by the archbishop, for which a mandamus would lie. *Ib.*

By 3 & 4 Vict. c. 86, s. 3, in every case of a clerk in holy orders who may be charged with any offense against the laws ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the bishop of the diocese, on the application of any party complaining thereof, or, if he shall so think fit, of his own mere motion, to issue a commission of inquiry as to the grounds of such charge or report. A bishop having refused to issue a commission to inquire into certain charges against a rector in his diocese, upon an application by a clerk in holy orders, who was a stranger to the parish and diocese, and he having obtained a rule for a mandamus to the bishop commanding him to issue a commission:—Held, by Wightman, J., that under s. 3 the power of the bishop to issue a commission was discretionary; Lord Campbell, C. J., and Erle, J., concurring; Hill, J., doubting as to the construction of s. 3, but holding that the court ought not to issue a mandamus upon the application of a party who was not shown to be aggrieved, or to have some connection with the parish or diocese. *Reg. v. Chichester (Bishop)*, 6 Jur., N. S. 120; 29 L. J., Q. B. 23; 2 El. & El. 209.

A party applied to the Insolvent Debtors' Court, for an order to vest such a surplus in him, under 1 & 2 Vict. c. 110, s. 92, claiming under an alleged assignment to him by the insolvent. That court held that the assignment was invalid as against other claimants of the surplus, and refused to make the order. The Court of Queen's Bench, holding that the functions of the Insolvent Debtors' Court were judicial and not merely ministerial, refused to issue a mandamus commanding that court to make the order. The applicant then took proceedings in Chancery, which resulted in a decree in his favor, that

the assignment to him by the insolvent was valid. The Court of Chancery further pressed an opinion that this decree made the duty of the Insolvent Debtors' Court the matter more simply ministerial. The latter court, however, refused, on a new application to it, to act upon that opinion and make the order. On a subsequent application by the claimant for a mandamus to the Insolvent Debtors' Court to make the order, it was held, that, after as before the proceedings in Chancery, and notwithstanding the opinion there expressed to the contrary, the Insolvent Debtors' Court retained a judicial discretion whether or not to make the order; and that therefore the mandamus could not issue. *Cook, Ex parte*, 2 El. & El. 586; 6 Jur., N. S. 224; 29 L. J., Q. B. 68.

A statute provided that if the election of certain deputies should be objected to, notice in writing should be given or delivered to the party objected to four days before the first meeting; it should be lawful for the deputies assembled at such meeting (exclusive of those objected to), and they were required to inquire into and determine the validity of such disputed election. When proof was given, that notice of objection had been in due time served on the wife of the party objected to at his dwelling-house, and the meeting decided that personal service was essential, and refused to inquire into the election:—Held, that there had been a mistake of the law, and a declining of jurisdiction, and that, consequently, a mandamus to inquire should be issued. *Reg. v. Goodrich*, 14 Jur. 914; 19 L. J., Q. B. 413; or *Reg. v. Leicester (Freemen)*, 15 Q. B. 671.

But where evidence was given of personal service of a notice upon the party objected to in due time, but the meeting disbelieved the witness, and decided that the disputed election was valid:—Held, that the deputies having decided upon a question of fact on which they had jurisdiction, their decision was final, and that the court could not interfere. *Ib.*

As to mandamus to particular courts or judicial officers,—see this title, I., 2.

—to compel the exercise of visitatorial powers.]—The court refused to grant a mandamus requiring the visitors named in the charter of the College of Doctors' Commons to inquire into the mode in which the college under 20 & 21 Vict. c. 77, ss. 116, 117, had exercised their discretion as to the surrender of their charter and the disposition of the property. *Lee, Ex parte*, El., Bl. & El. 86.

If the visitor of a college refuses to exercise his visitatorial power by hearing an appeal, the court will grant a mandamus to set him in motion, but cannot afterwards review his decision. *Buller, Ex parte*, 1 Jur., N. S. 7.

—B. C.—Coleridge.

—to admit or restore to offices.]—Upon application for a mandamus to restore to office, a *prima facie* title must be shown, the party having, if properly admitted, another

remedy: secus on a mandamus to admit. *Ree v. Jotham*, 3 T. R. 577.

Where an office is full by the appointment of the person who *prima facie* has the right of appointment, and where there are means of trying the title by action, the court will not grant a mandamus against the party filling the office, in order to try the title. *Ree v. Stokes Damerel (Minister, &c.)*, 1 N. & P. 56; 5 A. & E. 584; 2 H. & W. 346.

A mandamus lies to restore a man to the office of master of a free school. *Anon.*, Loft, 148.

The office of surgeon of the district prison of St. Catherine, in Jamaica, created by local acts of the legislature of that island, is a public office, and on a mandamus to question the title of an occupant:—Held, that the office being full, a mandamus did not lie. *Hill v. Reg.*, 8 Moore P. C. C. 139.

The remedy was by *quo warranto* against the occupant of the office. *Ib.*

The office of clerk to the guardians of a union, appointed under 4 & 5 Will. 4, c. 76, s. 46, is a public office created by statute, and where such office is full a *quo warranto*, and not a mandamus, is the proper remedy to try the validity of the election. *Reg. v. St. Martin in the Fields (Guardians)*, 15 Jur. 800; 20 L. J., Q. B. 423; 17 Q. B. 149.

But when the office is full by a void election, and the right to appoint to it cannot be tried in any other way, the court will grant a mandamus to try the right. *Ib.*

A magistrate's clerk has no permanent interest in his office, and if he is dismissed without cause no mandamus lies to restore him. *Sandys, Ex parte*, 1 N. & M. 591; 4 B. & Ad. 863.

When a corporate office is full, the title thereto cannot be tried by mandamus, but it must be questioned by *quo warranto*. *Reg. v. Chester (Mayor, &c.)*, 5 El. & Bl. 531; 2 Jur., N. S. 114; 25 L. J., Q. B. 61.

As a mandamus to reinstate a person in an office only lies where the office, and its tenure, are of a permanent nature, it is not an available remedy for the secretary of a benefit society, who has been dismissed by a resolution of a meeting of the society. *Evans v. Hart of Oak Benefit Society*, 12 Jur., N. S. 163—Q. B.

A mandamus lies to admit a clerk of trustees under the General Turnpike Act. *Ree v. Cheshunt Roads (Trustees)*, 5 B. & Ad. 439.

When no application has been made to the trustees of a local turnpike act, as a body, to appoint a gentleman appearing to be duly elected as their clerk, and there has been consequently no refusal by them as a body, the court will not grant a mandamus commanding them to make such appointment. *Reg. v. Chaddle Highway (Trustees)*, 7 Jur. 373—B. C.

A fellow of King's College, Cambridge, had been expelled the college and deprived of his fellowship, by the provost and fellows, upon a charge of fraud and perjury, the proceed-

ings being conducted partly in the absence of the accused, and the charge being alone supported by a comparison of his letters with an answer which he had filed in a suit in Chancery. Upon appeal to the visitor, the decision of the provost and fellows was affirmed:—Held, that the court had no power to grant a mandamus to restore to the fellowship. *Buller, Ex parte*, 1 Jur., N. S. 709—B. C.—Coleridge.

A mandamus will not lie to the vicar, churchwardens, and inhabitants of a parish to elect an organist to the parish church, though there has always been such an office beyond the time of living memory, and a yearly salary has been invariably paid him out of the church rates, as it is optional with the parishioners whether the organ shall be played. *Reg. v. St. Stephen's, Coleman street (Vicar, &c.)*, 3 D. & L. 571; 9 Jur. 255; 14 L. J., Q. B. 34—B. C.—Patteson.

Where the founder of an eleemosynary corporation directed that the bishop, dean and archdeacon of Worcester should be visitors, and should correct, punish, and reform all abuses and offenses to be committed by the master and brethren, and see that his ordinance was truly executed according to its meaning; and afterwards the heir of the founder, upon a vacancy of one of the brethren, appointed a person to succeed, who was a soldier, not belonging to either of the towns or lordships, to the inhabitants of which a preference was to be given, against which appointment three persons appealed to the visitors, on the ground that the appointee was ineligible, and that there were others besides themselves, who were eligible:—Held, that such an appeal lay, and therefore the court granted a mandamus to the visitors, who had heard the evidence in such appeal, but declined to act therein, to proceed and determine the appeal. *Ree v. Worcester (Bishop)*, 4 M. & S. 415.

The registrars of a diocese were authorized by their patent of office (under the bishop's hand and seal) to appoint a deputy, to be "approved of and allowed by the bishop;" who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation and consent of the bishop, who, on being informed of it, answered that "for good and sufficient reasons" he disapproved of the party nominated, but declined specifying his reasons. The court refused a rule nisi for a mandamus to the bishop to admit the deputy. *Ree v. Gloucester (Bishop)*, 2 B. & Ad. 158.

A mandamus commanding the dean and chapter of a cathedral to restore a chorister, alleged that the office was a freehold in their gift, paid by salary out of their land revenues, and conferring a right to vote on the election of members of parliament, and that the chorister had been wrongfully removed. Return, that by ordinances of the founder for the



government of the cathedral, it was provided that if any of the officers of the cathedral, including choristers, commit a small fault, he may be punished by the dean, but that "if his crime be of a blacker dye (if it be judged equitable), he may be expelled by whom he was admitted;" and that the bishop of the diocese should be the visitor of the cathedral, to take special care that all its ordinances should be inviolably preserved, to punish and correct all offenses committed by officers of the cathedral, and to do all things that are judged lawfully to appertain to the office of visitor; and that the chorister had not appealed to the bishop:—Held, that a mandamus did not lie, as the remedy for the wrongful amotion complained of, was by application to the visitor, who had sufficient exclusive jurisdiction, although the foundation was spiritual and not eleemosynary, and the office was a freehold office; and that it was not necessary to return the cause of amotion. *Reg. v. Chester (Dean and Chapter)*, 15 Q. B. 513; 15 Jur. 10; 19 L. J., Q. B. 485. S. P., *Reg. v. Rochester (Dean and Chapter)* 17 Q. B. 1.

By 21 & 22 Vict. c. 98, c. 29, if a medical practitioner shall, after due inquiry, be judged by the General Council of Medical Education and Registration of the United Kingdom to have been guilty of infamous conduct in any professional respect, they may, if they see fit, erase his name from the register; and where a medical officer has been so adjudged guilty by the general council, and his name erased from the register, a mandamus will not lie to restore it. *La Mert, Ex parte*, 4 B. & S. 582; 33 L. J., Q. B. 69.

As to mandamus to corporations to admit or restore to office or membership,—see this title, I, 2.

— to compel corporations, officers, trustees, and others to levy or pay over moneys.]—A mandamus directed to a corporation, commanding them to pay a poor's-rate to the overseers, omitted to state that the corporation had no effects on which a distress could be levied:—Held, a fatal objection in substance to the writ, which might be taken after the return, or at any time before a peremptory mandamus issued. *Rez v. Margate Pier Company*, 3 B. & A. 220; 2 Chit. 256.

A duty having been imposed upon a party by statute to levy certain moneys from other parties, and pay over to another a portion of the sums levied, a mandamus was issued directing him "to take the necessary and legal measures and proceedings for obtaining and recovering payment."—Held, per Crompton, J., and Blackburn, J. (Cockburn, C. J., dissentiente), that the words legal measures, did not necessarily mean instituting legal proceedings. *Reg. v. Port of Southampton (Commissioners)*, 1 B. & S. 5; 7 Jur., N. S. 990; 30 L. J., Q. B. 244; 9 W. R. 630.

Where B. paid a special rate, erroneously and illegally imposed by a board of health, and five years afterwards, having discovered

the mistake, commenced an action against the board, for the recovery of the money so paid, obtained judgment, and afterwards sued the board upon the judgment, demanding a mandamus to them, to make and levy a rate under the 11 & 12 Vict. c. 63, for the purpose of satisfying the judgment:—Held, that (assuming the sum recovered to be a charge within s. 89) B. was not entitled to a mandamus, inasmuch as the action upon which the judgment proceeded was not commenced within six months from the date of the charge. *Burland v. Kingston-upon-Hull Board of Health*, 3 B. & S. 271; 9 Jur., N. S. 275; L. J., Q. B. 17.

A company was incorporated by act of parliament, which directed that all actions against the company should be prosecuted against the treasurer or a director for the time being; but that the body or goods, lands, &c. of such treasurer or director should not, for reason of his being defendant in such action, be liable to execution. An action having been brought by C. against the treasurer, in such, and another by the company, in the name of the treasurer, against C., all matters in difference were referred to an arbitrator, who awarded that C. had cause of action against the defendant as such treasurer, for a certain sum, and directed that the treasurer should pay to C. that sum on demand; and as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay the costs on demand:—Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded. *Rez v. St. Katharine Dock Company*, 4 B. & A. 360; 1 N. & M. 121.

Mandamus refused to the trustees of the Rugby charity to compel the payment of increased alms to claimants on the funds, although the applicants were at an advanced age, and would probably be dead before relief could be had in chancery. *Rugby Charity Trustees, Ex parte*, 9 D. & R. 214.

A controversy existing in a corporation, between the freemen under an old charter, and the town council, under 5 & 6 Will. 4, c. 76, as to the exclusive right of the former to some corporation property to their own private use, a public meeting of the freemen was held, and a resolution was carried at the instance of A., a freeman, that the rents should be paid into the hands of the defendant, to wait until the claim of the freemen should be decided. The rents having been so paid, and a rule nisi having been obtained by A., as a freeman and a burgess and an inhabitant of the borough, liable to contribute to the borough rate, for a mandamus to the defendant to pay the money over into the hands of the treasurer of the borough, the court discharged the rule. *Reg. v. Frost*, 1 P. & D. 75; 8 A. & E. 822; 1 W. & H. 664; 2 Jur. 966.

The court will not grant a mandamus to commissioners appointed under a local act, either on the application of a company ordering them to perform a contract made with the

company, or on the application of certain ratepayers, ordering them to provide for the execution of the powers under the act, where no inconvenience is being suffered by the inhabitants. *Reg. v. Cheltenham (Commissioners of Paving)*, 4 Jur. 1060—Q. B.

— to enforce other private rights.]—A mortgagee of tolls and toll-houses of a turnpike road has only an equitable right to enforce payment of principal and interest, and is therefore not entitled to a mandamus for that purpose. *Reg. v. Balby and Worksop Turnpike Road (Trustees)*, 1 B. C. C. 184; 17 Jur. 794; 22 L. J., Q. B. 164—Crompton.

**Semble**, that a mandamus may be issued against a party for a matter in respect of which he is liable to an action, or to a suit in equity. *Reg. v. Port of Southampton (Commissioners)*, 1 B. & S. 5; 7 Jur., N. S. 990; 30 L. J., Q. B. 244; 9 W. R. 630.

**Mandamus to churchwardens**, to raise a rate to pay principal and interest of money borrowed on the credit of parish and church-rates, under the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 184. A return, that since the security was given, the lender, who was the prosecutor, had become bankrupt. Plea, that the prosecutor had lent the money, as a trustee for a party named, out of the money vested in him as trustee, in which he had no interest except as trustee. On demurrer, assigning for cause that the nature of the trust did not appear:—Held, good. *Reg. v. Brancaster (Churchwardens)*, 7 A. & E. 458; 2 N. & P. 580.

In pursuance of the will of a private person, his executor, by deed, conveyed lands to trustees for the benefit of the poor of a parish. The deed provided that a chest, of which there should be three locks and three keys, should remain in the parish church, for keeping all writings, accounts, &c., and the trust moneys remaining unexpended. One of such keys to be kept by the receiver, the second by the parson, the third by the churchwardens:—Held, that a mandamus lay to the trustees to compel the delivery of one key to the churchwardens, although the application concerned a trust and a mere private endowment. *Reg. v. Ottery St. Mary, Devon*, 3 G. & D. 382; 4 Q. B. 157; 7 Jur. 129; 12 L. J., Q. B. 118.

The advowson of a vicarage had been purchased by certain land-owners, and conveyed to feoffees, in trust, upon every avoidance, to present such person as should be nominated by the majority of the land-owners. At a meeting of the land-owners for the purpose of nominating a successor to a deceased vicar, a dispute arose as to which of two candidates, A. and S., had the legal majority of votes, and thereupon the trustees refused to concur in presenting. Upon an application for a mandamus to the trustees to present A.:—Held, first, that it could not be made by the land-owners, because their right, if legal, and not equitable, could be enforced by quare im-

pediit. *Orton Vicarage, In re*, 14 Q. B. 189; 18 Jur. 1049; 18 L. J., Q. B. 321.

Held, secondly, that it could not be made by A., because he had no legal right. *Id.*

**When granted, in actions, to enforce payment of money or performance of duties, under the provisions of The Common Law Procedure Acts.**—[By 17 & 18 Vict. c. 125, s. 68, the plaintiff, in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served, a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration either together with any other demand which may now be enforced in such action, or separately, a writ of mandamus, commanding the defendant to fulfill any duty in the fulfillment of which the plaintiff is personally interested.

By s. 69, the declaration in such action shall set forth sufficient ground upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains, or may sustain, damage by the non-performance of such duty, and that performance thereof has been demanded by him, and refused or neglected.

By s. 70, the pleadings and other proceedings in any action, in which a writ of mandamus is claimed, shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in ordinary actions for the recovery of damages.

By s. 71, in case judgment shall be given to the plaintiff, that a mandamus do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced.

By s. 72, the writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of compliance, shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms.

By s. 73, the writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and, in case of disobedience, may be enforced by attachment.

By s. 74, the court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done by the plaintiff, or some other person appointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a master, as the court or a judge may order; and the court may order



payment of the amount of such expenses and costs, and enforce payment thereof by execution.

By s. 75, nothing herein contained shall take away the jurisdiction of the Court of Queen's Bench to grant writs of mandamus; nor shall any writ of mandamus issued out of that court be invalid by reason of the right of the prosecutor to proceed by action for mandamus under this act.

By 23 & 24 Vict. c. 126, s. 32, in all cases in which a writ of mandamus is issued under the provisions of "The Common Law Procedure Act, 1854," such writs shall, unless otherwise ordered by the court or judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ, and payment of such costs may be enforced in the same manner as costs payable under a rule of court are now by law recoverable.]

The 17 & 18 Vict. c. 125, s. 68, applies only to the fulfilment of such duties as might be enforced by the prerogative writ of mandamus, and not to the specific performance of contracts. *Benson v. Paul or Paull*, 6 El. & Bl. 273; 2 Jur., N. S. 425; 25 L. J., Q. B. 274.

But a mandamus may be claimed under the above provisions to enforce the fulfilment of a duty in which the plaintiff is personally interested, where such duty does not arise out of a mere personal contract. *Norris v. Irish Land Company*, 8 El. & Bl. 512; 4 Jur., N. B. 235; 27 L. J., Q. B. 115.

An action for a mandamus may lie even when no actual damage has been sustained. *Fotherby v. Metropolitan Railway Company*, 2 L. R., C. P. 188; 36 L. J., C. P. 88; 12 Jur. N. S. 1005; 15 W. R. 112; 15 L. T., N. S. 243.

The neglect by a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land which the company has given notice of requiring for the purposes of its act, within a reasonable time after such notice, is an actionable wrong, and the issue of the warrant may be enforced by an action for a mandamus. *Ib.*

When a debt is of such a nature that a mandamus will be granted to enforce its payment, it is not necessary that the amount of the debt should have been previously ascertained, but such amount may be ascertained by the verdict of the jury in the action in which the writ of mandamus is claimed. *Ward v. Lowndes*, 5 Jur., N. S. 1124; 28 L. J., Q. B. 265; 7 W. R. 489; affirmed in error, 6 Jur., N. S. 247; 29 L. J., Q. B. 40; 1 El. & Bl. 940; 1 L. T., N. S. 268—Exch. Cham.

A plea that the causes of action did not accrue within six years, is a bad plea to a declaration for a mandamus, as the Statute of Limitations does not bar an application for such a writ. *Ib.*

A claim to a writ of mandamus cannot be sustained if there is any other equally effectual remedy. *Bush v. Beavan*, 1 H. & C. 500; 32 L. J., Exch. 54; 8 Jur., N. S. 1015; 10 W. R. 845; 7 L. T., N. S. 106.

In an action by executors against the commissioners for putting into execution a town improvement act, and in which act they claimed a writ of mandamus, the declaration stated that the commissioners were indebted to the testator for the agreed salary payable by them to him for services rendered by him as clerk to the commissioners; also for other work by him, as the attorney and otherwise for the commissioners in and about their business; that the debts became due and were a charge on any moneys which might be in the hands of the commissioners, and which should have been collected by them under and by virtue of the act; and that if the commissioners should not have in their hands any moneys sufficient to pay the debts, then such debts became a charge and were chargeable on a rate leviable and to be levied by the commissioners under the act. They pleaded to so much of the debts as became due on simple contract, the Statute of Limitations, and to the debts, except the agreed salary, that no signed bill was delivered; also, that the commissioners had no funds whereout they could pay the debts:—Held, first, that the declaration was bad, inasmuch as, assuming that the services in respect of which the "agreed salary" was claimed were payable out of the rates, the others might be services for which the commissioners were personally liable, and consequently the remedy might be by action, not by a claim of mandamus. *Ib.*

Held, secondly, that on the same principle the two first pleas were good. *Ib.*

—under the Judicature Acts.]—A writ of mandamus under the Judicature Act, 1873, s. 25, sub-s. 8, can only be obtained in a pending cause or matter; the prerogative writ being preserved to the Queen's Bench Division by s. 34. *Paris Skating Rink Company, Ltd. v. 6 L. R., Ch. Div. 731; 46 L. J., Chanc. Div. 831; 25 W. R. 767—V. C. H.*

While a petition for winding up a company was pending, notice of motion in the winding up was given to the company and the directors for a mandamus to direct them to convene an ordinary meeting. An order was made for winding up the company, which was reversed on appeal. The motion for a mandamus was then brought on:—Held, that the court had jurisdiction to direct the issue of a writ of mandamus in every cause or matter pending before it, but inasmuch as the petition had been dismissed there was no longer any matter pending before it, in which it could make the order. *Ib.*

When an action has been commenced in which a mandamus is claimed, an interlocutory application for a mandamus will not be granted unless it can be shown that the plaintiff will suffer some injury by waiting for the result of the action. *Wilnes Alkali Company v. Sheffield and Midland Railway Company's Committee*, 37 L. T., N. S. 131—C. P. Div.

As to proceedings by mandamus, generally, —see this title, II.



1. *To Particular Courts, Officers, Corporations and other Persons.*

**To the privy council.**—A mandamus will not lie to the lords of the privy council, commanding them to receive a petition praying them to re-hear a decision upon a case heard before and determined by them, upon an appeal from an ecclesiastical court to the judicial committee, instead of a court of delegates. *Smith, Ex parte*, 4 N. & M. 582; 1 H. & W. 282.

Where a case has been brought before the judicial committee of the privy council, on appeal from the Court of Arches, and the judicial committee has decided in favor of the appeal, at the same time retaining the principal cause, and ordering the unsuccessful party to appear absolutely, subject to the approbation of the king in council, which approbation has been afterwards given, the court cannot, on a suggestion of error in the decision, issue a mandamus to a privy council to receive a petition for a re-hearing of the appeal. *Smyth, Ex parte*, 3 A. & E. 719; 5 N. & M. 145; 1 H. & W. 417.

**To inferior courts, generally.**—Where a statute does not allow a removal of proceedings by certiorari, the court will not indirectly bring them under review by a mandamus. *Reg. v. Yorkshire, W. R. (Justices)*, 1 A. & E. 563; 3 N. & M. 802.

A mandamus will go to a lord to hold a court baron, and to the homage to present conveyances of burgage tenures, whether those conveyances are legal or not. *Reg. v. Montacute*, 1 W. Bl. 60. S. P., *Reg. v. Midhurst*, 1 Wils. 288.

So, to permit a court-leet and a court-baron to be held in the accustomed place. *Reg. v. Grantham*, 2 W. Bl. 716; *Reg. v. Colchroke*, 2 Ld. Ken. 163.

But a mandamus to the mayor of Wigan to give the key of the town-hall to the lord of the manor to hold his leet there was refused, although the leet had been usually held in that place. *Reg. v. Wigan (Mayor, &c.)*, 1 Wils. 76. And see *Reg. v. Ilchester*, 2 D. & R. 724; 4 D. & R. 324; 2 B. & C. 704.

A mandamus was granted commanding the lord of a manor to hold a court leet for the purpose of appointing a high constable of a hundred, though the day on which the court had been usually held for sixty years past had gone by, it not being distinctly sworn, that the court was held on that particular day by prescription. *Reg. v. Milberton*, 3 A. & E. 284; 1 H. & W. 282.

A mandamus to summon specific jurors upon a court leet was refused. *Reg. v. Banks*, 1 W. Bl. 452; 3 Burr. 1452.

The court will never grant a mandamus commanding the enrollment in an inferior court of an instrument, which, though in part valid, would, in its terms, give power to commit unlawful acts. Nor will the court by mandamus enforce the process of an inferior court, the judge of which has power to com-

pel obedience to its process. *Reg. v. Conyers*, 8 Q. B. 981; 10 Jur. 899; 15 L. J., Q. B. 300.

Where an inferior court declines to exercise a jurisdiction imposed on it by law, the court will, by mandamus, enforce its proceeding; but, when it has acted, its judgment can only be reversed in that court on a case stated for its opinion. *Reg. v. W. R. (Justices)*, 1 New Sess. Cas. 247—Q. B.

**To justices, in general.**—The court will not grant a mandamus commanding justices of the peace to do an act which may render them liable to an action. *Reg. v. Buckinghamshire (Justices)*, 2 D. & R. 689; 5 B. & C. 485. S. P., *Reg. v. Buckinghamshire (Justices)*, 3 N. & M. 68.

Therefore the court refused a mandamus to compel a magistrate to enforce a conviction, where it was doubtful whether such conviction was good for want of setting out the evidence on which it was grounded. *Reg. v. Broderip*, 7 D. & R. 861; 5 B. & C. 239.

Also, to summon a person for not paying poor-rates. *Anon.*, 2 Chit. 257; 3 B. & P. 220.

Also, to make a warrant of distress for the poor's rate. *St. Luke's Parish v. Middlessex (Justices)*, 1 Wils. 133.

The court, if it doubts whether the writ should or should not be granted, will not direct it to issue merely in order that the justices may make a return, and be protected by 6 & 7 Vict. c. 67, s. 3, if a peremptory mandamus should issue and be obeyed. *Reg. v. Dartmouth*, 5 Q. B. 878.

Where a mandamus is directed to justices, they ought not to make a return instead of obeying the writ, merely to gain the protection of the statute. *Id.*

As to the protection conferred by 6 & 7 Vict. c. 67, s. 3, in respect of acts done in obedience to peremptory writs of mandamus, —see this title, II., 3.

A railway act enacted that the company shall not be obliged, nor any justice allowed to receive or take notice of any complaint for any loss or injury sustained in consequence of the execution of the powers of the act, unless notice in writing shall have been given by the complainant to the company within six months after the time of such loss or injury. And that, in case of differences between the company and owners of property, as to the amount of damage done thereto by the company, the same shall (when the claim does not exceed 20*l.*) be determined by two justices. A subsequent act, in all cases of land occupied by the company for temporary purposes, enacted that the compensation for the same shall be ascertained in like manner by the justices, whatever may be the amount claimed:—Held, that the notice required by the first act did not apply to cases before the justices. And, therefore, where a justice had dismissed a complaint for want of proof of such notice, the court granted a mandamus, calling upon him to hear and determine the complaint. *Reg. v. Bingham*, 4 Q. B. 877; 3 Railw. Cas. 390.

Mandamus commanding justices to hear and adjudicate on a complaint by overseers, that a pauper was chargeable to and ought to be removed from their township. The return showed that the justices had received and began to hear the complaint, and that in the course of the investigation it appeared that the pauper was chargeable to the township, and resided continuously in the township for ten years before the application, and during six of these ten years (before the passing of the 9 & 10 Vict. c. 66), had received parochial relief, and the justices thereupon decided that the pauper was irremovable:—Held, that the return was a sufficient answer, as it showed that the justices had not declined to exercise their jurisdiction, but had exercised it, though erroneously. *Reg. v. Blanchard*, 13 Q. B. 318; 18 L. J., M. C. 110.

— to compel issue of warrants of distress.]

—It is the constant practice to call upon magistrates by mandamus to grant a distress warrant for levying a poor-rate. *Reg. v. Cheek*, 11 Jur. 86, n.—Q. B.

The court will not grant a mandamus to magistrates to order them to issue warrants of distress to levy a poor-rate on certain persons who have refused to pay, unless those persons have been previously summoned by the justices. *Rez v. Benn*, 6 T. R. 198.

It is no objection to a rule for a mandamus to justices, to issue their warrant of distress for the levy of poor rates, that it includes two separate and distinct rates. *Reg. v. Ellis*, 2 D., N. S. 361; 7 Jur. 108; 12 L. J., M. C. 20.—B. C.—Patteson.

Although there are more than two magistrates at petty sessions, all of whom take part in a decision, by which the issuing of a distress warrant to levy poor rates is refused, it is not necessary that upon an application for a mandamus, all who were present and took part in the decision should be included in the rule; but that, if the court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined. *Ib.*

Where upon an application for a mandamus to justices, to issue their warrant of distress to levy a poor rate, it appeared that the property, in respect of which the rate was sought to be obtained, was trust property, left by a testator for the purpose of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate:—Held, that, notwithstanding his character as such trustee, he was liable to the mandamus. *Ib.*

Where, in an answer to an application for a mandamus against magistrates, commanding them to issue distress warrants to levy a poor-rate, it was suggested that the warrants were to be executed within Hampton Court Palace, and that the officers of the crown claimed that the property was exempt from the operation of such warrants, and threatened proceedings if they were executed;

the court nevertheless granted the writ, and refused to call upon the applicant parish to give the magistrates an indemnity against the consequences of any proceedings which might be taken. *Reg. v. Middlesex (Justices)*, 2 D. N. S. 385—B. C.—Wightman.

So, where the court had decided that certain property was ratable, and the justices nevertheless refused to issue a warrant of distress unless an indemnity was offered, the court granted a mandamus. *Reg. v. Middlesex (Justices)*, 7 Jur. 259; 12 L. J., M. C. 36—B. C.—Wightman.

The court has a discretion as to granting a mandamus to justices to issue a warrant of distress or commitment against a person summarily convicted by them. *Thomas, Esq. parte*, 9 Q. B. 976; 11 Jur. 107; 16 L. J., M. C. 57; 2 New Sess. Cas. 570.

On motion for a mandamus to justices to issue a warrant to distrain for a poor's-rate, it must appear clearly to the court that the warrant would be legal, and that the parties applying have no other remedy to enforce the rate. *Reg. v. Hall*, 1 H. & W. 83.

Where there is no appeal given against an order of justices for expenses of a pauper, the justices are bound to enforce it, and in the event of their refusing, the court will grant a mandamus for a distress warrant. *Reg. v. North Riding of Yorkshire (Justices)*, 6 L. T. N. S. 351—Q. B.

To sessions.]—Where, on an appeal against a poor-rate to the sessions, the justices allow the appellant to act upon a practice which then prevailed, but by which the appeal was put off till the next sessions, and the justices at those sessions, on an objection made to such practice, refuse to hear the appeal, the court will issue a mandamus to them to do so. *Reg. v. Wiltshire (Justices)*, 2 M. & R. 401; 8 B. & C. 380.

Where the sessions on determining an appeal have granted a case, but none has been stated, the court will, under some circumstances, direct a mandamus to the justices who heard the appeal to state a case. But not where it is clear that such a proceeding could lead to no result, as where the chairman, in consequence of his own opinion and that of the court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case. *Reg. v. Pembroke-shire (Justices)*, 2 B. & Ad. 391. S. P., *Jarvain. Ex parte*, 9 D. P. C. 120.

The court will issue a mandamus to hear an appeal, if the sessions have refused to hear upon an erroneous decision as to the sufficiency of the grounds of appeal. *Reg. v. Carnarvon (Justices)*, 1 G. & D. 423.

The court will not issue a mandamus to compel the quarter sessions to give their reasons for their judgments, or make special entries thereof on their records. *Reg. v. Devon (Justices)*, 1 Chit. 34.

Or grant a mandamus to the justices at sessions to re-hear an appeal against an order

of removal, after judgment given by them, and entered by the clerk of the peace, for quashing the order; upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake, instead of an adjournment of the appeal. *Reg. v. Leicestershire (Justices)*, 1 M. & S. 442.

So, where the justices were divided, and the sessions, thinking it lay on the respondent parish to establish their case to the satisfaction of a majority of the court, quashed the order of removal, a mandamus was refused. *Reg. v. Monmouthshire (Justices)*, 7 D. & R. 334; 4 B. & C. 844.

Where justices at sessions had heard witnesses in an appeal on the one side, and refused to hear those on the other, on the ground that their testimony had been prefaced by observations on the part of the advocate, contrary to their usual practice, the court refused to grant a mandamus to re-hear the appeal. *Reg. v. Carnarvon (Justices)*, 4 B. & A. 86.

A party having been convicted of forcibly passing a turnpike gate without paying toll, the sessions, on appeal, rejected evidence to show that the gate had been unlawfully erected; and the court refused a mandamus to compel the sessions to receive such evidence, the admissibility of it being exclusively a question for the justices. *Reg. v. Cambridge-shire (Justices)*, 1 D. & R. 325.

A mandamus to the justices in sessions, to allow an item of charge in a coroner's account, refused; because the justices were of opinion, under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death; and therefore that the inquisition had not been duly taken; and the court saw no reason for interfering with that judgment. *Reg. v. Kent (Justices)*, 11 East, 229.

On appeal against a poor-rate on the ground that the appellant was over rated, the practice at the sessions requiring the appellant to begin by proving his case, which the appellant refusing to do, the appeal was dismissed; the court refused a mandamus to the sessions to re-hear the appeal on this objection. *Reg. v. Suffolk (Justices)*, 6 M. & S. 57.

On an appeal against a rate under the Middlesex County Act, 3 Geo. 4, c. 107, the justices confirmed the rate, subject to the opinion of the Court of Queen's Bench on a case. The certiorari directed the justices to send up an order of sessions, "with all things touching the same;" and the court quashed the order of sessions. The sessions, after such order, were applied to to quash the rate, but refused, as the rate had not been removed into the court, and there was no longer any appeal against it. The court refused to grant a mandamus to compel them to enter continuances, and quash the rate: first, because, by so doing, the parties who had been engaged in collecting the rate might be exposed to an action; secondly, because the court could not compel the sessions to decide in a

particular way. *Reg. v. Middlesex (Justices)*, 1 P. & D. 402; 9 A. & E. 540; 2 W., W. & H. 100.

An appellant against an order of affiliation moved the court of quarter sessions for a postponement of the appeal, on account of the absence of material witnesses. They rejected the application; upon which the appellant declined going into his case, and the order was confirmed. On motion for a mandamus to the justices to hear the appeal, and affidavits tending to show that they had acted unjustly in not granting the postponement, the court refused to interfere, the matter being one peculiarly within the discretion of the sessions. *Becke, Ex parte*, 3 B. & Ad. 704.

Where the sessions decide, on a point preliminary to the whole case or to the reception of a particular piece of evidence, that they will not hear the case further, this is conclusive of the point involving matter of fact only; otherwise, if it raises a point of practice which the court can perceive to be matter of law. In the latter case the court will grant a mandamus to enter continuances and hear the appeal. *Reg. v. Kesteren (Justices)*, D. & M. 113; 3 Q. B. 810; 1 New Sess. Cas. 151. S. P., *Reg. v. Flintshire (Justices)*, 1 B. C. Rep. 331; 2 New Sess. Cas. 572; 11 Jur. 185; 16 L. J., M. C. 55.

The court of quarter sessions has no power of its own authority to erase an entry from the records of a past sessions. *Reg. v. West Riding of Yorkshire (Justices)*, 3 G. & D. 170; 12 L. J., M. C. 148.

But a mandamus will issue directing it to be so, where an entry has been made which is manifestly false, and made without jurisdiction. *Id.*

Where the quarter sessions, having jurisdiction over an appeal, have directed an entry to be made, that an order of removal has been "quashed, not on the merits," the court will not grant a mandamus commanding an erasure of that entry, although it appears that the order, in point of fact, was quashed on the merits. *Ackworth, Ex parte*, 1 D. & L. 718; 1 New Sess. Cas. 64; 3 Q. B. 397; 8 Jur. 291; 13 L. J., M. C. 88.

Three persons, who had been summoned before a magistrate, for unlawful fishing, had been convicted, after a joint hearing, each in a separate penalty, and gave a joint notice of appeal to the sessions, describing the conviction as a joint conviction. Separate convictions were returned to the sessions:—Held, that the variance between the notice of appeal and the conviction was immaterial, because it could not mislead, and the court made a rule absolute for a mandamus to the sessions to hear the appeal. *Reg. v. Oxfordshire (Justices)*, 3 G. & D. 348; 4 Q. B. 177.

The court refused to grant a mandamus to the chairman of the Middlesex sessions, requiring him to issue process for the apprehension of two persons against whom a bill of indictment had been found at those sessions a



year previously for keeping a common gaming-house, upon the ground that an application for such process had been rejected at sessions. *Reg. v. Russell*, 1 D., N. S. 544; 6 Jur. 221—B. C.

A mandamus to enter continuances and hear an appeal will not be granted if it clearly appears that the sessions preceding those at which the appeal is entered were the next practicable sessions. *Reg. v. Derbyshire (Justices)*, 19 W. R. 876—B. C.—Hannen.

The general rule that an application for a writ of mandamus to the quarter sessions to enter continuances and hear an appeal must be made not later than the term following the sessions at which the refusal was made, does not apply to an application to remove an order of sessions for the purpose of getting it quashed. *Reg. v. Brecknockshire (Justices)*, 42 L. J., M. C. 135—Q. B.

When, on an appeal against a conviction coming on for hearing at the sessions, objection was taken to the conviction, by reason of the omission of certain words alleged to be material, and the justices, after discussion, quashed such conviction, declining either to amend or hear the evidence, the court has no power to interfere by mandamus, there having been a decision on the legal merits. *Reg. v. Middlesex (Justices), Slade's case*, 46 L. J., M. C. 225; 2 L. R., Q. B. Div. 516; 25 W. R. 610.

**To county court judges and officers.**—[By 19 & 20 Vict. c. 108, s. 43, no writ of mandamus shall issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office, but a party requiring such act to be done may apply to a superior court, or, by 21 & 23 Vict. c. 74, s. 4, to a judge thereof, upon affidavits of the facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to show cause why such acts should not be done. See title COUNTY COURTS.]

Where, before this enactment, the judge of a county court, upon an interpleader summons, erroneously decided against a claimant, on the ground that the notice of claim was insufficient, the court issued a mandamus to him to adjudicate upon the claim. *Reg. v. Richards*, 2 L., M. & P. 263; 20 L. J., Q. B. 351—B. C.—Coleridge.

But when a judge of a county court entered upon the hearing of a plaint, and from the evidence adduced before him decided that he had no jurisdiction to adjudicate between the parties, a mandamus would not lie commanding him to hear and determine it, even although he might be wrong in point of law. *Milner, Ex parte*, 15 Jur. 1037—Q. B.

**To lords and stewards of manors.**—A mandamus will not be granted, commanding the steward of a manor to accept a surrender into the hands of the lord according to the custom, unless the lord is made party to the rule. *Reg. v. Evans*, 1 Q. B. 355; *S. C.*, nom. *Reg. v. Witchford*, 7 D. P. C. 709.

A mandamus will not lie to compel the ad-

mission of a customary tenant to a royal manor. *Reg. v. Powell*, 4 P. & D. 719; 1 Q. B. 352.

A mandamus to admit to a copyhold tenement must not be directed to the steward only; the lord must be joined. *Id.*

A mandamus was granted to the steward of the manor of Midhurst and to the homage to hold a court, and present certain conveyances to purchasers of burgage tenements, whereby they were entitled to be sworn in burgesses of the corporation, and to vote for members of parliament. *Reg. v. Midhurst*, 1 Wils. 283.

In applying for a mandamus to the steward of a manor to enroll a deed of disposition, pursuant to 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in an affidavit. *Crosby v. Fortescue*, 5 D. P. C. 273. *S. P.*, *Reg. v. Lunn*, 2 H. & W. 314.

**To government officers, public commissioners and others.**—A mandamus will not lie to the crown, or its servants, strictly as such, commanding it or them to pay over money, in its or their possession, in liquidation of claims on the crown. *De Bode, In re*, 6 D. P. C. 776; 1 W., W. & H. 332.

Nor will a mandamus lie to the mere public depositaries of money, commanding the payment by them of a sum in gross. *Id.*

The lords of the treasury recommended a retired allowance to a public officer, and obtained a vote of parliament for a particular sum, which was received from time to time under the appropriation act, by the proper officer. In several letters written by their secretary, these facts were stated, and directions given as to the mode of obtaining payment. The lords of the treasury refused to give an authority to him to pay it over to the individual to whom it was granted, unless upon conditions to which he would not agree:—Held, first, that he had a legal right to the amount so recommended. *Reg. v. Treasury (Lord)*, 5 N. & M. 589; 4 A. & E. 286; 1 H. & W. 533.

Held, secondly, that the court would enforce payment by mandamus, inasmuch as the claimant had no other remedy, and as the writ was demanded, not against the king, but against officers into whose hands money had been paid under an act of parliament for the use of an individual. *Id.*

A party to whom a superannuation allowance has been granted in pursuance of a treasury minute, according to 5 Geo. 3, c. 117, in respect of an office held during pleasure, has no vested interest in such allowance; but the minute may be revoked at will by the lords of the treasury. *Reg. v. Treasury (Lords)*, 4 A. & E. 976; 6 N. & M. 505.

The lords of the treasury granted, under 3 Geo. 4, c. 113, a pension for life to a person whose office had been abolished. They afterwards, thinking they had no power to grant such a pension, revoked their warrant. The amount once appeared in the parliamentary

estimates, because the item could not be withdrawn in time. It was afterwards withdrawn, and no money was ever received from parliament on account of the pension, the sum which had been once in the estimates having been applied to the ways and means:—Held, that no mandamus could issue to the lords of the treasury to enforce payment of the pension. *Reg. v. Treasury (Lords Commissioners)*, 4 A. & E. 984; 6 N. & M. 508; 2 H. & W. 67.

Deductions having been made from a naval officer's half-pay, in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of such deductions restored; and the Lords of the Admiralty stated, in answer, that they had given direction for restoring it. Afterwards they retracted their consent, giving, as a reason, that it would subject them to many similar applications. After the officer's death, his administratrix moved for a mandamus to the Lords of the Admiralty to restore the deducted sums, on the ground that they had admitted the right to them, and the possession of applicable funds:—Held, that there was no vested right in the half-pay entitling the administratrix to a mandamus. *Ricketts, Ex parte*, 6 N. & M. 523; 4 A. & E. 999.

By 9 & 10 Vict. c. 38, the Commissioners of Woods and Forests, on behalf of her Majesty, were empowered to take lands for the purpose of forming Battersea Park, which were to be conveyed to the Queen, or to trustees on her behalf, and to form a royal park. The commissioners had given notice of their intention to take lands of the prosecutor, but had not taken them:—Held, that mandamus would lie to the commissioners, commanding them to issue their warrant to the sheriff to summon a jury for assessing compensation to the prosecutor for the lands. *Reg. v. Woods and Forests Commissioners*, 12 Jur. 915; 17 L. J., Q. B. 341—Q. B.

The Commissioners of Woods and Forests gave notice under 9 & 10 Vict. c. 38, s. 15, that they intended to take lands specified in the schedule to that act for the purpose of forming Battersea Park. One of the landowners obtained a mandamus to the commissioners to cause a jury to be summoned, to assess compensation for his land. On return (stating the proceedings at length and showing that the commissioners, in pursuance of the act, and on behalf of the crown, gave the notices, in order to ascertain whether the lands could be purchased for a sum limited by section 1, which, by the claims sent in, it appeared they could not):—Held, that the commissioners under the statute were acting in a public capacity, and that the notice given by them did not constitute a quasi contract enforceable by a mandamus. *Bulge, Ex parte*, 15 Q. B. 761; 19 L. J., Q. B. 497.

The court will not grant a rule for a mandamus to the commissioners of excise, commanding them to assent to the appropriation of a part of an excise officer's pension, under

1 & 2 Vict. c. 110, s. 56. *Reg. v. Excise Commissioners, Hayward, In re*, 9 Jur. 257; 14 L. J., Q. B. 113—B. C.—Williams.

The court will not grant a mandamus commanding the Commissioners of Woods and Forests to pay a poor rate in respect of lands held by them under the crown. *Reese, Ex parte*, 5 D. P. C. 668; W., W. & D. 364.

The commissioners of customs refused to deliver up certain tobacco claimed as wrecked goods, and upon which a duty of 5l. per cent. had been tendered; the court refused to grant a mandamus to compel them to do so, as there was another remedy. *Reg. v. Customs (Commissioners)*, 1 N. & P. 536; 5 A. & E. 380; 2 H. & W. 247.

Nor will it lie to commissioners of customs to compel the delivery up of goods wrongfully detained by them after payment of the duty. *Reg. v. Customs (Commissioners)*, 6 N. & M. 828.

William the Fourth, in pursuance of the 1 & 2 Will. 4. c. 11, granted, to trustees for his consort Queen Adelaide an annuity of 100,000l., to commence on the decease of his Majesty, and continue during the natural life of her Majesty, payable out of the Consolidated Fund, on the 13th March, 30th June, 30th September, and 31st December, by even and equal portions, the first payment to be made at such of those days as shall first and next happen after the decease of his Majesty, in case her Majesty should survive him. His Majesty died on the 20th June, 1837. On 30th June the trustees received a full quarter's payment. This payment was made after consulting the law officers of the crown, who advised that the entire sum was due; and her Majesty was informed of their advice. The quarterly payments were made up to and on 30th September, 1849. Her Majesty died on 2d December, 1849. Her trustees applied for a proportionate part of the quarterly payment which would have become due on 31st December, 1849, if she had so long lived. On a rule nisi for a mandamus to the Lords of the Treasury to issue a warrant for this payment:—Held, that if the annuity had been apportionable and the sum due, mandamus was the proper remedy; and that the court would not, in the exercise of its discretion, make the refunding of what on that supposition would have been the overpayment on 30th June, 1837, a condition to the issuing of the writ, there being no equity to require her Majesty's representatives to restore a sum received under the bona fide belief that it was her own. *Reg. v. Treasury (Lords)*, 16 Q. B. 357; 15 Jur. 767; 20 L. J., Q. B. 305.

The court will not grant a mandamus calling upon the Lords Commissioners of the Treasury to pay a debt or claim unless they have admitted that they have received money granted by parliament for that specific purpose. *Walmesley, Ex parte*, 1 B. & S. 81; 7 Jur., N. S. 1010; 9 W. R. 599; 4 L. T., N. S. 242.

In the half-year ending the 31st of Decem-



ber, 1870, certain prosecutions took place at the assizes and quarter sessions of a county, and the costs were taxed by the proper officers under the orders of the respective courts, and the treasurer of the county paid the bills, and returned the bills, with the usual vouchers, to the treasury. The lords of the treasury had appointed officers called the examiners of criminal law accounts, and these officers disallowed or reduced in amount fifty-one of the items in the bills returned; and a rule nisi was then obtained for a mandamus to the lords of the treasury, commanding them to issue a treasury minute authorizing the paymaster of civil contingencies to pay to the treasurer of the county the sums disallowed:—Held, that a mandamus would not lie, inasmuch as the lords of the treasury received the money, which was granted to her majesty, as servants of the crown, and no duty was imposed upon them as between them and the persons to whom the money was payable. *Reg. v. Lords Commissioners of the Treasury*, 41 L. J., Q. B. 178; 7 L. R., Q. B. 387; 20 W. R. 336; 26 L. T., N. S. 64.

Held, also, that the course which the lords of the treasury had pursued was erroneous, as they had no authority whatever to have the bills retaxed, and ought to have paid over to the treasurer of the county the full sum which he had expended as costs of prosecutions. *Id.*

An officer commanding forces of the Queen and of the East India Company in India has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the company to discharge arrears; though he has always received his pay from the company, and their practice has been to discharge it monthly. *Napier, Ex parte*, 18 Q. B. 692; 21 L. J., Q. B. 332; 17 Jur., N. S. 380.

Three persons were indicted, at the assizes for a county, for forging the will of D. D. died in a borough, and one of the prisoners took away the deeds, &c., of the deceased to his own house, which was in the county, but not in the borough; the forged signatures of the testator and of one of the witnesses were written in the borough; and the offense was completed in another county, where the forged signature of the second witness was written. The borough did not contribute to the county-rate, but had a borough-fund of its own:—Held, that the order for payment of all costs and expenses of the prosecution was properly made on the treasurer of the borough, and a mandamus would lie to the treasurer to compel payment. *Reg. v. Hayteard*, 17 L. J., Q. B. 223; *S. C.*, nom. *Reg. v. Oscestry (Borough Treasurer)*, 12 Q. B. 239; 12 Jur. 744.

A bill being introduced into parliament for the purpose of more effectually draining a particular district of level through another district, entirely within the jurisdiction of the commissioners of sewers for the county of Norfolk, acting under 3 & 4 Will. 4, c. 42, the commissioners apprehending that the bill

would, if passed, occasion an injury to the land within their jurisdiction, *bonâ fide*, and with discretion and prudence, caused their clerk to take all reasonable and necessary steps for opposing the bill in parliament, and to prevent its passing, or to obtain the adoption of certain clauses, and thereby considerable amount for costs and expenses had been incurred, and remained due to the clerk, who had since died:—Held, that his legal representatives were entitled to a mandamus, directing the commissioners to levy a rate on the land within their jurisdiction, under the 4 & 5 Vict. c. 45, and to pay off the amount due for such costs and expenses. *Reg. v. Sewers of Norfolk (Commissioners)*, 20 L. J., Q. B. 121.

Commissioners appointed under a local act, were empowered to appoint officers at such salaries as they should think reasonable, and to remove such officers, and appoint others. In some sections of the act the officers were spoken of as employed by the commissioners. The commissioners were empowered to make rates, which were vested in them, and they were directed to apply the moneys which should come to their hands under the act, in paving, lighting, &c., the parish, and carrying the several purposes of the act into execution:—Held, that an action did not lie against them by one of their officers for arrears of salary. *Bogg v. Pearse*, 2 L. M. & P. 21; 10 C. B. 534; 20 L. J., C. P. 99.

To parish officers generally.]—A mandamus does not lie to admit a vestry clerk. *Rez v. Croydon (Churchwardens)*, 5 T. R. 713.

Nor to restore the clerk and treasurer of the guardians of the poor of St. Nicholas, Rochester. *Rez v. St. Nicholas, Rochester*, 4 M. & S. 324.

Nor to overseers of the poor, to make a rate without first appealing to the sessions. *Rez v. Canterbury*, 4 Burr. 2290; 1 W. Bl. 667.

Nor to collect a rate. *Rez v. Norwich (Overseers)*, Nolan, 28.

The court refused a mandamus to a board of guardians to admit a person as their clerk, who complained that the person filling the office had been unduly elected by the votes of guardians who were themselves not properly elected. *Reg. v. Dolgelly Union (Guardians)*, 8 N. & P. 542; 8 A. & E. 561; 1 W., W. & H. 513.

When a person was appointed sexton of a parish by the minister, in whom the right to appoint *primâ facie* was, and the churchwardens refused to call a vestry meeting of the parishioners (who also claimed the appointment) to elect one, and it appeared that there was another method of trying the right; the court refused to grant a mandamus to the minister and churchwardens to call the vestry meeting. *Rez v. Stoke Damerel (Minister)*, 1 N. & P. 56; 5 A. & E. 584; 2 H. & W. 346.

A mandamus will lie against the old overseers to compel them to deliver their public

books and papers to their successors. *Puse v. Clapham*, 1 Wils. 305.

But not to churchwardens to deliver a vestry book to the vestry clerk. *Anon.*, 2 Chit. 255.

An assistant overseer, after the expiration of his office, having refused to deliver up the parochial books to the existing overseers, they applied to two justices under the statute; but the justices refused to interfere. The court granted a mandamus to compel the assistant overseer to deliver up the books. *Reg. v. Fox*, 1 W., W. & H. 4.

A local act required a select vestry from time to time to make rates for the relief of the poor, and also for the support and repair of the churches, and rate-payers were empowered to appeal to the vestry and also to the quarter sessions. It was also provided, that nothing in the act contained should avoid any ecclesiastical law, or in any manner interfere with persons having ecclesiastical jurisdiction over the parish:—Held, 1, that notwithstanding this saving of ecclesiastical rights, the court had jurisdiction to issue a mandamus to compel the vestry to make such a rate for the repair of the churches. 2. That a general refusal to do either of two things, one of which the vestry was required to do by act of parliament, was sufficient to entitle the churchwardens to a mandamus. 3. That a colorable adjournment of the question, under the pretence of waiting until the churchwardens had furnished estimates of the sum of money which would be required for the repair of the churches, was equivalent to a positive refusal to make a rate. *Reg. v. St. Margaret's, Leicester (Select Vestry)*, 1 P. & D. 116; 8 A. & E. 889; 1 W., W. & H. 673.

Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts, according to the directions of the 17 Geo. 2, c. 38, he must state some special reason for which he wishes to see the accounts. *Re v. Clear*, 7 D. & R. 398; 4 B. & C. 809.

The court will grant a mandamus to commissioners, intrusted by act of parliament with the regulation of the expenditure of a parish, to compel them to levy a rate for the purpose of paying off a sum borrowed on the rate, by former commissioners, without pledging their personal responsibility. *Reg. v. St. Paul, Shadwell (Commissioners)*, 1 M. & R. 591.

At an election of churchwardens the votes of tenants of small tenements, the owners of which were rated to the poor and highway rates, by virtue of 13 & 14 Vict. c. 99, tendered on behalf of one of the candidates, were rejected:—Held, that a mandamus to convene a vestry for the election of churchwardens would not lie to try the question whether such tenants were entitled to vote, it not being shown that the result of the election would have been different if their votes had been received. *Mawby or Joyce, Ex parte*, 8 El. & Bl. 718; 18 Jur. 906; 23 L. J., M. C. 153.

The court will not grant a mandamus, re-

quiring parish officers to receive a pauper, in obedience to an order of removal. The proper course is by indictment. *Downton (Overseers), Ex parte*, 8 El. & Bl. 856; 27 L. J., M. C. 28.

There is no general unqualified right on the part of rate payers to inspect and take extracts from the churchwardens' books of accounts. To entitle a rate-payer to a mandamus to compel such inspection, some special and public ground must be shown. *Briggs, Ex parte*, 28 L. J., Q. B. 272.

By 10 Geo. 4, c. 59 (Metropolis Roads Act), s. 36, all annuities chargeable upon the tolls taken on any of the roads which shall cease to be under the management of the commissioners, are to be payable and paid by the respective parties by whom the roads, on the tolls of which the same were chargeable, are to be thenceforth maintained. By s. 11, the roads within the parish of St. Pancras shall be repaired from the same funds (except as to limitation of expenditure) as are by law chargeable with the repair of the highways within the parish. By a local act the rates made by the vestrymen of this parish are vested in directors, and to be applied (among other purposes) in making appropriations for the expenses of keeping highways in repair, with a limitation as to the amount of the appropriations; and the making of any rate, other than is thereby directed, is prohibited:—Held, that a mandamus to pay an annuity charged on the roads in the parish of St. Pancras, mentioned in the 10 Geo. 4, c. 59, s. 36, was wrongly directed to the churchwardens, overseers and inhabitants of St. Pancras, and should have been directed to the directors mentioned in the local act. *Reg. v. St. Pancras (Churchwardens, &c.)*, 6 Jur. 391—Q. B.

Where by a custom of a parish one churchwarden was elected annually by the parishioners, and the other annually by the rector, and the latter appointed as his churchwarden a person who was not a parishioner, or an inhabitant of or occupier of property in the parish:—Held, that a mandamus to the rector to appoint a churchwarden was the proper process by which to question the validity of the appointment. *Barlow, In re*, 30 L. J., Q. B. 271; 5 L. T., N. S. 289.

To guardians and vestries.]—A local statute, after providing for the appointment of governors and guardians of the poor of a parish, and for the filling up of vacancies by the remaining governors and guardians, enacted, that after the first year "the inhabitants of the parish in vestry assembled" are to nominate and choose twelve persons in lieu of those retiring each year:—Held, that the meeting was to be called by the governors and guardians, and, therefore, the writ should be directed to them, notwithstanding 58 Geo. 3, c. 69, s. 1, and 1 Vict. c. 45, s. 3. *Reg. v. St. Mary, Newington (Governors, &c.)*, 6 D. & L. 162; 2 B. C. Rep. 303; 12 Jur. 918; 17 L. J., Q. B. 220—Coleridge.

A vestry of a parish comprised within the



18 & 19 Vict. c. 120, having obtained the necessary approval of the Metropolitan Board of Works to the construction by them of such sewers as may be requisite for the drainage of the parish, has, under that section, a discretion with respect to the exigencies of one portion of the parish as compared with others, and is entitled to a reasonable time for the beginning and completion of the works; and a mandamus ordering the immediate construction of sewers in a particular part of the parish is defective, unless it shows on the part of the vestry a present duty, and a non-compliance therewith. *Reg. v. St. Luke's, Chelsea (Vestry)*, 3 Jur., N. S. 308; 31 L. J., Q. B. 50; 10 W. R. 293; 5 L. T., N. S. 744.

As to mandamus to overseers,—see POOR LAW.

**To corporations; to compel elections, generally.**—A mandamus lies after an election merely colorable and clearly void. *Reg. v. Cambridge (Mayor)*, 4 Burr. 2008.

The claim of cognizance as to the election of aldermen by the court of mayor and aldermen of London, does not exclude the jurisdiction of the court to issue a mandamus. *Reg. v. London (Mayor)*, 4 M. & R. 36.

To a mandamus to a mayor to convene a meeting to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses, he returned (after stating objections to the title of several of the remaining burgesses), that there were not then within the borough eight legally elected chief burgesses, by whom the election of others could be made, and that, for the several reasons before mentioned, he could not proceed to such election:—Held, an insufficient return. *Reg. v. Monmouth (Mayor)*, 4 B. & A. 496.

A mandamus was granted to compel a mayor and the capital burgesses of a corporation to fill up two vacancies occasioned by the death of two capital burgesses, though there was a quo warranto information depending against the mayor, questioning his title. *Reg. v. Grampound (Corporation)*, 6 T. R. 301.

The court will not in general grant a mandamus to elect another upon non-residence, unless the non-resident party has been previously removed. *Reg. v. Truro (Mayor, &c.)*, 3 B. & A. 590; 2 Chit. 257.

By an act it was enacted, that the mayor, sheriffs, citizens, and commonalty of the city of Norwich, at an assembly to be held within three calendar months before the 4th of June in each succeeding year, should elect twenty persons to be guardians of the poor of the city, and that on the Monday in Easter week in every succeeding year there should be elected for each parish, hamlet, &c., of the city and county an additional number of persons to be guardians of the poor, amounting in the whole to forty-eight, and that the several persons so elected should enter upon the office of guardians on the 4th day of May next ensuing their election. There was then a proviso, that, in case default should

be made in the election of a guardian, the other guardians might proceed in the execution of the act as fully and effectually as if the election of the guardian had actually taken place:—Held, that a clause fixing the time of election was directory, and the mayor, sheriffs, citizens, and commonalty having neglected to elect twenty persons to be guardians within three calendar months next before the 4th day of May, 1853, the court granted a mandamus to compel them so to do. *Reg. v. Norwich (Mayor, &c.)*, 1 B. & Ad. 310.

The court refused to grant a mandamus to compel a corporation to elect members of an indefinite body. *Reg. v. Fouey (Mayor)*, 4 D. & R. 132; 2 B. & C. 584; 5 D. & R. 614.

Where a charter of Hen. 7 granted to the citizens and commonalty in these words:—"Quod ipsi, et successores sui, in perpetuum singulis annis successivis, 24 concives civitatis in aldermannos, necnon 40 alios cives ejusdem civitatis pro communi concilio civitatis illius eligere, favere, et creare possint;" and it appeared that, in 1693, and the two following years, successive elections of the forty common councilmen had been made, since which time the usage had been not to elect the aldermen or common councilmen annually; the court refused a mandamus, which was applied for in order to raise the question against the usage, whether the election of those officers ought to be annual, there being another remedy open to the parties making the application. *Reg. v. Chester (Mayor, &c.)*, 1 M. & S. 101.

Where a charter, after ordaining who should be entitled to be burgesses, directed that they should make application for that purpose to the mayor and commonalty on a day certain in each year, and at no other time, and then make due and legal proof of their qualifications; and A. and B., claiming to be admitted burgesses, made application to the mayor and commonalty on the charter day, and offered to make due and legal proof of their qualifications, but their applications were not heard, nor their proofs received, on account of the time having been spent in other business; the court granted a mandamus to the mayor and commonalty to enter an adjournment to a subsequent day, and then to hold a meeting, and receive and examine such proofs. *Reg. v. Carmarthen (Mayor, &c.)*, 1 M. & S. 697.

Mandamus to a corporation stating that, on 1st November, 1854, C. and S., two councillors of a ward, being a third part of the number assigned for the ward, were in turn to go out of office, and an election ought to have been held for the election of two councillors for the ward, but that an election was held on the 1st November for one councillor only, whereby the office of one councillor was vacant, and the writ commanded the mayor to proceed to the election of a councillor. Return that, on the 9th November, 1853, S. being a councillor for the ward, was elected mayor for a year, and until his successor

should have accepted office, and S. then accepted the office of mayor, and held it till 9th November, 1854, when his successor was elected mayor and accepted the office, and S. ceased to hold the office of mayor, and by reason thereof S. was not, on the 1st November, 1854, in turn to go out of office as councilor, and the election ought not then to have been held for two councilors, and that on the 30th November, 1854, S. was duly elected councilor, and afterwards accepted that office, made and subscribed the declaration, and thence, continually, held and continued to hold, and did still hold and continue in that office, and the same during all the time had been and still was filled by S.:—Held, that the election of S. as councilor on 9th November, 1854, was, at any rate, not colorable, and there was therefore a plenarty, and mandamus did not lie, the proper mode of questioning the election being by quo warranto. *Frost v. Chester (Mayor, &c.)*, 5 El. & Bl. 581; 2 Jur., N. S. 114; 25 L. J., Q. B. 61.

— to compel new election. ]—[By 7 Will. 4 & 1 Vict. c. 78, s. 26, powers given to the Court of Queen's Bench under 11 Geo. 1, c. 4, were extended to municipal elections under 5 & 6 Will. 4, c. 76.]

If it appeared with sufficient certainty to the court, that a person had been elected mayor of a borough on the day appointed by the usage, who was not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they would grant a mandamus to the electors to proceed to a new election, under 11 Geo. 1, c. 4, s. 2, as if no election had in fact been made. *Re v. Bedford (Corporation)*, 1 East, 79.

The court, however, expressed great doubt whether they could with propriety grant the writ in this case. *Id.*

When a town councilor has been struck off the Burgess roll, for non-payment of poor-rates, but continues to exercise the duties of the office, the court will not grant a mandamus to the mayor or aldermen to proceed to a new election, but will leave the parties to their remedy by quo warranto. *Reg. v. Ricketts*, 2 Jur. 440; *S. C.*, nom. *Reg. v. Phippen*, 7 A. & E. 966.

Where an election to the office of mayor becomes void within the year, the court has power, under 7 Will. 4 & 1 Vict. c. 78, s. 26, to issue a mandamus commanding a new election. *Reg. v. Pembroke (Corporation)*, 8 D. P. C. 302; 4 Jur. 317—B. C.

When there is a statutable incapacity in a person being twice elected to the office of mayor, the court will consider the election as void ab initio, and will thereupon issue a mandamus commanding a new election; and such mandamus must be addressed to the mayor and burgesses, though there is legally no mayor. *Id.*

The court will grant a mandamus for the election of a new mayor, under 11 Geo. 1, c. 4, although a quo warranto is depending

against the new mayor. *Re v. Bridgewater (Corporation)*, 3 Dougl. 379.

A mandamus to go to election upon judgment of ouster cannot be moved for till judgment is actually signed. *Re v. West Looe (Corporation)*, 3 Burr. 1386.

When a defendant is ousted on a quo warranto, the prosecutor is entitled to a mandamus for a new election, if he applies in a reasonable time; if he does not, the defendant is entitled to move for the writ. *Re v. McKay*, 6 D. & R. 432; 4 B. & C. 658.

A charter having granted, that, upon the death or amotion of a principal burgess (who was appointed to hold for life), it should be lawful for the mayor and the remaining principal burgesses, within eight days next following, to elect another; the eight days after a vacancy having elapsed without an election, a mandamus was granted under 11 Geo. 1, c. 4, s. 2, to make an election. *Re v. Thetford (Mayor, &c.)*, 8 East, 270.

— to compel admission to office. ]—Upon affidavit that one of two candidates for an office had a majority only by means of illegal votes, the court granted a mandamus to the corporation to admit and swear in the other, who appeared upon the affidavits to have had the greater number of legal votes; and this, although the first was admitted and sworn into the office; there being no other specific, or, at least, no other such convenient mode of trying the right. *Re v. Bedford Level (Corporation)*, 6 East, 356; 2 Smith, 535.

Where three extraordinary vacancies, under 5 & 6 Will. 4, c. 76, s. 47, have been filled up by persons who had a majority of votes, the court will not issue a mandamus commanding the mayor and town council to admit two other persons to the office of town councilors. The proper mode of trying the validity is by quo warranto. *Re v. Winchester (Mayor, &c.)*, 2 N. & P. 274; 7 A. & E. 215; W., W. & D. 525; 1 Jur. 738.

A party, while still a councilor of one ward of a borough, was elected a councilor in another ward, and was admitted into office:—Held, that a mandamus should not be issued to swear in the candidate who had the next largest number of votes, the office being full, and being one for which a quo warranto might be brought. *Reg. v. Derby (Councilors)*, 2 N. & P. 589; 7 A. & E. 419; W., W. & D. 671.

A mandamus will not lie to admit an inhabitant of a borough by prescription to be a free burgess, unless it appears, first, that he had an inchoate right to be a free burgess; and, secondly, that such office is a corporate office by prescription. *Re v. West Looe (Mayor)*, 2 D. & R. 178; 5 D. & R. 590; 3 B. & C. 677.

A mandamus to admit a recorder was refused, because there was a recorder de facto, and the party had another remedy by quo warranto; though both of them claimed under the same election. *Re v. Colchester (Mayor)*, 2 T. R. 250



Where, on a disputed municipal election, two of the candidates obtain a rule nisi for a mandamus to admit, and afterwards a rule nisi for a quo warranto against the parties admitted, the rule for the mandamus will not be, as a matter of course, discharged. *Reg. v. Winchester (Mayor, &c.)*, 2 N. & P. 274; 7 A. & E. 215; W., W. & D. 525; 1 Jur. 738.

If the name of A. was inserted in the list of persons elected town councilors, duly published in pursuance of the 4 & 5 Will. 4, c. 76, s. 85, and he duly made and subscribed the declaration prescribed by s. 50, and on a later hour of the day a new list was published, in which the name of another candidate was substituted for that of A.; a mandamus laid to the mayor to receive and count the votes of A., and to permit him to exercise the functions of town councilor. *Reg. v. Leeds (Mayor, &c.)*, 11 A. & E. 512; 5 Jur. 548.

It is no ground for refusing a mandamus to admit a party to an office to which he has been elected, that to a similar mandamus granted in respect of a former election of the same party a return was made, showing an excuse, valid in point of law, for not admitting him. *Reg. v. London (Mayor)*, 1 N. & M. 285; 3 B. & Ad. 255.

A mandamus to the mayor of London, to admit a person to the office of auditor of the chamberlain's and bridgemaster's accounts, who had served them three years successively, and been elected again the fourth by the livery, refused; because the custom of the city appeared to be, that no person should be elected to or serve the office for more than two years successively. *Reg. v. London (Mayor)*, 1 T. R. 423.

A mandamus will not lie to compel the high steward of a corporation to admit a commoner, unless the person claiming to be so admitted shows that he has a good title in omnibus. *Reg. v. Malmesbury (High Steward)*, 4 Jur. 222—B. C.

As to when mandamus will be granted to compel admission to office, generally,—see this title, I., 1.

— to compel insertion or restoration of names in burgess rolls. ]—[By 7 Will. 4 & 1 Vict. c. 78, s. 24, it shall be lawful for any person whose claim shall have been rejected or name expunged at the revision of the burgess roll of any of the boroughs to apply, before the end of the term then next following, to the Court of King's Bench for a mandamus to the mayor for the time being of that borough to insert his name upon the burgess roll, and thereupon for the court to inquire into the title of the applicant to be so enrolled; and if the court shall award such mandamus, the mayor shall be bound to insert the name upon the burgess roll, and shall add thereto the words, "By order of the Court of King's Bench," and shall subscribe his name to such words, and thereupon the person whose name shall be so added to the burgess roll shall be deemed a burgess, and entitled to vote and act as a burgess in all respects as if his name had been put upon the burgess roll by the mayor and assessors; and

upon every such application the court shall power to make such order with respect to the as to the court shall seem fit.]

A rule calling upon a mayor to show why a mandamus should not issue, commanding him to insert the name of a person on the burgess roll, is nisi only. *Reg. v. Harwich (Mayor)*, 2 L., M. & P. 666, n.—B. C.—

The court will make absolute a rule for mandamus to insert a name on the burgess roll, although the year for which such burgess roll was made has expired since the grant of the rule nisi, and the mayor is dead, whom the rule was directed; such a writ is not peremptory in the first instance. *Reg. v. Eye (Mayor)*, 2 P. & D. 348; 9 A. & E. 67.

Where the overseers of one of several parishes in a borough omitted to make out a burgess list required by 5 & 6 Will. 4, c. 15, so that at the Revision Court of the mayor there was no list in which the name of a claimant for that parish could be inserted—Held, that this intermediate defect in title to be on the general burgess roll, which was made up of the several parish lists, did not preclude the court from issuing a mandamus for the insertion of his name. *Reg. v. Lichfield (Mayor, &c.)*, 1 G. & D. 28; 5 Jur. 889; 1 Q. B. 453.

Such a mandamus is not peremptory in the first instance. *Ib.*

Where a party, whose name has been expunged from the burgess roll by the mayor on revision, applies to the court for a mandamus to replace it, the court is bound to inquire into his title. It is not, therefore, sufficient for him to show that his name was inserted by the overseers, and was expunged by the mayor, on an objection which, for want of legal notice under 5 & 6 Will. 4, c. 78, s. 24 (as the party alleges), ought not to have been heard. *Reg. v. Harwich (Mayor)*, 8 A. & E. 919; 1 P. & D. 134; 1 W., W. & H. 611.

A householder of a borough had his name inserted by the overseers of a parish, within the borough, on the burgess list of the parish, which was signed by the overseers. The mayor struck off his name, without any objection having been made to it, but did not reject the list. A mandamus having issued commanding the mayor to insert the name on the burgess roll, the return alleged that the burgess list was not signed by the churchwardens, or either of them:—Held, that the mayor having acted on the list, this was no answer to the writ. *Reg. v. Dover (Mayor)*, 11 Jur. 710; 16 L. J., M. C. 97; affirmed on error, 11 Q. B. 260; 12 Jur. 334; 17 L. J., M. C. 95—Exch. Cham.

— to compel other restoration to membership or office. ]—The court will not grant a mandamus to restore a person to an office where it is confessed that he was rightly removed, although without notice. *Reg. v. Azbridge (Mayor, &c.)*, Cowp. 523.

A mandamus lies to restore a recorder. *Reg. v. Wells (Corporation)*, 4 Burr. 1999.

If a councilor of a corporation is ousted



and another elected in his stead, and such election is merely colorable, a mandamus will be granted to permit the ousted party to exercise his office, but not to restore him to his office. *Rez v. Oxford (Mayor, &c.)*, 6 A. & E. 849; 1 N. & P. 474.

A mandamus was refused to restore to the office of clerk of the Bridge-house estates in London, though the party was irregularly suspended, it appearing, on his own showing, that there was good ground for the suspension, if the proceedings had been regular. *Rez v. London (Mayor)*, 2 T. R. 177.

But granted to restore to office a clerk or a surveyor of the city works, which was an office for life, and on appointment, an oath administered. *Rez v. London (Mayor)*, 2 T. R. 182, n.

Where a corporator, who was entitled to divide a certain share of the profits of a fishery, which the corporators worked and enjoyed in partnership, was suspended from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged, the court refused a mandamus to restore him to his office; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits (if the by-law was illegal, or he was not guilty of a breach of it, or had been unlawfully suspended), or, considering the corporators as partners in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withheld from him. *Rez v. Whitstable Fishery Company*, 7 East, 353; 3 Smith, 819.

—*in respect of other corporate acts and matters.*—The bailiffs of a borough had been from time immemorial lords of the manor and owners of the guildhall within the borough, and by a charter of Philip & Mary power was granted to them to hold manor courts in the guildhall twice in every year, as of ancient time, and, until 1810, such courts had been immemorially held. In that year commissioners under an inclosure act awarded to Lord H. all the manor, with the rights, courts, &c., excepting to the bailiffs and burgesses the guildhall:—Held, that this exception did not exclude the new lord's right to hold his manor courts in the guildhall. *Rez v. Nether (Bailiffs, &c.)*, 4 D. & R. 324; 2 B. & C. 764.

If there are words of permission in a charter, to do an act which is clearly for the public benefit, they are obligatory; therefore, where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but which had been long disused, the court granted a mandamus to compel such court to be held, at the instance of an inhabitant of the town, though he was not a corporator. *Rez v. Hastings (Mayor, &c.)*, 1 D. & R. 148; 5 B. & A. 692, n. S. P., *Rez v. Huttering-atte-Bowor (Steward)*, 2 D. & R. 170, n.; 5 B. & A. 691.

Where a charter is granted to a corporation to hold a court for the trial of causes, the disuse of that court for 200 years, and the want of funds to hold it, are no answer to a rule for a mandamus commanding them to hold it. *Rez v. Wells (Mayor)*, 4 D. P. C. 562.

A mandamus was granted to put the corporate seal to the certificate of the election of the recorder, on an affidavit that he had the majority of legal votes; though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election. *Rez v. York (Mayor)*, 4 T. R. 690.

A mandamus will not lie to appoint a general deputy under a by-law, although it requires that the under-steward, or his sufficient deputy, shall be attendant at every court to discharge the duties of his office. *Rez v. Gravesend (Mayor)*, 4 D. & R. 117; 2 B. & C. 602.

A serjeant of mace to a corporation, being discharged from his office, refused to deliver up the mace to his successor:—Held, that no mandamus would lie to compel him to do so. *Reg. v. Todd*, 2 Jur. 565—Q. B.

As to compelling inspection of corporate books, records, &c.,—see EVIDENCE.

As to mandamus to public companies, their directors and officers,—see PUBLIC COMPANY.

## II. PROCEDURE.

### 1. Application for, and Issue and Service of the Writ.

*Time of making application.*—Any application for a writ of mandamus to justices, to enter continuances, and hear an appeal, shall be made not later than in the term following the sessions at which the refusal was made, unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court. *Reg. Gen., Q. B., E. T.*, 21 Vict., 6 May, 1858, *El. M. & El.* 255. See *Reg. v. Richmond (Recorder)*, *El. Bl. & El.* 253; 4 Jur., N. S. 456; 27 L. J., M. C. 197.

A mandamus to the sessions to hear an appeal must be applied for promptly. *Reg. v. West Riding*, 1 G. & D. 706; 6 Jur. 506.

Where, at a sessions, held in January, the court confirmed an order in bastardy, subject to a case for the opinion of the court, or to a mandamus to hear the appeal, at the option of the appellant, who decided upon not bringing up the case, but applied for a mandamus in Easter Term:—Held, that the application was not made too late. *Reg. v. Cheshire (Justices)*, 1 B. C. Rep. 164; 2 New Seas. Cas. 420; 4 D. & L. 94; 10 Jur. 808; 15 L. J., M. C. 114—Wightman.

*Parties.*—In a rule for a mandamus to elect a mayor, a subsisting mayor *de facto* must always be a party. *Rez v. Barnes*, 2 Burr. 1453; 1 W. Bl. 445.

It is not necessary to specify the particular

person to whom a mandamus should be directed. *Reg. v. Carmarthen (Corporation)*, 4 Jur. 865—B. C.

One writ cannot issue at the instance of two persons, for the enforcement of separate claims, although they have been successors in the same office in respect of which the claim arises. *Scott, Ex parte*, 8 D. P. C. 323; 4 Jur. 579—B. C.

A mandamus against churchwardens and overseers may be sued out by one of their own body. *Rez v. Edlston (Overseers)*, 1 N. & P. 20; W., W. & D. 163.

It is no objection to counsel being heard to show cause against a rule nisi for a mandamus, to compel justices to enter continuances, and hear an appeal against a conviction under the Turnpike Act, that they were instructed by the attorney of the trustees of the road, and not by the convicting justice or the informer. *Reg. v. Middlesex (Justices)*, 2 D., N. S. 716; 7 Jur. 306—B. C.—Williams.

If certain magistrates, attending at special sessions, do not take part in a decision of the sessions, they ought not to be brought before the court on an application for a mandamus in respect of that decision. *Reg. v. Wiltshire (Justices)*, 8 D. P. C. 717; 4 Jur. 460—B. C.

A motion for a mandamus cannot be made by an applicant in person unless he is a member of the bar. *Wason, Ex parte*, 10 B. & S. 580.

**Notice of application.**—[By 6 & 7 Vict. c. 80, s. 5, in all cases of intended application to the Court of Queen's Bench, for a mandamus to proceed to an election of any corporate officer or officers in boroughs, it shall be lawful for the party intending to make such application to give notice in writing thereof to the party to be affected thereby at any time not less than ten days before the day in the said notices specified for making such application, in which notices shall be set forth the name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time to deliver with such notice a copy of the affidavits whereby the application will be supported; and thereupon it shall be lawful for the said last-mentioned party to show cause in the first instance against such application; and if no sufficient cause is shown, it shall be lawful for the Court of Queen's Bench, on proof of the due service of such notice and statement, and of the delivery of a copy of such affidavits as may be used for the purpose of supporting such application, to make the rule for such mandamus absolute, if the court shall so think fit in the first instance, and also, if they shall so think fit, to direct that any writ of mandamus thereby ordered to be issued shall be peremptory in the first instance.]

**Affidavits on motion for a mandamus to sessions to hear an appeal** should state all the material facts that occurred at the sessions. *Reg. v. West Riding (Justices)*, 2 New Sess. Cas. 1.

When a rule for a mandamus, obtained by churchwardens, had been discharged, with

costs, on the ground that their affidavits were imperfect, and a subsequent rule was obtained by the same parties, on the same ground, amended affidavits, the court refused to discharge the second application upon the merits of the second rule also, with costs. *Reg. v. Pickles*, 12 L. J., M. C. 40—Q. B.

**Rule absolute in the first instance.**—[17 & 18 Vict. c. 125, s. 76, upon application by motion for any writ of mandamus in the Court of Queen's Bench, the rule may in cases be absolute in the first instance, if the court shall think fit.]

A rule for a mandamus to an archdeacon to administer the oath of office to a churchwarden, was absolute in the first instance where there was no rival candidate, and no reason assigned for the refusal to administer the oath. *Rez v. Lichfield and Coventry (Archdeacon)*, 5 N. & M. 42; 1 H. & W. 463.

[By 5 & 6 Will. 4, c. 62, s. 9, a declaration is substituted for an oath.]

The rule is absolute in the first instance for a mandamus to swear in a chapelwarden where, on the vacancy of a living, there is a dispute between the curate and the sequestrator who should appoint, and each has appointed one. *Penruddock, Ex parte*, 1 H. & W. 34.

A rule for a mandamus to churchwardens to swear in overseers of the poor, was granted absolute in the first instance. *Reg. v. Manchester (Churchwardens)*, 7 D. P. C. 707.

The rule for a mandamus to justices to hear a charge against a person brought before them is not a rule absolute in the first instance. *Reg. v. Ingham*, 3 New Sess. Cas. 689.

But a rule for a mandamus to justices to allow a poor-rate is absolute in the first instance. *Reg. v. Godolphin*, 1 D. & L. 830; 3 Jur. 574; 13 L. J., M. C. 57—B. C.—Williams.

As to peremptory mandamus in the first instance,—see this title, II., 3.

**Rule to show cause; and determination.**—[A rule to show cause why one or more writs of mandamus should not issue is an improper form of rule. *Reg. v. Bridgnorth (Mayor)*, 1 P. & D. 317; 10 A. & E. 66; 3 Jur. 384.]

The court will not grant a rule in the alternative for a mandamus or a quo warranto. *Reg. v. Leeds (Mayor)*, 11 A. & E. 512; 5 Jur. 548.

When cause is shown against a rule for a mandamus, the objection, that no sufficient demand and refusal appear, must be taken before the merits are discussed. *Reg. v. Eastern Counties Railway Company*, 10 A. & E. 531; 2 P. & D. 648; 1 Railw. Cas. 509.

After the determination of the court upon a rule nisi for a mandamus, the question decided cannot be again discussed, as a special case, until there is a return made to the writ. *Rez v. Leicester (Justices)*, 7 D. & R. 708. And see 7 D. & R. 370; 4 B. & C. 891.

The court will make a rule for a mandamus absolute, although the affidavits on which the rule nisi was obtained contain misrepresentations and suppress facts, if sufficient remain

answered to warrant the court in issuing a writ. *Rez v. Payn*, 1 N. & P. 524; 6 A. E. 393; W., W. & D. 142.

**Affidavits in answer** to a rule for a mandamus sworn before a commissioner, must contain the place where sworn, otherwise they cannot be read. *Rez v. W. R. Yorkshire Justices*, 3 M. & S. 493.

A mandamus applied for by the Earl of Radnor was directed to the trustees of a turnpike road:—Held, that an affidavit entitled, "The trustees of the H. roads on the prosecution of the Earl of Radnor," was improperly entitled, and could not be read. *Reg. v. Harnham Roads (Trustees)*, 5 Jur. 408—Q. B.

**Form and contents of writ.**—Every writ of mandamus shall be tested and made returnable on a day certain before the Queen at Westminster; and there shall be eight days between the teste and return of every such writ of mandamus, where the act required to be done is in London, or within forty miles thereof, and fourteen days in all other cases. R. 8.

Where there were only six days between the teste and the return:—Held, insufficient. *Rez v. Holborn Union (Guardians)*, 7 A. & E. 281; W., W. & D. 395; 1 Jur. 706.

By a regulation of the judges, made under 6 & 7 Vict. c. 20, s. 16, it was ordered that every mandamus should be tested and made returnable on a day certain before the Queen:—Held, that the words requiring the teste to be on a day certain, meant a day in term. *Reg. v. Conyers*, 8 Q. B. 981; 10 Jur. 899; 15 L. J., Q. B. 300.

If one parish officer applies for a mandamus against another to concur in a rate, the writ must be as well against the applicant as the other. *Anon.*, 2 Chit. 254.

A mandamus commanded "the directors of the Bristol Dock Company to make such alterations and amendments in the sewers as were necessary in consequence of the floating of the harbor:"—Held, that this was in the proper form, and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left to their discretion by the act of parliament. *Rez v. Bristol Dock Company*, 6 B. & C. 181; 9 D. & R. 309.

A mandamus recited that it was the duty of the church trustees of St. Pancras parish, who had been required to produce accounts (in the terms of the 1 & 2 Will. 4, c. 60, s. 35), and that they had refused to do so, and then ordered them to produce the accounts which they were ordered to keep by the local acts:—Held, that the mandamus was bad, in ordering more than was warranted, either by the grievance recited or by the General Vestry Act. *Rez v. St. Pancras (Church Trustees)*, 1 N. & P. 507; 6 A. & E. 814.

A mandamus to churchwardens and overseers to make a poor's-rate, recited that no rate had been made for the necessary relief of the poor, pursuing the form given by the crown office:—Held, that the writ was good,

and that it sufficiently appeared that a rate had become necessary. *Rez v. Edlaston (Overseers)*, 1 N. & P. 20; W., W. & D. 163; 1 Jur. 53. S. P.; *Rez v. Gadsby*, 1 N. & P. 572.

A writ which is bad in respect of one of the matters commanded is bad in toto, and a peremptory mandamus cannot be awarded. *Reg. v. Tithe Commissioners for England and Wales*, 14 Jur. 290; 19 L. J., Q. B. 177.

Where a company had given notice of requiring a part of premises, and a mandamus had been obtained, commanding the company to issue a precept for summoning a jury to assess compensation for the whole, the writ cannot go for part. *Reg. v. London and South-Western Railway Company*, 13 Q. B. 775; 13 Jur. 973; 17 L. J., Q. B. 326.

A mandamus commanded a person to deliver up, to the clerk of a court of requests, papers relating to the office. The writ did not show any claim by the person detaining to hold them under any right:—Held, that the writ was therefore bad, and that the defect could not be supplied by the return, on which it appeared that he claimed to be the lawful clerk of the court, and to retain the papers as such. *Reg. v. Hopkins*, 4 P. & D. 550; 1 Q. B. 160.

A direction in a mandamus to take measures for "obtaining and recovering payment" does not necessarily mean to bring an action, and such a direction, therefore, though not accompanied by a tender of indemnity, does not make the mandamus invalid. *Reg. v. Commissioners of Port of Southampton*, 4 L. R., H. L. Cas. 449; 39 L. J., Q. B. 253; 18 W. R. 1171; 23 L. T., N. S. 111.

When commissioners are, by an act of parliament, authorized to receive certain moneys, and at the same time directed to pay a portion of those moneys to another body of persons, the gross sum received is to be deemed the income of the commissioners, and the persons to whom the payment is to be made have an interest in that portion, and are entitled to enforce payment. *Id.*

An incorporated body having raised money under statutory powers by debentures, issued some of these debentures to one of their own body in payment for goods supplied by him, such a transaction being illegal under the statute by which they were constituted a corporate body:—Held, that in an action by the executors of an innocent holder for value of such securities, the same having been transferred to him from the original mortgagee in the manner provided by the statute, they were estopped from setting up as a defense the original illegality of the transaction, and that, under the Common Law Procedure Act of 1854, s. 63, the writ was in the proper form in praying for a mandamus to compel them to apply the money in their hands in payment of the plaintiff's claim, it being shown that the defendants did hold money in their hands raised under the powers of the statute, and applicable to that purpose, and that it was not necessary that the mandamus

should direct the defendants to levy a rate for the purpose of satisfying the plaintiff's demand. *Webb v. Herne Bay Commissioners*, 19 W. R. 241; 5 L. R., Q. B. 642; 39 L. J., Q. B. 221.

**Service of writ.**—Where a copy of the writ was served without showing the original, the court refused to set aside the service. *Rdg. v. Birmingham and Oxford Junction Railway Company*, 1 El. & Bl. 293; 17 Jur. 24; 22 L. J., Q. B. 195.

Service of a rule nisi for a mandamus to the sessions to hear an appeal against the determination of the petty sessions, need not be upon the clerk of the peace; it is sufficient if it is served on the justices whose decision is complained against. *Rez v. Tucker*, 5 D. & R. 434; 4 B. & C. 545.

When a mandamus has been granted for the election of a mayor, under 11 Geo. 1, c. 4, s. 2, and a rule made that public notice should be affixed in the market-place, which had been done accordingly, the court granted an attachment for disobedience of the mandamus, against a member of the corporation, who was served with a copy of the rule, notwithstanding neither the original mandamus nor the rule was shown him at the time; for the public notice directed by the act is *prima facie* sufficient. *Rez v. Eadyean*, 3 T. R. 352.

But the application for the attachment would be well answered, if the party could show that he had no notice of the mandamus. *Id.*

## 2. Return to the Writ; Pleadings and other Proceedings; Judgment.

**Statutes.**—[By 9 Anne, c. 20, s. 1, returns to writs of mandamus are to be made on the first writ.

By s. 2, as soon as the return is made, the prosecutor may plead or traverse all or any of the material facts contained in the return, to which the person making the return shall reply, take issue, or demur, and such further proceedings are to be had as would be the case in an action for a false return; and in case a verdict shall be found for the party suing out the writ, or judgment given for him upon demurrer, or *by nil dicit*, or for want of a replication or other pleading, he shall recover his damages and costs, as in such action for a false return, to be levied by *ca. sa.*, *fi. fa.*, or *elegit*; and a peremptory mandamus shall be granted without delay for him for whom judgment shall be given; and if judgment shall be given for the person making the return, he shall recover his costs of suit, to be levied as aforesaid.

By s. 3, persons against whom damages shall be recovered are not to be liable to be sued in other actions.

By s. 6, the court may allow a convenient time to return a mandamus, or to plead, reply, rejoin, or demur.

By 1 Will. 4, c. 21, s. 3, these several enactments are extended to all writs of mandamus.

By 1 & 2 Will. 4, c. 58, s. 8, the operation

of the Interpleader Act is to extend to applications for writs of mandamus.

By 1 Will. 4, c. 21, s. 4, it shall be lawful for the Court of King's Bench, to which application may be made for any writ of mandamus (other than such as relates to the offices and franchises mentioned in or provided for by 9 Anne, c. 20), if such court shall see fit so to do, make rules and orders, calling, not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ and payment of costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given or mentioned by or in any act passed or to be passed during this present session of parliament, for giving relief against adverse claims made upon persons having no interest in the subject of such claims:

Provided always, that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, shall be made and joined by and in the name of the person to whom such writ shall be directed; but, nevertheless, the same shall and may, if the court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules, and in that case such other person shall be permitted to frame the return and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given for or against the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had.

By s. 5, in case the return to any such writ shall, in pursuance of the authority given by this act, be expressed to be made on the behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of, or removal from office of the person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory writ shall be awarded, the same shall and may be directed to any successor in office or right to such person.

By 6 & 7 Vict. c. 67, s. 1, in all cases in which the person prosecuting any such writ shall wish or intend to object to the validity of any return made to the same, he shall do so by way of demurrer to the same, in such and the like manner as is now practiced and used in the Court of Queen's Bench in personal actions; and the writ and return and the demurrer shall be entered upon record, and such and the like further proceedings shall be thereupon had and taken as upon a demurrer to pleadings in personal actions; and the court shall thereupon adjudge



for that the return is valid in law, or that it is not valid in law, or that the writ of mandamus is not valid in law, and if they adjudge that the writ is valid in law, but that the return thereto is not valid in law, then and in every such case they shall also by their judgment award that a peremptory mandamus shall issue in that behalf, and thereupon such peremptory writ of mandamus may be sued out and issued accordingly, at any time after four days from the signing of the judgment; and it shall be lawful for the court, in and by their judgment, to award costs to be paid to the party in whose favor they shall thereby decide by the other party or parties.

By s. 2, whenever any such judgment shall be given, or whenever issue in fact or in law shall be joined upon any pleading in pursuance of 9 Anne, c. 20, and 1 Will. 4, c. 21, or either of them, and judgment shall be given thereon, it shall be lawful for any party to the record in any of such cases, who shall think himself aggrieved by such judgment, to sue out and prosecute a writ of error for the purpose of reversing the same, in such manner as a party to any personal action in the Court of Queen's Bench may now sue and prosecute a writ of error upon the judgment in such action; and such and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments in personal actions; and if the judgment be reversed by the court of error, the court of error shall thereupon by their judgment not only reverse the same, but shall also in addition thereto give the same judgment which the court, whose judgment is so reversed, ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, upon production to him of an office copy of the said judgment of the court of error, which shall be his authority and warrant for so doing:

Provided always, that the bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed, shall be duly put in within four days after the allowance of the said writ of error, and the same shall afterwards be duly perfected according to the practice of the court wherein the original judgment was given, otherwise the plaintiff in error shall be deemed to have abandoned his writ of error, and the same shall not be further prosecuted.

Before this enactment, the Court of King's Bench having allowed the sufficiency of a return, and therefore refused to grant a peremptory writ, the party applying brought his writ of error into parliament:—Held, that no writ of error lay, it being merely an award of the court, and not strictly a formal judgment. *Pender v. Herle*, 8 Bro. P. C. 505.

The 9 & 10 Vict. c. 113, regulates the proceedings on writs of mandamus in Ireland.

By 17 & 18 Vict. c. 125, s. 76, upon application by motion for any writ of mandamus in the Court of Queen's Bench, the rule may in

all cases be absolute in the first instance, if the court shall think fit, and the writ may bear date on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation; but time may be allowed to return it, by the court or a judge, either with or without terms.

By s. 77, the provisions of the Common Law Procedure Act, 1852, and of the Common Law Procedure Act, 1854, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by the Queen's Bench. See *Reg. v. Saddlers' Company*, 1 B. C. C. 138; 23 L. J., Q. B. 451.]

**Parties to make return to writ.**—The court has a discretion under 1 Will. 4, c. 21, s. 4, whether it will allow a return to a mandamus to be made and joined on behalf of a third person, claiming a right or an interest in or to the matter of the writ. *Reg. v. Cheek*, 9 Q. B. 943; 11 Jur. 86; 16 L. J., M. C. 65.

After a demurrer to a return by the party to whom it is delivered, the court will let in the party really interested to make a return. *Reg. v. Puynter*, 9 Jur. 926; 14 L. J., M. C. 182—Q. B.

The 5 & 6 Will. 4, c. 70, s. 19, is to be read with reference to the power of the Court of Queen's Bench to compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of it has passed; and if the public officer to whom belongs the performance of the duty has in the meantime quitted his office, and has been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor omitted to perform. *Rochester (Mayor) v. Reg. (in error)*, 4 Jur., N. S. 1227; 27 L. J., Q. B. 484; El., Bl. & El. 1034—Exch. Cham.

**Sufficiency of return.**—When several causes returned are inconsistent, the whole is bail. *Rez v. Cambridge (Mayor)*, 2 T. R. 456; 4 Burr. 2008.

That B. was not a burgess, that he was not eligible to the office of common councilman, and that he was not elected, are not inconsistent returns. *Id.*

A return to a mandamus to admit, or show cause to the contrary, may show one or more, or any number of causes, provided they are consistent. *Wright v. Faucett*, 4 Burr. 2041.

It is inconsistent to state in a return to a mandamus (to certify the election of a recorder, supposed in the writ to be on the 15th of January), that the corporation was not then duly assembled; and afterwards to state the election of another corporate officer, to wit, on the 15th of January. The day in such a case is material; and being laid under a viz., does not make any difference. *Rez v. York (Mayor)*, 5 T. R. 66.

The mandatory part of the writ may be very general, but the return must be very minute in showing why the party did not do what he was commanded to do. *Reg. v. Port of Southampton (Commissioners)*, 1 B. & S. 5;



7 Jur., N. S. 990; 30 L. J., Q. B. 244; 9 W. R. 630.

A return that C. was not duly elected sexton according to ancient custom, that there is a custom for the inhabitants to remove at pleasure, and that C. was removed pursuant to such custom, is good. *Rez v. Taunton (Churchwardens)*, Cowp. 113.

Mandamus to a lord and the steward of a manor to hear a plaint. Return, that, in 1835, the plaint was set aside, and annulled for certain errors; that afterwards (in 1838), in obedience to the writ, the defendants heard the plaint again, when, for the same errors and others, it was adjudged that the plaint had been rightly set aside in 1835 and that they could not take further cognizance of the plaint; that therefore they could not proceed in the plaint, as by the writ they were commanded:—Held, first, that the return was not contradictory, on the ground that it stated both that the plaint had been proceeded with in obedience to the writ, and that it could not be so proceeded with; and secondly, that the return showed that judgment had been given, and that the court could not review it. *Reg. v. Old Hall (Lord of Manor)*, 2 P. & D. 515; 10 A. & E. 248; W., W. & D. 650; 8 Jur. 868.

To a mandamus requiring A., a waywarden, to deliver to the churchwardens certain books of account, assessments, &c., in his custody, power or possession, it is a good return to say, that on and since the teste of the writ, A. had not nor has had the books, &c., or any of them, in his custody, power or possession. *Rez v. Round*, 5 N. & M. 427; 4 A. & E. 139; 1 H. & W. 546.

A statute directed that a sum of money should be paid to commissioners who were therewith to execute all such works as should from time to time be deemed necessary, proper or expedient, for putting certain banks and bridges in a permanent state of stability and security, and for constructing the fore-lands and slopes of the banks, as far as practicable, upon one uniform system. By a mandamus, reciting this clause, and that the money had been paid to the commissioners, they were ordered to proceed to put the banks forthwith in a permanent state of stability and security, and to construct the fore-lands and slopes of the banks, as far as practicable, upon one uniform system. Return, that the commissioners had from time to time, at all times from the passing of the act hitherto, proceeded to execute all such works as should be or were from time to time deemed necessary, proper or expedient for putting the banks in a permanent state of stability and security, and for constructing the fore-lands and slopes of the banks as far as practicable, upon one uniform system:—Held an insufficient return, and a peremptory mandamus was awarded. *Rez v. Ouse Bank Commissioners*, 3 A. & E. 544.

Mandamus to the officers of a parish included in a union, reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay

a sum, out of the poor-rates collected by them, to the treasurer of the union. Return, that the supposed guardians were not, nor were any of them, duly appointed under the provisions of the act, and that at the issue of the writ guardians therein mentioned were not, nor were any of them, guardians of the poor of the union:—Held, that the return was insufficient for not distinctly setting forth any defect in the appointment. *Reg. v. Andrew and St. George's (Governors, &c.)*, A. & E. 736.

A mandamus to admit A., an attorney, to the Lord Mayor's Court, alleged it to be an inferior court. The return, without traversing this allegation in terms, set out at length the peculiar customs and jurisdiction of the court, in order to show that it was not within the operation of the 6 & 7 Vict. c. 73, s. 2. —Held, on special demurrer, that the return was not bad in form, as an argumentative traverse of the allegation in the writ. *Reg. v. London (Mayor, &c.)*, 13 Q. B. 1; 11 Jur. 867; 19 L. J., Q. B. 185.

By a dock act, persons were formed into a company for improving a port, and made proprietors of the works, and were authorized and required to make, complete and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and with equal inclinations of the sides, as the then present river course had in those parts thereof which had not been excavated or embanked, or as near as circumstances would admit, except in such parts of the new course as should be cut through rock or stone. A mandamus issued to the company, stating in the inducement that the company had made and completed a new channel, but that parts of the south bank or side not cut through rock or stone had since become and were broken down and out of repair, and the inclination of the side was thereby greatly altered, to the danger of obstruction of the navigation. And the company was commanded to repair and maintain the parts of the south bank. Return, that the company was not required by the statute, nor otherwise liable, to repair and maintain the said parts; and that, as near as circumstances had admitted or did admit, they had maintained the new course of equal depth and breadth at the bottom, and with equal inclination of the sides, as the river course, at the time of the act passing, had in those parts which had not been excavated or embanked, and except such parts of the new course as had been cut through rock or stone:—Held, that the first part of the return was bad, as traversing matter of law, and also because a legal liability appeared. *Reg. v. Bristol Dock Company*, 2 Q. B. 64; 2 Railw. Cas. 599; 6 Jur. 216.

Held, also, that the second part was also bad, as not answering the mandatory part of the writ, but applying only to matter stated in the writ as a consequence of the omission to repair. *Id.*

A mandamus to a board of health, recited that the prosecutor had been injured by the

exercise by the board of the powers of the act; that he had demanded compensation from the board, and that they had denied all liability; and enjoined the board to cause compensation to be made to him out of the general or special rate to be levied under the act. The return stated that the board had not denied all liability, and that the board was always ready to make compensation as soon as it had been duly ascertained under the act; that it had not yet been so ascertained, nor had the prosecutor taken any steps towards having it ascertained, nor given the board notice of the amount of his claim, nor informed it whether it was above 20*l.*, nor appointed nor given notice of his intention to appoint an arbitrator. This return was traversed generally; and on the trial it was found that the board had denied all liability; and a verdict was entered for the prosecutor. On a motion to enter the verdict on the rest of the return for the board, and to enter judgment for them:—Held, that under 11 & 12 Vict. c. 63, s. 144, the mandamus was good, and that the prosecutor was entitled to a verdict on the whole return, and to a peremptory mandamus; for that, as it did not appear on the return that there was any dispute as to amount, the rest of the allegations in the return (beyond the traverse of the denial of liability, which had been found for the prosecutor) was immaterial. *Reg. v. Burslem Board of Health*, 5 Jur., N. S. 1394; 28 L. J. Q. B. 345; 7 W. R. 551; 1 El. & El. 1077.

To a mandamus to a corporation to restore a member, a return stating generally, that the body was duly assembled to move, is sufficient. *Ree v. Doncaster (Mayor, &c.)*, 2 Ld. Ken. 391; 2 Burr. 738.

In a return by a corporation to a mandamus to restore a member, who has been removed, it should appear that the body removing had proved the charge for which the member was removed; it is not sufficient to state merely that he was present when the charge was made, and did not deny it. *Ree v. Faversham Fishermen's Company*, 8 T. R. 352. And see *Ree v. Carmarthen (Burgesses)*, 1 M. & S. 697.

Mandamus to enter a person on the burgess roll. Return that he was not duly qualified, and was disqualified by reason of his non-payment of the borough rate. The borough rate was invalid:—Held, that the former part of the return was distinct from the latter, and constituted a good return. *Reg. v. New Windsor (Mayor, &c.)*, 7 Q. B. 998; 9 Jur. 798; 14 L. J., Q. B. 319.

Mandamus to the mayor, aldermen and burgesses of a borough, named in Schedule A. of the 5 & 6 Will. 4, c. 76, and divided into wards, recited that no election of assessors to revise the burgess lists with the mayor in place of the last assessors had been made on or since 1st March, 1844, by reason whereof the offices were still vacant; and the writ commanded the mayor, aldermen and burgesses to meet and elect such assessors. Return, that they

did meet, and were ready to elect and to deliver and receive voting papers, but there was not, at the time of such meeting, nor has there been thence hitherto any assessor of the borough, wherefore they could not elect. On demurrer to the return, for not stating how and under what circumstances it happened that there was no assessor for the borough:—Held, first, that the return was bad for that reason. *Reg. v. Weymouth (Mayor, &c.)*, 7 Q. B. 46; 10 Jur. 67; 14 L. J., Q. B. 353.

Held, secondly, that the mandamus did not in itself show that the election could not be proceeded with. *Id.*

Held, thirdly, that any omission to appoint assessors might be remedied by an election under 7 Will. 4 & 1 Vict. c. 78, s. 26, which extends to officers eligible under that act, and the 5 & 6 Will. 4, c. 76, the provisions of the 11 Geo. 1, c. 4, ss. 1, 2. *Id.*

**Objections to writ after return; and what defects are cured by the return.**—After a return has been made, the defendant cannot make any objection to the writ itself. *Ree v. York (Mayor)*, 5 T. R. 66.

After a return to a writ which is set down in the crown paper to be argued upon a concilium, it is competent to the defendant to object to the writ for any defect in substance. *Reg. v. Powell*, 1 Q. B. 352; *S. C.*, nom. *Reg. v. Richmond (Steward, &c.)*, 5 Jur. 605.

The court had given judgment for a defendant upon a demurrer to a return to a mandamus:—Held, that an objection to the sufficiency of the writ might be taken at any time before issuing the peremptory mandamus. *Clarke v. Leicestershire and Northamptonshire Canal Company*, 6 Q. B. 808; 3 Railw. Cas. 730; 9 Jur. 215—Exch. Cham.

Mandamus to churchwardens and overseers to produce the parish rate books at a scrutiny of the polls taken at the election of churchwardens and overseers. The writ stated the refusal of the defendants to be to the damage of the parishioners, and the complaint to be by them. The return denied facts stated in the inducement respecting the polls. Two parishioners, for themselves and the other parishioners, traversed these denials, on which issues were joined, and found for the crown:—Held, that it sufficiently appeared that the two parishioners were the prosecutors of the mandamus. *Reg. v. Full*, 1 Q. B. 636; 2 G. & D. 803; 13 L. J., Q. B. 187—Exch. Cham.

A writ, which omits a necessary fact, cannot be cured by the return. *Reg. v. South-Eastern Railway Company*, 17 Jur. 901; 4 H. L. Cas. 471. *S. P.*, *London (Mayor, &c.) v. Reg. (in error)*, 13 Q. B. 30; 13 Jur. 33; 17 L. J., Q. B. 330—Exch. Cham. And see *Reg. v. Hopkins*, 4 P. & D. 550; 1 Q. B. 160.

Attorneys of the superior courts are entitled, by virtue of 6 & 7 Vict. c. 73, s. 27, to be admitted to inferior courts of law. Where, therefore, a writ of mandamus was directed to the presiding officers of the Lord Mayor's Court to admit A., and described it as an in-



ferior court, without stating it to be a court of law:—Held, that such writ was bad, and that the defect was not cured by such court being described in the return as a court of law. *London (Mayor, &c.) v. Reg. (in error)*, 18 Q. B. 30; 18 Jur. 33; 17 L. J., Q. B. 330—Exch. Cham.

**Amendment of writ upon return.**—A mandamus to a company, incorporated by the name of "The D., S., and W. Junction Railway," was directed to them as "The D., S., and W. Junction Railway Company." Upon return, the court amended the writ by striking out the word "company." *Reg. v. Derbyshire, Staffordshire, and Worcestershire Junction Railway*, 2 C. L. R. 1053; 18 Jur. 1054; 23 L. J., Q. B. 333.

A mandamus cannot be amended after a return has been made to it. *Reg. v. Stafford (Mayor, &c.)*, 4 T. R. 689.

Where a mandamus had, under the direction of a special pleader, been drawn with a teste out of term, and so issued, and a return had been made and demurred to, whereupon the defendant objected, that the writ was wrongly tested, the court, by its general authority, may amend; for the mistake was that of the officer, not the party, the officer being bound to see that a proper teste was affixed, and not adopt an irregular one given by the prosecutor. *Reg. v. Conyers*, 8 Q. B. 981; 10 Jur. 899; 15 L. J., Q. B. 300.

**Quashing or superseding writ.**—A mandamus for compensation, under 5 & 6 Will. 4, c. 76, s. 66, was moved for, on the ground that the prosecutor had, by the passing of the act, lost the emoluments of an office; and that, although he had since been re-appointed to another office at an increased salary, there had been no agreement between the prosecutor and the corporation that such increase should be deemed a compensation for the loss. On return and trial of an issue, bringing this fact into question, the judge and jury declared themselves of opinion that such an agreement had existed:—Held, no ground for quashing the mandamus. *Reg. v. Stamford (Mayor, &c.)*, 6 Q. B. 433.

The mandamus required the corporation, by its corporate style, to assess compensation (instead of requiring the council to assess compensation, and the corporation to execute a bond) after return and issue in fact tried:—Held, that assuming the writ to be materially defective in form, the court ought not to quash it on motion. *Ib.*

After a mandamus has been granted, a return made, and an issue thereon tried, the court will not quash the writ on grounds which were or might have been discussed on showing cause against the application for it; as, that a suggestion on which the motion was made is untrue. *Ib.*

A notice of a motion to quash or supersede a mandamus or any other writ whatever, must always be given. *Anon.*, 1 Wils. 30.

A college may interpose to stop a manda-

mus to a visitor. *Reg. v. Kely (Bishop)*, 1 W. Bl. 52.

Where a writ has been obtained for a mandamus to issue, and the mandamus is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a mandamus, but materially enlarging the terms, the court will quash the mandamus; notwithstanding, perhaps they would have granted a rule as large if it had been applied for upon the same affidavits, and they will not, upon a motion to quash it, amend the rule, to support the mandamus the party ought, if there is a mistake, to apply to amend his rule before the mandamus issues. *Reg. v. Water Eaton (Mayor, &c.)*, Smith, 54. And see *Reg. v. Tucker*, 5 D. J. R. 434; 3 B. & C. 545.

A mandamus to a company to summon a jury was obtained on affidavits, showing that the applicant had a claim for the value of land in his occupation taken by the company, and likewise for damage done to his remaining land by severing it, and had asserted both claims to the company. By mistake, the rule was drawn up for a mandamus to summon a jury who should assess the value of the land, and omitted to mention damages for severance. The mandamus was drawn including both, and was quashed, as varying from the rule. The court refused to amend the rule, so as to make it agree with the writ; but they afterwards, on the original affidavits, and on counsel's statement of the mistake, granted a mandamus, including both objects. *Reg. v. East Lancashire Railway Company*, 9 Q. B. 980; 11 Jur. 169; 16 L. J., Q. B. 127.

A company gave notice to B., G. and D., trading in copartnership, of their intention to take the premises occupied by them, for the purposes of their railway, under the powers of the act of parliament constituting the company, which incorporated the 8 & 9 Vict. c. 18. A mandamus having been granted to the company, commanding them to issue their precept for summoning a jury to assess the amount of compensation to be paid to B., G. and D., the court refused to quash the writ, although it was alleged to have been obtained without the knowledge or assent of D., one of the copartners, but left the company to make a return of the facts, if they should think fit. *Reg. v. London and Southwestern Railway Company*, 13 Jur. 10—Q. B.

**Pleading to return, generally.**—The prosecutor may plead several matters to the return by leave of the court. *Reg. v. Ambergate Railway Company*, 17 Q. B. 957; 16 Jur. 777.

If there is in a writ of mandamus a defective statement of a valid claim, but that statement renders it necessary to establish facts which, if established, would support the claim in the writ, the defectiveness, though it might be fatal on demurrer, is cured by the verdict. *Delamere v. Reg. (in error)*, 2 L. R., H. L. Cas. 419; 35 L. J., Q. B. 913; 17 L. T., N. S. 1.

To a mandamus, suggesting that trustees of

a turnpike-road had carried the road over the private grounds of C., but had not (as directed by 4 Geo. 4, c. 95, s. 60) fenced them on each side, and commanding them to do so, a return was made: 1. Denying that the land belonged to C. 2. Alleging that the trustees had made satisfaction to C. (under 8 Geo. 4, c. 120, s. 83) for the damage done by so carrying the road, which satisfaction C. had accepted, had taken security for the amount, and had proceeded to enforce the security. 3. Alleging that the trustees had no funds enabling them to execute the required work. C. pleaded, tendering issue on the denial of property, and leaving the other allegations unanswered. Issue was joined, and a verdict found for the crown:—Held, that the unanswered allegations were no valid return; that the want of funds was no excuse after the road had been made; and that the prosecutor, having succeeded on the plea, was entitled to a peremptory mandamus. *Reg. v. Luton Roads (Trustees)*, 1 Q. B. 860.

Mandamus to the defendant, as vicar of a parish, to restore the prosecutor to the office of clerk and sexton of the parish. The return, after alleging the right of the defendant, as vicar, to remove for lawful cause, and upon any vacancy legally arising to nominate, appoint and admit a legal and discreet person, stated the dismissal of the prosecutor by the defendant for various acts of misconduct, alleging them to have been done by the prosecutor in the presence and hearing of the defendant, and also the appointment of another person by the defendant in his place. The prosecutor, in his first plea, admitted the right, as alleged by the vicar, and the appointment of another person as clerk in his place, but pleaded *de injuriâ* as to the residue of the return; and pleaded, secondly, that he was not, before the removal from his office, summoned by the defendant to answer or explain the charges and cause of dismissal:—Held, first, that the return was bad, for not showing that the prosecutor had had an opportunity of answering the charges made against him before dismissal. *Reg. v. Smith*, D. & M. 564; 5 Q. B. 614; 14 L. J., Q. B. 166.

Held, secondly, that the second plea only admitted the truth of the charges for the purpose of that plea, and that the whole record showed no such admission, as the truth of the charge was put in issue by *de injuriâ*. *Id*

Mandamus to the lord and steward of a manor to admit P. upon payment of the usual fines and fees to copyhold estates, which were alleged in the writ to have descended to her as the heiress-at-law of T., deceased, who was her maternal uncle, and the person last seized. The return alleged that the estates did not descend to P. as the heiress of T., and that P. was a stranger in blood to T., and not entitled to the estates whereof T. died so seized. Plea, that P. was not a stranger in blood to T. as alleged:—Held, that the plea was to be considered as a distinct and single plea, and that it traversed an immaterial allegation

in the return, and was therefore bad. *Reg. v. Dendy*, 1 El. & Bl. 829; 17 Jur. 970; 22 L. J., Q. B. 247.

**Traversing facts contained in return.**—The prosecutor of a mandamus, to which a return has been made, having moved for a concilium, and the court having, upon argument, adjudged that the return is sufficient in point of law, cannot afterwards traverse the facts contained in the return. *Reg. v. London (Mayor, &c.)*, 3 B. & Ad. 253.

The prosecutor of a mandamus moved to take the return off the file, on affidavit, and on objections made against the validity of the return itself; the court, after argument on the law and facts, ordered, in general terms, that the rule should be discharged. The defendant then traversed the return. On motion to take the traverse off the file, because judgment had already been given in favor of the validity of the return:—Held, that discharging a rule under the circumstances was not equivalent to a judgment on concilium, and that the prosecutors were entitled to traverse, the court saying, that they did not intend, on the motion, to decide upon the validity of the return in point of law. *Reg. v. Payn*, 11 A. & E. 955; 3 P. & D. 623.

But where the court quashes part of a return to a mandamus on a concilium, they will allow the prosecutor to traverse the other part of the return after the judgment on concilium. *Reg. v. North Midland Railway Company*, 3 P. & D. 622; 11 A. & E. 955, n.; 2 Railw. Cas. 1.

A mandamus stated that L. was an inhabitant householder, and had paid all rates, including all such borough rates directed to be paid under 5 & 6 Will. 4, c. 70, as had become payable by him, except such as had become payable within six months next before the 31st of August; that the overseers inserted his name in the burgess list, and that at the revision of the list the mayor expunged it. The return traversed the allegation as to payment of rates, and alleged non-payment of a certain borough rate:—Held, that the title set up in the writ was answered, and that a general traverse of the allegation in the writ as to payment of rates was sufficient. *Reg. v. Dover (Mayor)*, 11 Jur. 710; 16 L. J., M. C. 97; affirmed on error, 11 Q. B. 260; 12 Jur. 384; 17 L. J., M. C. 95—Exch. Cham.

**Demurrer to return, and argument on demurrer.**—Where, on return to a mandamus (to admit a copyholder), concilium has been obtained, and the return, on argument, held sufficient in law, and a peremptory mandamus awarded, the court will not, at the instance of the party making such return, direct the prosecutor to demur, in order that the case may go to a court of error. *Reg. v. Oundle (Manor)*, 1 A. & E. 233; 3 N. & M. 484.

On demurrer to a traverse of the return, the defendant may impeach the validity of the writ. *Clarks v. Leicestershire and North-*



*amptonshire Canal Company*, 6 Q. B. 898; 3 Railw. Cas. 730—Exch. Cham.

Although the return may be in the nature of a demurrer, the counsel for the crown is entitled to begin. *Reg. v. St. Pancras (Church Trustees)*, 1 N. & P. 507; 6 A. & E. 314.

The party demurring to a return is entitled to be first heard, as in an ordinary demurrer. *Reg. v. Smith*, 5 Q. B. 614; D. & M. 564; 13 L. J., Q. B. 166.

Upon demurrer to a plea to a return, the court refused an application of the prosecutor that he might withdraw his plea, and argue the question upon the return. *Reg. v. York (Mayor, &c.)*, 6 Jur. 1082—Q. B.

Where a return is set down for argument on a concilium, the defendant may take objections to the writ in matters of substance. *Reg. v. Powell*, 4 P. & D. 719; 1 Q. B. 352.

**Inspection of documents referred to.]—**A mandamus, the object of which is to enforce a civil right is a proceeding, in aid of which the 14 & 15 Vict. c. 99, s. 6, a judge may grant an order for the inspection of documents by either of the litigant parties, when the return to such writ is traversed. *Reg. v. Ambergate Railway Company*, 17 Q. B. 957; 16 Jur. 777.

**Amending or withdrawing return.]—**A clerical mistake may be amended in the return, after the return has been filed. *Reg. v. Lyme Regis (Mayor, &c.)*, 1 Dougl. 135.

Leave may be given to withdraw a return by consent. *Reg. v. Barker*, 3 Burr. 1379.

The court will not direct in what manner justices shall make their return to a mandamus; but if the return made to it is insufficient to raise the question intended to be agitated, the court will, at the instance of the party interested, make a rule, giving the justices liberty to amend in the manner required, if they wish so to do. *Reg. v. Marriott*, 1 D. & R. 166.

A rule for a mandamus to a magistrate, commanding him to issue a warrant of distress upon the goods of A., who showed cause against the rule, was made absolute, and a return was subsequently made. The court allowed A. to amend the return, no loss of time or other injury being occasioned thereby, but not to file a separate return. *Reg. v. Paynter*, 9 Jur. 926; 14 L. J., M. C. 182—Q. B.

The court would not allow the defendants in a traverse to amend the return to a mandamus by setting forth a different constitution, where the application was after verdict. *Reg. v. Grampound (Mayor, &c.)*, 7 T. R. 699.

**Quashing return.]—**A rule for quashing a return to a mandamus need not go into the crown paper. *Reg. v. St. Katharine's Dock Company*, 1 N. & M. 121; 4 B. & Ad. 360.

It is discretionary in the court either to determine the validity of a return to a mandamus on motion, or to order the cause to be set down in the crown paper for argument. *Id.*

In showing cause against a rule for quashing

a return, the defendant may object that the writ was improperly issued. *Id.*

If a return consists of several independent matters, not inconsistent with each other, a part of them good in law and part bad, the court may quash the return as to such part only as is bad, and put the parties to plead to or traverse the rest. *Reg. v. Cambridge (Mayor)*, 2 T. R. 456; 4 Burr. 282; P., *Reg. v. York (Mayor)*, 5 T. R. 66.

The court may quash part of a return on a concilium as well as on motion, and allow the prosecutor to traverse part of the return on the judgment on concilium. *Reg. v. Midland Railway Company*, 3 P. & D. 12; 11 A. & E. 955, n.; 2 Railw. Cas. 1.

On showing cause against a rule for quashing the return, affidavits cannot be read. *Reg. v. Harham Roads (Trustees)*, 4 Ex. R. Q. B.

When a return is not frivolous on the face of it, its validity must be urged on a concilium, and not on a rule for quashing the return. *Reg. v. St. Saviour's, Seaford (Wardens, &c.)*, 3 N. & P. 126.

Nor will the court, in such case, order a return to be taken off the file, on the ground of its being a contempt of court, as directed by affidavits. *Reg. v. Payne*, 3 N. & P. 11 W., W. & H. 105.

The court will not quash a return to a mandamus (which directs an inferior court to give judgment on an indictment) merely because it states an erroneous judgment below; but a writ of error must be brought to reverse that judgment. *Reg. v. W. R. shire (Justices)*, 7 T. R. 467.

**Judgment.]—**Under 9 Anne, c. 20, Will. 4, c. 21, s. 3, judgment non obverdicto may be given for the party making return to a mandamus. *Reg. v. Darlington School (Governors)*, 6 Q. B. 682.

When a mandamus had been issued, and ought not to have issued, against a company for making a road, and the return merely traversed a part, and the issue raised had been found against the company, and a peremptory mandamus had been awarded:—Held, that on a writ of error being satisfied that the mandamus ought not to have issued, had properly reversed the whole judgment. *Reg. v. Eastern Railway Company*, 4 H. L. Cas. 17 Jur. 931.

As to proceedings upon mandamus motions,—see this title, I., 1; upon peremptory mandamus,—see this title, II., 3.

As to costs in mandamus proceedings,—see this title, II., 4.

### 3. Peremptory Mandamus.

**Issuing.]—**[By 6 & 7 Vict. c. 67, s. 1, action or suit, or any other proceedings, commenced or prosecuted against any persons whatsoever, for or by reason of any disobedience to any peremptory



*Mandamus issued by any court having authority to issue writs of mandamus.*

The court, if it doubts whether a mandamus should or should not be granted, will not set it to issue merely in order that justices may make a return and be protected by this writ, if a peremptory mandamus should be made and be obeyed. *Reg. v. Dartmouth*, 5 B. 878.

A party, whose right to an office has been established by a verdict, cannot have a peremptory mandamus to restore him to his office until he has signed judgment in the action. *See v. Bowles*, 1 H. & W. 584.

A peremptory mandamus will not be awarded until the proceedings on the first mandamus are complete. *Reg. v. Baldwin*, 8 B. & E. 947; 8 P. & D. 124; 1 W., W. & H. 81.

The court granted a peremptory mandamus, in the first instance, to the bailiff of the Honor of Pontefract, to deliver up the corpse of a person who had been committed to his custody under a ca. sa., and which he detained on the ground of certain fees due to him remaining unpaid. *Wakefield (In re Bailiff)*, 1 G. & D. 566; 5 Jur. 989; S. C., nom. *Reg. v. Fox*, 1 Q. B. 246.

An attachment was ordered against the mayor of a corporation, for not making a return to a peremptory mandamus within the time prescribed by the writ, though there was no personal service. *Reg. v. Fowey (Mayor, &c.)*, 5 D. & R. 614; 2 B. & C. 584.

The court will not grant a peremptory mandamus to reinstate a person in a corporate office, though the return made may be objectionable or defective in point of form, if the facts stated on that return justify the court in refusing the mandamus as matter of discretion; such as to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner. *Reg. v. Bristol (Mayor)*, 1 D. & R. 389; S. C., nom. *Reg. v. Griffiths*, 5 B. & A. 731. And see *Reg. v. Bank of England*, 2 B. & A. 620.

When a mandamus is addressed to churchwardens during their year of office, and disobeyed by them during that period, it is no reason for refusing a peremptory writ that their year of office has expired. *Reg. v. Allen*, 27 L. T., N. S. 707; 8 L., Q. B. 69; 42 L. J., Q. B. 87; 21 W. R. 190.

**Quashing.**—After judgment for the crown on a return to a mandamus, the defendants having voluntarily, and with the prosecutor's consent, done the act enjoined, the court will quash a peremptory writ of mandamus as unnecessary and an abuse of the process of the court. *Reg. v. Saddlers' Company*, 4 B. & S. 570; 33 L. J., Q. B. 68.

**Disobedience.**—A return, stating an excuse for non-compliance with a peremptory writ, is inadmissible. *Reg. v. Poole (Mayor, &c.)*, 1 G. & D. 728; S. C., nom. *Reg. v. Ledgard*, 1 Q. B. 616.

There cannot be a return to a peremptory

mandamus. *Reg. v. Hudson*, 9 Jur. 845—Q. B.

An attachment cannot be granted against the mayor, aldermen and burgesses of a borough, for disobedience to a peremptory writ requiring them to pay a sum of money secured by a compensation bond under the corporation seal, but the particular individuals who have been concerned in disobeying the writ must be named in the rule for the attachment. *Reg. v. Poole (Mayor, &c.)*, 1 G. & D. 728; S. C., nom. *Reg. v. Ledgard*, 1 Q. B. 616.

**Review.**—Upon the award of a peremptory mandamus error will not lie, there being no plea to it, and it therefore not being in the nature of a judgment. *Dublin (Dean, &c.) v. Rex* (in error), 1 Bro. P. C. 73.

A writ of mandamus is a prerogative writ, and not a writ of right, and the granting of it is, in that sense, discretionary. *Reg. v. All Saints, Wigan (Churchwardens)*, 1 L. R., App. Cas. 611; 23 W. R. 128; 35 L. T., N. S. 881—H. L.

The exercise of this discretion cannot be questioned, but the grant of a peremptory mandamus is a decision upon a right, declaring what is and what is not lawful to be done, and such decision is subject to review. *Id.*

#### 4. Damages and Costs.

**Right of prosecutor to damages and costs, generally.**—An action will lie for a suppressio veri in a return, as well as for an allegatio falsi. *Reg. v. Lyme Regis (Mayor, &c.)*, 1 Dougl. 149.

Though, by 9 Anne, c. 20, s. 2, the prosecutor of a mandamus, to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return, yet, if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the venire facias into another county, though he might originally have alleged the facts there, and have there brought his action for a false return. *Reg. v. Newcastle-upon-Tyne (Mayor, &c.)*, 1 East, 114.

A party who has been removed from being a member of a corporation, and who has been restored by mandamus, cannot maintain an action for damages against the members of the corporation who removed him by an act done in their corporate capacity, nor recover the costs of the mandamus. *Harman v. Tappenden*, 1 East, 555; 8 Esp. 278.

All prosecutors of a mandamus are, by 1 Will. 4, c. 21, entitled to damages and costs, whether an action for a false return can be sustained by them or not. *Reg. v. Fall (in error)*, 1 Q. B. 616; 2 G. & D. 803; 18 L. J., Q. B. 187—Exch. Cham.

The jury having omitted to find damages on a traverse to a mandamus:—Held, that the judge who tried the cause might order, from his recollection, the verdict to be entered on

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...*(in error)*, 7

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...doubtful questions of  
...*Reg. v. St. Saviour's*,  
...*Reg. v. W. & H.* 234; 2

...functionaries, such as a  
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...are obliged to come be-  
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...of parliament, the court  
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...to a mandamus, showing  
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...the inhabitants joined in  
...and make the rule for  
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...equipped by law to pronounce  
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...rule is, that he shall have  
...application fails. *Reg. v. Bridg-*  
...*Reg. v. C. & S.* 66.

...and judgment on return to  
...the court will give costs to the  
...a very strong ground  
...shown on the other side.  
...*Reg. v. Mayor, &c.*, 1 Q. B. 751; 2  
...*Reg. v. S. P.*, *Reg. v.*  
...*Reg. v. Railway Company*, 8 Railw.

...a corporation to admit a  
...a custom in favor of  
...inhabitant householders.  
...the custom, and that the  
...inhabitant and a house-  
...were taken on this  
...asserting the custom;  
...prosecutor was a parishioner;

third, that he was a householder. The first issue was found for the corporation, and the other two issues for the prosecutor:—Held, that he was not entitled to the costs of the issues on which he had succeeded, under *Reg. v. Anne*, c. 16; 9 *Anne*, c. 20; or *Reg. Gen.*, H. T. 2 Will. 4, r. 74; or 4 Will. 4, *Reg. v. Malmesbury (Mayor, &c.)*, 3 G. & D. 483; Q. B. 577; 6 Jur. 1107.

Judgment of ouster having been given in a quo warranto against a person exercising the office of an alderman of a borough, and the town council having failed to fill up the vacancy within ten days, and having subsequently declined to do so, the relator obtained a mandamus commanding them to hold an election for that purpose, which was obeyed. The court ordered the defendants to pay the costs of the mandamus to the prosecutor. *Reg. v. Cambridge (Mayor, &c.)*, 4 Q. B. 801; 9 Jur. 11; 14 L. J., Q. B. 82.

Although the costs of obtaining a writ of mandamus, where cause is shown, are in the discretion of the court, yet they ought to be given to the successful party, unless there are strong grounds to the contrary. *Reg. v. Harden*, 1 B. C. C. 214; 18 Jur. 147; 28 L. J., Q. B. 127.

Where cause is shown against a rule for a mandamus, the court, in the exercise of its discretion, will in general order costs to be paid, by that party to the application who ultimately fails to that party who ultimately succeeds, but the rule is not invariable. *Reg. v. Surrey (Justices)*, 9 Q. B. 37; 10 Jur. 432; 15 L. J., M. C. 117.

Where a mandamus has been applied for to justices at sessions, to compel them to perform an act they erroneously supposed they had no power to do, if the party, in whose favor such decision is given, opposes the application for the writ unsuccessfully, the general rule, that an unsuccessful party must pay all the costs, is applicable. *Reg. v. Cumberland (Justices)*, and *Reg. v. Lancashire (Justices)*, 3 New Sess. Cas. 202; 2 B. C. Rep. 287; 5 D. & L. 430; 12 Jur. 1048; 17 L. J., M. C. 133—Wightman.

The rule is, that where an application for a mandamus is made and opposed, the unsuccessful party pays costs, except under very particular circumstances. *Reg. v. Surrey (Justices)*, 14 Q. B. 684; 2 New Sess. Cas. 377; 14 Jur. 457; 19 L. J., M. C. 171.

The court, in the exercise of its discretion, will generally order that the costs of a mandamus shall be paid to the successful party. This rule applies when, on the one hand, there has been a wrongful refusal to do the act which the court afterwards compels the party to do; or when, on the other hand, the party applying for the writ fails on a discussion of the merits. In either case, however, it is essential that no blame should have attached to the successful party. *Reg. v. Langridge*, 1 Jur., N. S. 64; 24 L. J., Q. B. 73—B. C.—Crompton.

A rule had been obtained calling upon B. and certain justices of the county of Suffolk

to show cause why the justices should not issue a distress warrant against B. to levy the amount of a poor-rate. B. showed cause against the rule, upon the ground that the premises in respect of which he refused to pay the rate were not within the jurisdiction of the magistrates, as they were in the county of Norfolk, and not in the county of Suffolk. The rule was made absolute in order that the fact might be determined in some other way. A warrant was accordingly issued, and a levy made upon B.'s goods, which he replevied, and the cause went down for trial at the assizes, the issue being, whether or not the premises were in the county of Suffolk. The jury found in favor of B., and thereupon he applied for the costs incurred in resisting the original rule:—Held, that he was entitled to such costs. *Reg. v. Great Yarmouth (Justices)*, 1 Jur., N. S. 476—B. C.—Coleridge.

Where magistrates are present, but take no part in the proceedings, the application against them will be discharged, with costs. *Reg. v. Radnor*, 8 D. P. C. 717; 4 Jur. 460—B. C.

It is a general rule that unsuccessful applications against magistrates are discharged with costs. *Ib.*

The court has power, under 1 Will. 4, c. 21, s. 6, to give the costs to the defendant as well as to the prosecutor of a mandamus. *Reg. v. Dartmouth (Mayor, &c.)*, 2 D., N. S. 980; 7 Jur. 629; 12 L. J., M. C. 83—B. C.—Wightman.

Where the prosecutor omitted to proceed with a mandamus after a return had been made, the court compelled him to elect either to proceed or pay the costs of the mandamus. *Ib.*

The rule that a party who unsuccessfully opposes a rule for a mandamus to set right the decision of an inferior court, must pay the costs occasioned by the mandamus, applies to a party showing cause in the first instance. *Reg. v. Derby Recorder*, 2 L., M. & P. 292—B. C.—Wightman.

The right to the costs of a mandamus to sessions to hear an appeal does not depend upon whether or not cause has been vexatiously shown against the rule for the writ, but whether cause has been unsuccessfully shown. *Reg. v. Middlesex (Justices)*, 15 Jur. 907; 20 L. J., M. C. 42—B. C.—Coleridge.

By a drainage act commissioners were ordered to administer an oath to new commissioners elected. On a mandamus requiring a commissioner to swear in a person alleged to be elected, the defendant returned that the party was not elected; and, on a traverse taken on the return, the defendant had the verdict and judgment:—Held, that the defendant was entitled to costs of showing cause upon the rule as part of the general costs, without special application and order under 1 Will. 4, c. 21, s. 6. *Reg. v. Kelk*, 1 Q. B. 660.

Where a party unsuccessfully opposes a rule for a mandamus to set right the sessions, who have wrongly decided a matter in his favor,

he will in general be made to pay the costs of the mandamus, unless, perhaps, the matter is wrongly decided by the court itself, uninfluenced by any improper objection on his part. *Reg. v. Cheshire (Justices)*, 5 D. & L. 426; 3 B. C. Rep. 186; 12 Jur. 161—B. C.—Wightman.

Upon a rule for mandamus to inspect the register of a company by one of its proprietors, the company opposed on the ground that the applicant was prompted by improper motives. Although the majority made the rule absolute, one of the court expressed his opinion that the object of the application was not justifiable, and dissented from the decision:—Held, that this was no ground for setting aside the ordinary rule, by which costs are given to the successful party. *Reg. v. Wilts and Berks Canal Navigation*, 30 L. T., N. S. 498—Q. B.

When a writ of mandamus is opposed, the court will in all cases grant costs against the party so opposing it, even when the opposition is withdrawn before the time for the argument of the rule arrives. *Ludlow Union (Guardians) v. Birmingham Union (Guardians)*, 31 L. T., N. S. 587; 44 L. J., M. C. 48.

When no cause is shown a different rule may be adopted. *Ib.*

**What costs allowed.**—The costs of a writ of mandamus, whether such writ shall be granted or refused, and also if the writ is issued or obeyed, are not alone the costs in applying for and of the writ itself, but also include the costs of the return and subsequent proceedings. *Reg. v. St. Pancras (Churchwardens and Overseers)*, 2 D., N. S. 955; 7 Jur. 1060. S. P., *Reg. v. Scott*, 1 D. & L. 212; 7 Jur. 993—B. C.—Wightman.

A sheriff, on a compensation case under a railway act, directed the jury that the claimant's case was not within the act, and they so found. A rule was afterwards made absolute for a mandamus to the sheriff to execute the inquiry, upon the ground that he was mistaken:—Held, that the parties opposing the rule for a mandamus should not pay the costs of the other side in moving and making that rule absolute, as the necessity for the rule arose from the mistake of the judge. *Reg. v. Middlesex (Sheriff)*, 5 Q. B. 365; 3 Railw. Cas. 396; 13 L. J., Q. B. 14.

**Application for costs.**—In every case in which the court shall grant a rule for the payment of costs occasioned by the application for any writ of mandamus or the proceedings thereon, or to compel any person, not a party to an original rule, to pay the costs of such original rule, such rule for costs shall be drawn up on reading all the affidavits filed in support of, and in opposition to, the original rule. *Reg. Gen.*, E. T. 6 Vict. 1843, Q. B.; 3 G. & D. 612.

It is ordered that application for costs of a mandamus shall be made within two terms of the obeying of the writ. *Reg. Gen.*, Q. B., T. T. 1867; 7 B. & S. 399. *Sec Reg. v. Kent*



(Justices), 36 L. J., M. C. 130; 16 L. T., N. S. 322; 15 W. R. 743.

The general practice upon making absolute a rule for a mandamus is not to give costs, but to require a separate motion to be made for them; yet where, upon making such rule absolute, it appears that the litigation is at an end, the court will not require a separate motion to be made for the costs, but will give them as a part of the rule. *Reg. v. Brighton and South Coast Railway Company*, 10 L. T., N. S. 496—Q. B.

But where no cause was shown against a rule for a mandamus, and it appeared from affidavits that the litigation was substantially at an end, the court made the rule absolute, with costs, and did not require a separate application for costs. *Reg. v. East Anglian Railway Company*, 2 El. & Bl. 475; 18 Jur. 69.

A rule nisi was obtained for a mandamus, commanding a magistrate to hear a claim against a railway company for compensation under their railway act, which rule was opposed by the company only, and made absolute. A mandamus issued thereon. Afterwards the prosecutor applied for the costs of his application for the mandamus and of the writ, but did not show what had been done since the mandamus issued, or account for not stating the proceedings further, and costs were refused. *Reg. v. Bingham*, 4 Q. B. 877; 3 Railw. Cas. 390.

On motion for costs of a mandamus the prosecutor cannot refer to affidavits used by him in applying for the mandamus, unless the rule for costs is drawn up on reading such affidavits. *Reg. v. Peterhouse (Master, &c.)*, 1 Q. B. 314; 5 Jur. 408.

Where a rule to pay the costs of a mandamus has been discharged, on the ground that an affidavit on which it was moved is defectively entitled, the court will hear a fresh application, but not where the defect of form is in the body of the affidavit. *Reg. v. Great Western Railway Company*, D. & M. 471; 5 Q. B. 597; 1 D. & L. 742; 8 Jur. 107; 13 L. J., Q. B. 129.

**Costs upon award of a peremptory mandamus.**—Upon a judgment awarding a peremptory mandamus, the costs are not those awarded at the discretion of the court, under 1 Will. 4, c. 21, s. 6, but are the general costs, under s. 4. *Reg. v. South-Eastern Railway Company*, 4 H. L. Cas. 471; 17 Jur. 901.

**Obtaining security for costs.**—The court will not compel a relator to give security for costs, he being interested in the matter in question, on the ground of his poverty, or that other persons had induced him to apply for the writ. *Reg. v. Malmesbury (Mayor)*, 9 D. P. C. 359; 5 Jur. 306—B. C.

On an application by rate-payers of a borough for a mandamus to the corporation to obtain payment of moneys due to them under certain local acts, the rule was discharged, upon the terms that the applicants should be

at liberty to take legal proceedings in the name of the corporation, on giving them an indemnity to the satisfaction of the coroner and attorney of the court, who fixed the amount at 200*l.* A mandamus having issued accordingly on the prosecution of the corporation, and judgment having been given for the crown, which was reversed in the Exchequer Chamber, and a writ of error to the House of Lords being pending, and the expenses of the mandamus having exceeded 200*l.*, the court made a rule absolute to increase the security to such sum as the coroner and attorney of the court should think reasonable. *Reg. v. Commissioners of Port of Southampton*, 6 B. & S. 407.

## Manor.

- I. GRANT; NATURE, EXTENT AND INCIDENTS, 8818.
- II. STEWARD, 8825.
- III. ACCRETIONS FROM SEA DEPOSITS. See SEA.
- IV. COMMONS AND INCLOSURES. See COMMON.
- V. COPYHOLD AND CUSTOMARY TENURE AND DESCENT. See COPYHOLD.
- VI. CUSTOMS AND DESCENT. See CUSTOM AND PRESCRIPTION.
- VII. MANOR COURTS. See INFERIOR COURTS.
- VIII. COURT ROLLS.
  - 1. Proof. See COPYHOLD.
  - 2. Inspection. See EVIDENCE.
- IX. MINES. See MINES AND MINERALS.
- X. TIMBER AND TREES. See TIMBER AND TREES.
- XI. RIGHTS OF SPORTING BY LORD. See GAME.

### I. GRANT; NATURE, EXTENT AND INCIDENTS.

**Royal manors.**—The Queen remains lady of the royal manors, notwithstanding 10 Geo. 4, c. 58, whereby powers over crown lands are conferred on the Commissioners of Woods and Forests. *Reg. v. Powell*, 4 P. & D. 719; 1 Q. B. 352.

That act, giving commissioners the management of the land revenues of the crown, does not divest the legal estate out of the crown. *Ib.*

**Grant and incidents; nature and extent of rights of lord, generally.**—A female infant, tenant for life in possession of a manor, but subject to a legal term of 1000 years, vested in trustees for securing annuities, and also subject to a provision for the receipt by the trustees of the rents during the minority, and for the application of a limited sum thereout for her maintenance, is the lady of the manor. *Griggs v. Gibson*, 14 W. R. 819—V. C. W.

Semble, that an office of trust under the crown cannot be annexed to a manor. *Att.*

*Gen. v. Mathias*, 4 Kay & J. 579; 4 Jur., N. B. 628; 27 L. J., Chanc. 761.

The demesne lands of a manor previously granted in fee do not become reunitd to the manor, if purchased by the lord, as they would do if they had reverted to him by escheat. *Delacherois v. Delacherois*, 11 H. L. Cas. 62; 10 Jur., N. S. 886; 18 W. R. 24; 10 L. T., N. S. 884.

If the demesne lands of a manor are treated in a conveyance of them in fee, as a distinct property, as, for instance, being conveyed by the lord in fee without being accompanied by a declaration of the feoffor's title as lord, or being described as lands held of the manor, but only as lands situate, lying, and being within the manor, they are severed from the manor, and cease to form part of it, although the rents and dues may remain. *Ib.*

On re-purchase, by the lord, of the fee-simple, he will hold of the chief lord. *Ib.*

They will, on such re-purchase, again form part of the manor, so as to pass under that description made in a will dated anterior to the purchase. *Ib.*

The grant of a court baron involves the grant of a manor, for it implies the existence of freeholders of the manor, holding under the lord, and owing suit and service to him. *Ib.*

Unascertained and undefined advantages will pass under the general words by a grant of a manor, although not in the contemplation of either party at the time. Thus, for instance, the minerals in the lord's waste would pass, although their existence was neither known to nor suspected by any of the parties to the contract; so also the advowson to a living will pass with a manor by general words, though not specifically named in the grant. *Att. Gen. v. Ewelme Hospital*, 17 Beav. 366; 22 L. J., Chanc. 846.

In 1790, an advowson appendant to a manor was sold and assigned for the residue of a term of 500 years, created in the manor and advowson in 1745, and which, except as to the advowson, ceased:—Held, that this did not sever the appendancy, and that the advowson passed by a subsequent release of the manor with general words. *Cooper v. Harrison*, 2 Kay & J. 86.

The term "demesne lands" properly signifies lands of a manor which the lord either has or potentially may have in propriis manibus. *Att. Gen. v. Parsons*, 2 C. & J. 279; 2 Tyr. 223.

A grant of a reputed manor will not pass a freehold interest in the wastes, nor in any specific tenement possessed by the grantor. *Doe d. Clayton v. Williams*, 11 M. & W. 803; 13 L. J., Exch. 429.

A bishop who had free warren, by prescription, over the demesne and tenemental lands of a manor whereof he was seized jure ecclesie, accepted a grant from the crown, to himself and his successors, of free warren over the demesne lands of all his manors in England:—Held, that, if the grant could have the effect of extinguishing the prescription as to

the demesne lands, it could not affect it over the other lands of the manor. *Carnarvon v. Villebois*, 18 M. & W. 313; 14 L. J., Exch. 233.

Where a private river runs through a manor, the presumption of law is, that each owner of land within the manor and on the bank of the river has the right of fishing in front of his land; and, if the lord claims a several fishery, he must make out that claim by evidence. *Lamb v. Newbiggin*, 1 C. & K. 549—Pollock.

From the words of a deed under which the lord claimed, it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor:—Held, that this presumption was rebutted by proof, that, before the date of that deed, owners of land within the manor and on the bank of the river had the right of free fishery therein. *Ib.*

A prescription or a custom in a manor to work mines under houses, without making compensation for any damage occasioned to such houses, is bad, as being unreasonable. *Hilton v. Granville*, D. & M. 614; 5 Q. B. 701; 13 L. J., Q. B. 193. But compare *Roubootham v. Wilson*, 8 H. L. Cas. 348; 30 L. J., Q. B. 4; 2 L. T., N. S. 642. See *Wakefield v. Buccleugh*, 4 L. R., H. L. Cas. 377; 39 L. J., Chanc. 441; 23 L. T., N. S. 102.

Admissions on the court rolls of a manor "pro pastura bosci et subbosci," and for "the pasture, wood, and underwood of, &c." are sufficient to pass the land. *Doe d. Kinglake v. Bevis*, 7 C. B. 456; 18 L. J., C. P. 128.

The right of a lord of a manor to seize quousque is not taken away by 11 Geo. 4 & 1 Will. 4, c. 65. *Dimes v. Grand Junction Canal Company*, 15 Sim. 433. S. P., and S. C., 9 Q. B. 469; 16 L. J., Q. B. 107.

A lessee for years of a copyholder may maintain ejectment, though there is no custom in the manor to lease, and no license has been obtained from the lord, such lease being good between the parties to it, and void only as against the lord. *Doe d. Tresidder v. Tresidder*, 1 Q. B. 417; 1 G. & D. 70; 5 Jur. 981.

A lord, having only a temporary estate in his manor, may make grants of copyhold to endure after the determination of his own interest; but such grants must conform strictly to the custom of the manor. *Doe d. Rayer v. Strickland*, 2 Q. B. 792; 2 G. & A. 278.

A lord may drive carriages along a tramway under copyholds of the manor, for the purpose of working mines within the manor, but not of working mines beyond its limits. *Bowser v. Maclean*, 2 De G., F. & J. 415.

By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom. *Revell v. Jodrell*, 2 T. R. 415.

Under a conveyance by the lord of the manor of P., of all those messuages, lands, tenements, commons, wastes, woods, underwoods, and the soil of the woods and under-



woods of P., without any reservation of manorial rights, the soil of the common of P. passes. *Cator v. Croydon Canal Company*, 4 Y. & C. 405.

In an action by the lord of a manor against his copyholder, for removing from the land loose stones, which had been thrown upon it by the shivering of certain neighboring rocks, there being no evidence to show that the stones, the subject of the action, had come down upon the land during the tenancy of the copyholder:—Held, that they must be taken, *prima facie*, to form part of the soil of the copyhold, and that the copyholder could not remove them for his own profit. *Dearden v. Evans*, 5 M. & W. 11; 2 H. & H. 7; 8 Jur. 703.

In an action by the lord of a manor for taking shell-fish and shingle on the foreshore of the manor, between high and low-water mark, his title being under a royal grant of the manor, with anchorage and groundage, but with no express mention of the shore:—Held, that this grant afforded of itself a presumption that it included the soil of the shore; and the jury was directed that, upon matters of that nature, they would properly be guided by the opinion of a judge. *Le Strange v. Roire*, 4 F. & F. 1048—Erie.

An earlier grant from the crown to a corporation of rights of anchorage, groundage, and ballast over the shore of the locus in quo would not weigh much against positive evidence of the exercise of rights of ownership over the shore by the plaintiff's ancestors, under the grant of the manor. *Id.*

Evidence of such acts of ownership as licenses to take shingle, sand, and seaweed, is receivable to support the presumption of a grant of the soil of the shore. *Id.*

A lessee of a manor assigned all his interest in the manor to trustees, but continued nevertheless to act as lord of the manor, and made grants, and one to himself:—Held, that such grant to himself could not be considered a grant by the trustees, and was therefore void. *Christchurch, Oxford (Dean and Chapter) v. Buckingham*, 10 Jur., N. S. 749; 83 L. J., C. P. 322; 12 W. R. 986; 10 L. T., N. S. 575; 17 C. B., N. S. 891.

A crown lessee of minerals under a crown manor entered a farm within the manor and opened the surface in search of minerals. The occupier of the farm brought an action for the trespass in the Court of Exchequer against the lessee. The crown undertook to defend the action, and afterwards filed an information and bill against the occupier and the copyhold tenant of the farm. The bill alleged that the queen, in right of her crown, was entitled as lady of the manor to search for and win, and to grant to others the right to search for and win, minerals within the manor, and had granted this right to the lessee; the bill then prayed that those rights might be declared:—Held, that the crown, by virtue of its prerogative, was entitled to maintain the bill, and that since the bill would determine all the questions raised in

the action, the occupier of the farm must be restrained from proceeding with the action till the hearing of the bill. *Att. Gen. v. Barker*, 41 L. J., Exch. 57; 7 L. R., Exch. 57; 20 W. R. 509.

The lord of a manor has rights in respect of the timber on the copyhold properties, in which rights he was, upon a commutation under 4 & 5 Vict. c. 35, and is, upon an enfranchisement under 15 & 16 Vict. c. 53, and 21 & 22 Vict. c. 94, entitled to compensation. *Reynolds v. Woodham Walter*, 7 L. R., C. P. 639; 41 L. J., C. P. 281; 27 L. T., N. S. 374. The 51 Geo. 3, c. 115, does not empower the lord of the manor to discharge commonable lands from common or customary rights not strictly manorial, as, e. g., the right of parishioners to their village green. *Forbes v. Ecclesiastical Commissioners for England*, 21 L. T., N. S. 511; 21 W. R. 169—V. C. W.

**Evidence of existence of manor, and of title of lord.**—It seems that reputation alone is admissible to prove the existence of a manor, without any proof of the actual exercise of any manorial rights. *Steel v. Prickett*, 2 Stark. 463—Abbott. And see *Ouram v. Lomax*, 5 East, 60.

In ejectment by a party claiming to be the devisee of a manor, the facts of the deviser having held a court thirty-five years ago, and the devisee on several occasions since his death, and of appointments of game-keepers, are *prima facie* proof, both that a manor exists, and that the devisee is the lord, without the production of court-rolls, or any documentary evidence of courts having been held. *Doe d. Beck v. Heakin*, 6 A. & E. 495; 2 N. & P. 660.

An allegation in a declaration that one was seized of a manor, and that he and all those whose estates he had in the manor have immemorially appointed a sexton in the parish, is sustained by proof of his seizin of a quondam manor, which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Seane v. Ireland*, 10 East, 259.

Where a legal manor has once existed, declarations of persons deceased as to its boundary are still admissible, though the manor has ceased to exist otherwise than by reputation. *Doe d. Molesworth v. Sleeman*, 9 Q. B. 298; 10 Jur. 568; 15 L. J., Q. B. 338.

Dispute between a lord of a manor and a corporation as to the ownership of a piece of foreshore. The court rolls contained entries—(1) Of fines paid to the lord for salvage, for moorage and for trespasses, in taking wreck and the like, and of sums paid to the lord by the bailiff for wreck sold by him. (2) Presentments as to wreck, porpoises, &c., coming on the soil, with no express mention of receipt of money except (in some cases) by the bailiff. (3) Presentments of wreck, the payments in respect of which were partly made to the salvors and partly to the lord. (4) Presentments directing the bailiff to levy certain fines, &c. (5) Similar presentments

with no express direction to the bailiff to levy. (6) Presentments of wreck with no particular entries as to value, or entered as matter for future inquiry:—Held, that all the entries except the last could be safely admitted as evidence of the lord's title. *Walton-cum-Trimley (Manor), In re, Tomline, Ex parte*, 21 W. R. 475; 28 L. T., N. S. 12—V. C. W.

An action of trespass by a former lord of the manor against the same corporation, and decided in his favor in 1738 and acquiesced in ever since, considered the strongest possible evidence in his favor. *Id.*

**Extent of manor; boundaries and waste-lands.**—When the boundary between two manors is formed by a ridge of hills which run beyond the manors, and on an issue as to the boundary between one of these manors and a third manor, one of the parties wishes to prove that the same ridge is the boundary between the two latter manors, evidence of its being the boundary of the other two is admissible for this purpose, the three manors being contiguous. *Brisco v. Lomax*, 3 N. & P. 308; 8 A. & E. 198; 1 W., W. & H. 235; 2 Jur. 682.

In an action which turned on a question as to the boundary of two manors a verdict was taken for the plaintiff, subject to the award of an arbitrator, who was to determine for which party the verdict was to be finally entered, and to set out the boundaries. He directed the verdict to be entered for the defendant. In a subsequent action by the defendant against a third party, where also the question substantially was as to the boundary of the same manors, the verdict was received, but the award rejected as evidence of reputation. *Evans v. Rees*, 10 A. & E. 151; 2 P. & D. 626.

An ancient presentment by the homage of a manor, in the form of a book, set out the boundaries of the manor and gave in alphabetical order the names of the several parishes within it, and of the tenants resident in each parish, but this part of the presentment contained nothing as to boundaries. Two or three sheets at the concluding part of it, where a parish should have followed in order, had been cut off, but it did not appear under what circumstances. In an action involving a question as to the boundary of the manor and the parish, where it was admitted that the manor and the parish were conterminous in the direction of the locus in quo, the presentment was received in evidence of the reputed boundary, as the document, although mutilated, was perfect in that part of it which related to the subject of the boundary. *Id.*

In an action by a lord of a manor for carrying away dollars claimed by him as wreck, two instruments, dated in 1639 and 1657, and purporting to be presentments or answers of a jury, partly consisting of the tenants of the manor, to questions by commissioners of survey appointed by the lord, were put in to prove the boundaries of the manor and also the lord's title to wreck, which was affirmed

in particular passages:—Held, that they were only evidence of the boundaries, and could not be admitted as declarations by the tenants of the manor of the title of the lord to wreck, that being a matter of private right, derived from the crown, respecting which they could not be taken to have any peculiar knowledge, as they had no concern with it. *Talbot v. Lewis*, 5 Tyr. 1.

A tenant encroached on an adjoining waste, part of a manor belonging to her son, a minor. On his attaining his majority, the homage presented that she had encroached. She thereupon applied for and obtained from her son, the lord, a grant of the piece of land so encroached on. She never paid any rent for it, nor was any service ever rendered in respect of the grant. At the expiration of the tenancy, the landlord took possession, not only of the land demised, but of the piece of the waste encroached on:—Held, in ejectment by the lord of the manor, that the ordinary presumption of law, that an encroachment made by a tenant is for the benefit of his landlord, was rebutted; that by the acceptance of the grant from the lord, the encroacher became his tenant, and that the lord therefore was entitled to succeed. *Berney v. Bickmore*, 8 L. T., N. S. 353—Q. B.

Upon a question whether a piece of waste land, lying between a highway and the plaintiff's inclosed land, belonged to the plaintiff or to the lord of the manor:—Held, that grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself and of other persons, were admissible for the purpose of showing that the locus in quo was part of the waste of the manor, without showing continuity. *Dendy v. Simpson (in error)*, 18 C. B. 831; 2 Jur., N. S. 642—Exch. Cham.

The ordinary presumption is, that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent inclosed land between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. *Dendy v. Simpson*, 7 Jur., N. S. 1058—Exch. Cham.

Where waste land was, with the consent of a lord of the manor, inclosed by a former owner of the plaintiff's property, and the plaintiff had dug for minerals thereon, and where a subsequent lord asserted his right to the minerals, and sold them property and commenced digging for them; on a bill to restrain the defendant:—Held, that the lord of the manor had not succeeded in establishing his claim, and that the plaintiffs were entitled to the minerals. *Ackroyd v. Briggs*, 13 L. T., N. S. 521—V. C. S.

There is no general common-law right of tenants of a manor to common appendant on the waste. *Dunraven v. Llewellyn*, 15 Q. B. 791—Exch. Cham.

The defendant was the lord of a manor, the boundary of which was the medium flum

aquæ of a river. Between the river and a freehold close of the plaintiff lay a narrow uninclosed strip of land, the ownership of which was the question in dispute. At the trial of an action of trespass the plaintiff offered evidence that the owner of the inclosure adjoining his own was in the undisputed possession of a similar narrow strip of land between his fence and the river, the last-mentioned piece of land being continuous with that claimed by the plaintiff and within the same manor:—Held, that the evidence was properly admitted. *Vaughan v. De Wynton*, 17 L. T., N. S. 80; 15 W. R. 1145.—Q. B.

The 51 Geo. 3, c. 115, s. 2, does not empower the lord of a manor to grant a portion of the waste land of the manor, which is a village green, freed from the parishioners' customary right to the use of it, as such. *Forbes v. Ecclesiastical Commissioners for England*, 42 L. J., Chanc. 97; 15 L. R., Eq. 51—V. C. W.

**Division.**—The law as to the divisibility of manors, and the consequences of a division, considered. *Cutley v. Arnold*, 4 Kay & J. 595.

**Enfranchisement of lands.**—[By 4 & 5 Vict. c. 35, *lands of copyhold and customary tenure may be enfranchised, and manorial rights commuted.* See COMMON.]

## II. STEWARD.

**Grant and tenure of office.**—A lord of a manor being tenant in fee, may grant by deed the stewardship of the manor, for the life of the grantee, and the steward cannot be displaced by the devise of the lord. *Bartlett v. Doones*, 5 D. & R. 526; 3 B. & C. 616; 1 C. & P. 522.

**Duties and liabilities.**—The steward of a court baron is a judicial officer; and therefore is not responsible for the acts of the regular bailiffs of the court to whom process is directed. *Bradley v. Carr*, 3 Scott, N. R. 523; 8 M. & G. 221.

But he is responsible where he directs the process to bailiffs specially nominated by the party who sues it out, taking an indemnity. *Id.*

A steward of a manor is bound, when called upon, to deliver up the papers, of which he has the charge, in a proper condition. *North-Western Railway Company v. Sharp*, 10 Exch. 451—Martin.

## Manslaughter.

See CRIMINAL LAW.

## Marine Insurance.

See INSURANCE.

## Marine Store Keepers.

**Statutes.**—[24 & 25 Vict. c. 110, *regulates the trade of dealers in old metals.* See also 33 & 33 Vict. c. 99, s. 17.]

## Mariner.

See SHIPPING.

## Markets and Fairs.

- I. RIGHT TO HOLD; HOW ACQUIRED AND REGULATED; DISTURBANCE; REMOVAL, 8826.
- II. TOLLS, STALLAGE, AND PICCAGE, 8832.
- III. REGULATIONS; AND PENALTIES FOR BREACH, 8838.
- IV. SALES IN; MARKETS OVERT, 8843.
- V. SALES OF HORSES IN. See HORSE.
- VI. FORESTALLING, REGRATING AND ENGROSSING. See CRIMINAL LAW.
- VII. HAWKING AND PEDDLING. See HAWKERS AND PEDDLERS.

- I. RIGHT TO HOLD; HOW ACQUIRED AND REGULATED; DISTURBANCE; REMOVAL.

**Statutes.**—[10 & 11 Vict. c. 14, "The Markets and Fairs Clauses Act," *consolidates in one act the provisions usually contained in acts for constructing and regulating markets and fairs.*

By 13 & 14 Vict. c. 23, *the exception in the 27 Hen. 6, c. 5, as to holding fairs and markets on the four Sundays in harvest time is repealed.*

By 31 & 32 Vict. c. 51, and by 36 & 37 Vict. c. 37, *the usual days for holding fairs, if inconvenient, on representation to the Home Secretary of State, may be altered on publication in Gazette; and by 34 & 35 Vict. c. 12, fairs may be abolished, on the like representation and publication.*

*As to fairs within the metropolitan police district, see 2 & 5 Vict. c. 47, ss. 38, 39, 40, and 31 & 32 Vict. c. 106.]*

**How right acquired, and its extent.**—Whoever will have a stall in a market must have a license for that purpose from the owner of the soil. *Northampton (Mayor, &c.) v. Ward*, 1 Wils. 107; 2 Str. 1238.

Trespass lies for setting tables in a marketplace for the sale of goods thereon, without leave of the owner of the soil. *Norwich (Mayor, &c.) v. Swan*, 2 W. Bl. 1116.

Where a place had been used as a fair or a market, to which persons resorted to expose articles to sale:—Held, to be a sufficient answer to an indictment for a nuisance, that the same had been enjoyed more than twenty years without interruption. *Re v. Smith*, 4 Esp. 111—Ellenborough.

Where, by law, markets are forbidden to

be held on particular feast days, it is unnecessary, in pleading the right to hold a market on certain days of the week, to state the exceptions of the feast days. *Mosley v. Walker*, 7 B. & C. 40; 9 D. & R. 863.

A market overt cannot be for pawning. *Hartop v. Moore*, 1 Wils. 8; 2 Stra. 1187.

A person brought sheep to a public house forty yards out of the limits of a market, left them there, went into the market in search of customers, whom he brought back to the public house, and there sold the sheep to them:—Held, that this was a fraud upon the market, for which the seller was liable to an action by the lessee of the market. *Brigland v. Shapter*, 5 M. & W. 875.

The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops within the limits of the franchise on market days. *Macclesfield (Mayor, &c.) v. Chapman*, 12 M. & W. 18; 7 Jur. 1041; 13 L. J., Exch. 32.

To entitle a party to exemption from penalties for an offense against the 50 Geo. 3, c. 41, on the ground that the place where the hawker exposed his wares for sale was a public market, it must be shown that it was a legally-established market, by grant from the crown, and not merely a market de facto. *Benjamin v. Andrews*, 5 C. B., N. S. 200; 4 Jur., N. S. 41; 27 L. J., M. C. 810.

A market company obtained an act, the preamble of which recited that a convenient site might be obtained between certain streets on the east and certain other streets on the west, and which enacted that the Markets and Fairs Clauses Act, 1847, was incorporated therewith. The special act authorized the erection of a market-house on land described in the deposited plans, and the company was enabled to alter and widen streets in the way pointed out on the deposited plans, and to buy additional lands, not exceeding two acres. A. was owner of land on the west side of one of the streets on the western boundary of the area spoken of in the preamble, and his land was described in the deposited plans, but it did not thereby appear that more was intended to be taken than enough to widen one of the streets. The company proceeded to take the whole land of A. compulsorily, and to build upon it a covered building, in addition to the market house authorized by the act, whereupon A. filed a bill for an injunction, which was granted, the Master of the Rolls deciding that the company could only erect one market-house, and not two, and that on the east side; and that, although the preamble could not control the enactments, it might be resorted to to remove obscurity:—Held, that as the land of A. was described in the plan, and as therefore it might be wanted, the company was authorized to take it; and as by the general act "the singular may mean the plural," the company was not restricted by the word "market-house;" that the enactments of the special act did not require a reference to the preamble to explain them, and

the injunction must be dissolved, the company being the proper judges of what lands were necessary for the works. *Richards v. Scarborough Public Market Company*, 23 L. J., Chanc. 110—L. J.

**Improvement of markets.]**—In the Cambridge Market Act, 1850, power was given to the mayor, aldermen, and burgesses in council, to enlarge as well as to improve the market of that borough:—Held, that the meaning of the word was not restricted to merely extending the market to streets theretofore forming parts of its sides, but authorized them to extend the market to other streets in its immediate neighborhood, even though such streets were not mentioned in the act. *Att. Gen. v. Cambridge (Mayor, &c.)*, 6 L. R., H. L. Cas. 808.

The general object of the act being to enlarge and improve the market of the borough, the mayor and aldermen, who had the right to hold markets in the borough, though by the act not authorized to enlarge an existing corn exchange, were authorized to erect a new corn exchange, and to make it adjoin the borough market, such being, in their opinion, a matter of public convenience, and an enlargement and an improvement of the market. *Id.*

**Disturbance.]**—Where part of the space granted for a market was used for other purposes than those specified in the grant, and the remaining part became insufficient for the public accommodation:—Held, that the lord of the market could not maintain an action against an individual for selling vegetables in the neighborhood of his market, and thereby depriving him of toll, even at a time when there was room in the market, without showing that on the day when the sale took place, he gave notice to the seller that there was room within the market. *Prince v. Lewis*, 5 B. & C. 863; 3 D. & R. 121; 2 C. & P. 66.

Where a corporation held a market by prescription, and the crown afterwards granted to the corporation a charter with these words:—"quod nullum mercatum infra septem leucas in circuitu burgi prædicti per nos vel hæredes nostros alieno concedatur;"—Held, that such prohibition, if it could be considered to extend beyond that which is attached by the common law to the grant of a market, was void. *In re Islington Market Bill*, 2 C. & F. 513.

Held, also, that the establishment of a new market to be holden within the same times, within the common-law distance of the old market, was *prima facie* injurious to the latter, and therefore void; the convenience of the public would not, under such circumstances, justify the grant of a new market. *Id.*

And where the first charter purported to be granted "de assensu prælatorum, comitum, &c., in instanti parlamento convocato," a new charter granted to hold the market within the prescribed distance would be void, and would be repealable by *scire facies*. The

words stated would have the effect of giving the first charter the authority of an act of parliament. *Ib.*

Such a charter could only be repealed by act of parliament. If the market created by the first charter had not sufficient space for the accommodation of the public, and also if part of the space originally allotted to it was employed, or suffered by the grantee to be employed for other purposes, without his providing a convenient place for the public to buy and sell in elsewhere, within the limits of his grant, such circumstances would form a good defense to an action brought by him against any person for selling out of the market. They might also furnish ground for a scire facias to repeal the patent. *Ib.*

Quære, whether such circumstances would not render the grantee liable to an indictment for a misdemeanor? If they would, an action would lie also against him for his default; but while such grant remained unrepealed, no other market could be granted within the limited distance. *Ib.*

If, by the terms of the grant, the market was to be held in a fixed place, defined and known by metes and bounds, should those limits not be sufficient, and the owner of the market have no power to enlarge them, a new market might be granted to such an extent as to supply the deficiency, but no more. *Ib.*

If the grantee of a market under letters patent from the crown suffers another to erect a market in his neighborhood, and uses it for the space of twenty-four years without interruption, he is by such use barred of his action for disturbance of his market. *Holcroft v. Heel*, 1 B. & P. 400.

An action will lie for erecting a market near the plaintiff's ancient market, though the defendant only took money in the nature of rent for his stalls, which is a lawful act; but took no toll, and had no pretense to a pie-poudre court, or anything that amounted to an usurpation of the franchise of the crown. *Mosley v. Chadwick*, 7 B. & C. 47, n.; 8 Doug. 117.

Ejectment cannot be maintained against a person for having a stall in a street; the proper remedy is an action of trespass by the owner of the soil on which the stall was erected. *Doe d. St. Julian, Shrewsbury (Minster, &c.) v. Cowley*, 1 C. & P. 123—Hullock.

A right by custom to exclude persons from selling marketable articles in their shops on market days without the limits of the market is valid. *Macclesfield (Mayor) v. Pedley*, 1 N. & M. 708; 4 B. & Ad. 397.

Where a market for meat, &c. was proved to have been in existence in the reign of James I., proof that the grantees of the market had for the last hundred years appointed market brokers, that no butchers' shops had existed out of the market-place until 1810, and that the shops then set up were objected to by the grantees, were held to be sufficient evidence of such immemorial right. *Ib.*

In an action by a lord of a manor, for

disturbance of a market, if the lord proves a market immemorially holden in certain places within the manor, it is not a necessary legal inference (no grant being produced), that the market was granted to be holden in those places only; but a jury may presume, from circumstances, that the market was granted to be holden in any convenient place within the manor. *De Rulzen v. Lloyd*, 5 A. & E. 456; 6 N. & M. 776.

A sale by sample, on a market day, near to but without the limits of the market, is not a disturbance of the market, unless done designedly and with the intention to evade payment of toll. *Brecon (Mayor, &c.) v. Edwards*, 1 H. & C. 51; 8 Jur., N. S. 461; 31 L. J., Exch. 368; 6 L. T., N. S. 293.

A market held in the same town with an old market, if held upon the same day, is a disturbance by intendment of law; but if it is held on a different day it is only evidence of a disturbance. *Dorchester (Mayor, &c.) v. Ensor*, 4 L. R., Exch. 335; 39 L. J., Exch. 11.

To support an action for the disturbance of a market, it is not necessary that the defendant should have actually sold; any active interference by him in the conduct of the new market, or participation in its profits or risk, is sufficient. *Ib.*

To account for disturbance of a fair and market place, a plea that the market was held by the plaintiff, without any lawful warrant or authority, is not embarrassing. *Fitzgerald v. Connors*, 5 Ir. R., C. L. 191—C. P.

**Removal.**—The lord of a manor, to whom a grant of a market is made *infra villam de W.*, may hold it anywhere *infra villam de W.*; and whether villa extends to the town of W., or the township or parish of W., the lord has a right to remove the market-place from one situation to another within the precinct of his grant; and though he should have holden it for above twenty years within the township of W., when the grant only gave it him within the town properly so called at the time, yet if he afterwards gives notice of the removal to another place in the township, the public has no right to go upon his soil and freehold in the old market-place; and any person going there is liable to an action of trespass by the lord. *Curwen v. Salkeld*, 3 East, 538.

Charles the Second, by a charter, granted to a corporation two fairs to be holden annually within the borough and foreign, and confirmed to them all markets which they then held, with a reservation of the rights of the lord of the manor. A market had been holden immemorially in the High street until a very late period, when the corporation, finding it inconvenient, removed it out of the High street to another and more convenient place within the borough; the corporation exercised acts of ownership in pulling down an old market-house and erecting a new one; the clerk of the markets, however, had been appointed by the lord of the manor, but he did



not receive any toll from the persons frequenting it. The defendant having been indicted for a nuisance in erecting stalls in the High street, after the removal of the market, the judge left it to the jury to say, whether the corporation was owner of this market; adding, that if so, the right of removal was incident to the grant. The jury having found in the affirmative, the court refused to grant a new trial. *Rea v. Cotterill*, 1 B. & A. 67.

B. being entitled to a market in the manor of K., which was held in the public street on B.'s soil, removed it to another site in K., which site he had demised, without demising the franchise, for a term of years:—Held, that the removal was bad, unless the public had the same privilege in the new market as in the old. *Rea v. Starkey*, 7 A. & E. 95; W., W. & D. 502.

A person indicted for a nuisance in erecting a stall in the old market-place, after a wrongful removal of the market, may set up the wrongfulness of the removal as a defense, and need not proceed by scire facias to repeal the grant of the market. *Id.*

Although there is a clear right at common law for a corporation to change the site of a market held in a borough, yet if the members of the corporation avail themselves of the 21 & 23 Vict. c. 98, and, as a local board rather than in their corporate capacity, propose to transfer and regulate the market, they will be held to the provisions of the Local Government Act, and their powers will be limited to that extent. *Ellis v. Bridgnorth (Mayor, &c.)*, 2 Johns. & H. 67; 9 W. R. 331; 4 L. T., N. S. 112.

A corporation was owner of an ancient market, and also lord of the manor in which the borough was situate. The market had from time immemorial been held in and near the High street. A party had a house in that street, and he and the previous owners and occupiers of the houses in which he lived, as well as several other occupiers of houses in the street, had from time immemorial erected, on market-days, stalls opposite their houses, and either used the stalls themselves, or let them to others. No tolls were ever taken in respect of the goods sold at these stalls, though they were formally taken for similar produce exposed in the market elsewhere. In an action against the corporation for removing the market to another place within the borough:—Held, that the right to the stalls was a right which might reasonably be supposed to have been granted by the owners of the market to the owners and occupiers of the houses, and that it was sufficiently connected with the enjoyment of the houses to be claimed as appurtenant thereto. *Ellis v. Bridgnorth (Mayor, &c.)*, 9 Jur., N. S. 1078; 15 C. B., N. S. 52; 62 L. J., C. P. 273; 12 W. R. 56; 8 L. T., N. S. 668.

Held, also, that if the original grant was presumably to hold the market at any place within the borough, still the corporation could not remove it, as to do so would be in

derogation of their own grant of the right claimed. *Id.*

A municipal corporation was entitled to hold a market at any place within the limits of its municipal borough. The 2 & 3 Will. 4, c. 64, enlarged the boundaries of the borough for parliamentary purposes. The 5 & 6 Will. 4, c. 76, subsequently extended the boundaries of the municipal borough to those of the parliamentary borough for certain purposes. The corporation thereupon removed its market to a place without the boundaries of the old municipal borough, but within those of the parliamentary borough:—Held, that the corporation did not forfeit its ancient right to hold the market by the change which it had made in the place for holding it. *Dorchester (Mayor, &c.) v. Enser*, 30 L. J., Exch. 11; 4 L. R., Exch. 335.

Under a grant of a market to be holden within certain limits, the grantees may hold the market in any convenient place within the limits, and may from time to time remove such market, or any part thereof, to any other convenient place within the limits. *Wortley v. Nottingham Local Board*, 21 L. T., N. S. 582—Q. B.

## II. TOLLS, STALLAGE AND PICCAGE.

**Grant, origin, validity and extent of right to toll.**—A grant of a fair or a market, with an express grant of toll, passes reasonable toll, though no amount of toll is specified. *Stamford (Corporation) v. Pawlett*, 1 C. & J. 57, 400; 1 Tyr. 291.

The grant of a fair, “cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi feriam pertinentibus,” does not give a right to take tolls. *Egremont v. Saul*, 6 A. & E. 924.

A toll of one penny for every pig brought into a market is not necessarily unreasonable. *Wright v. Bruister*, 4 B. & Ad. 110.

In an action for toll traverse evidence that a party on a market-day sold forty-one quarters of corn by two sacks pitched in the market, is not sufficient to authorize a verdict against him. *Vines v. Reading (Mayor, &c.)*, 4 Bing. 8; 13 Moore, 201; 1 Y. & J. 4.

A prescription for toll of corn brought into a town to be there sold on a market-day, any part of which is pitched within the market for sale, and which shall be there sold, is bad, as there cannot be any toll in respect of goods not actually brought into the market. *Wells v. Miles*, 4 B. & A. 559.

A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported. *Hill v. Smith*, 4 Taunt. 520. But see *S. C.*, 10 East, 476.

A claim of toll-thorough cannot be supported, without showing a beneficial consideration moving to the person from whom it is claimed. *Id.* S. P., *Yarmouth (Mayor)*, 3 Burr. 1402.

A seller of corn by sample in a market is benefited by the market as well as the seller

of corn which is pitched there in bulk and sold; and if he refuses to pay the same toll which is paid by the seller of corn in bulk, an action lies against him for the injury done to the market in selling by sample. If a grantee of a royal franchise, as toll, grants an immunity thereout, and the franchise of toll afterwards becomes extinct by unity of possession in the crown, the immunity does not thereby cease; and if the crown regrants the toll, the grantee must take it still subject to the immunity. *Teakesbury (Bailliff) v. Bricknell*, 2 Taunt. 120.

An action by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold, alleging that the defendant, intending to deprive them of their toll, fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the owners were prevented from taking their toll, is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the owners' claim to toll, coupled with the fact of not paying the toll on demand afterwards when the corn was delivered to the defendant in the same borough, but out of the market. *Teakesbury (Bailliff, &c.) v. Dalton*, 6 East, 433; 2 Smith, 508.

A claim of toll to be taken in specie for goods sold in a market, is supported by evidence of a right to toll for goods brought into the market, and there sold, without showing any right to toll for goods sold in the market without being brought there. *Mosley v. Pierson*, 4 T. R. 104.

To support a claim of toll traverse, a special consideration need not be shown. *Richards v. Bennett*, 2 D. & R. 389; 1 B. & C. 223.

An act for the better regulating a market, enacted, that it should be lawful for the owner thereof to take all such tolls as were usually collected or taken, or which were payable within the market:—Held, that such owner, although not entitled at common law to any toll, might, under that act, recover such tolls as, at the time of passing thereof, were usually paid in any part of the market; although the tolls then usually paid in respect of the same articles were different in other parts of the market. *Bedford v. Emmett*, 3 B. & A. 866.

Where a corporation was entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city, on horses, or in carts or wagons (that is, at the rate of 1*d.* for every horse load, and 2*d.* for every cart load drawn by one horse, and 2*d.* more for each additional horse):—Held, that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches, instead of carts or wagons, could not vary the right of toll in the proportion of 2*d.* for each horse drawing the coach, although the number of horses was estimated by the weight of

passengers rather than of goods. *Carlisle (Mayor) v. Wilson*, 5 East, 2; 1 Smith, 297.

Where a toll of corn has been customarily taken by dipping into the sack, so as to bring out a certain quantity, and the collector varied from the proper mode (by sweeping in, instead of lifting the toll), so as to take more:—Held, that trover lay against him for the excess. *Norman v. Lell*, 2 B. & Ad. 110.

An action on the case is the proper remedy for a fraud upon the toll of a market. *Blakey v. Dinsdale*, Cowp. 664. See *Brigland v. Shapter*, 5 M. & W. 375.

By a private act, passed in 1835, the market of Devonport, belonging to A., was enlarged into a market for cattle, sheep, &c., and A. was empowered to let the erections, buildings, &c., on the ground whereon the market should be held; and to demand and take certain tolls of and from any person or persons bringing any goods or articles to the market. There was also a clause providing, that if the owner should demise or lease the market, or the site, and all or any of the erections or buildings thereon, the lessee should, subject to such exceptions or restrictions as might be expressly contained in the lease, take and enjoy the rents and tolls authorized to be taken by the act, as the owner would have been entitled to do if the lease had not been made:—Held, that a lessee of the market, under a parol demise, was entitled to demand and receive the tolls. *Brigland v. Shapter*, 5 M. & W. 375.

In a high street in a town and manor there was a market-house belonging to the lord. This manor, together with the market, belonged to the crown in the reign of Henry 3. As far back as living memory extended, various tolls had been paid for the use of the market, for articles hawked about the town, and for stalls and standings, for the sale of articles erected in the street. One of these tolls was a shilling for every cart-load of fish, fruit and vegetables hawked about the town, for which no toll had before been paid in the market:—Held, first, that there was evidence that the toll had been paid from time immemorial, so that a legal origin of the claim would, if possible, be presumed. *Lawrence v. Miteh*, 9 B. & S. 467; 37 L. J., Q. B. 209; 3 L. R., Q. B. 521—Exch. Cham.

Held, secondly, that if any objection was made to the antiquity of the toll on the score of rankness, it might still be supported as a reasonable toll, the amount varying from time to time according to the varying value of money. *Id.*

Held, thirdly, that if such an objection was unanswerable, the claim might be sustained as to a toll granted or reserved within time of memory, by presuming a dedication by the crown of the street to the public since the time of Henry 3, which would be a good consideration for a grant or a reservation of the toll claimed, as it was not toll thorough, or a toll for the mere use of the way, but imported a license to rest and stay upon the land for

the purpose of selling marketable commodities. *Ib.*

A market for a town was established under a local act. A section, for preventing any encroachment on it, enacted that any person who should sell, or offer or expose to sale (among other things) any roots, fruit, or garden stuff in any other place within the town should be liable to a penalty; with a proviso excepting the sale by inhabitants in their houses, shops or premises. A party bought vegetables from a wholesale dealer in the market, who had previously on the same day paid the toll for them; he then offered them for sale in the streets:—Held, an offense within the section. *Black v. Sackett*, 10 B. & S. 693.

Upon the construction of a local act establishing a market for corn, &c., in the city of Cork and its suburbs:—Held, that market toll was not leviable upon a sale, made in the vendor's own house or premises, situate within the city, of corn then being outside the city and its suburbs. *Webber v. Adams*, 5 Ir. R. C. L. 146—Exch. Cham.

Held, also, that market toll was not leviable upon such a sale, though the corn sold was then actually within the city or its suburbs. *Ib.*

Tolls authorized to be taken by an act of parliament, in respect of cattle brought into a market for sale, which become due as soon as the cattle are brought into the market-place, and before the cattle are put into a pen or tied up, are mere market tolls, and not in the nature of stallage or tolls taken in respect of the use of the soil; and in assessing the lessee of the market and tolls to the poor-rate, in respect of his occupation of the market-place, such tolls cannot be taken into account as enhancing the value of the occupation. *Reg. v. Casswell or Casswell*, 7 L. R., Q. B. 328; 20 W. R. 624; 26 L. T., N. S. 574; 41 L. J., M. C. 108.

The Brecon Markets' Act, 1862, vested in the Brecon Markets Company certain tolls, which, under the name of "drift tolls," had been immemorially received by the corporation of Brecon for cattle, goods, and carriages passing to, through or from the borough. A railway company, under the sanction of an act passed in the same session, acquired land, not being a highway, on which they constructed a railway and station within the borough of Brecon, whence passengers, goods, and cattle were conveyed by other lines of railway to other places beyond the limits of the borough. The rights of the corporation and of the Brecon Markets Company were expressly reserved by the Railway Act, but there was no provision either in that or in the Markets Act expressly enabling the Brecon Markets Company to levy tolls on the railway:—Held, that the Brecon Markets Company was not entitled to toll in respect of cattle, goods, or carriages passing along the railway. *Brecon Markets Company v. Neath and Brecon Railway Company*, 8 L. R., C. P. 157—Exch. Cham.

—right to stallage and pittance.]—Charles the First, by letters-patent, in 1639, granted to H. and his heirs a weekly market at E., with all tolls and profits. By deed in 1646, between H. of the first part, and certain persons on behalf of the inhabitants of E. of the second part, the inhabitants "having considered the great charge H. had been at in procuring the market," and for other considerations, did grant unto him the court-house and the waste ground adjoining the market-place, together with the market-place; and H. covenanted that the inhabitants should have a market toll free:—Held, that, in the absence of any evidence of an ancient market, or of any reference to a custom or an exemption from stallage in the charter of 1639, there was no origin to which such exemption could be referred but the deed of 1646. *Lockwood v. Wood*, 6 Q. B. 81; 10 Jur. 158; 15 L. J., Q. B. 87.

The word toll in a grant may include stallage. *Ib.*

If the crown grants to H. and his heirs, that they may have and hold a market in the town of E., with all tolls and profits thence arising, but neither the crown nor H. has any right of soil in the town, if H. afterwards acquires the soil on which the market is held, he may claim stallage by virtue of the grant. *Ib.*

A modern grant by H., a subject holding under the crown as before mentioned, to which certain persons, styled inhabitants of E., are parties, granting that the inhabitants of E., their heirs and assigns forever, shall enjoy the market as freely as H. held it of the crown, and containing a covenant by H. that they shall do so, does not exempt from stallage an inhabitant not privy to the parties to such grant. *Ib.*

Such an exemption for the inhabitants of a town can be only by way of custom, not of grant or prescription. *Ib.*

An action may be maintained by the owner of a market for stallage, and that without showing any contract in fact between him and the occupier of the stall. *Newport (Mayor, &c.) v. Saunders*, 8 B. & Ad. 411.

A person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods. *Townend v. Woodruff*, 5 Exch. 506; 19 L. J., Exch. 315.

Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. *Yarmouth (Mayor, &c.) v. Groom*, 1 H. & C. 102; 32 L. J., Exch. 74; 8 Jur., N. S. 677; 7 L. T., N. S. 161.

Therefore, where a person used a market with a chair and a ped, that is, a wooden or a wicker basket, four feet long, two feet and a half wide, and two feet high, with a lid, which, being turned back and supported by pieces of wood not fixed in the soil, formed a table on which he exposed his provisions for sale:—Held, that he was liable for stallage. *Ib.*

The question what constitutes a stall, is a question of fact for a jury. *Id.*

A court of equity will require the right of stallage to be decided at law, before granting an injunction to restrain a corporation from interfering with such rights of stallage, where the right has not been admitted by the corporation. *Ellis v. Bridgnorth (Mayor, &c.)*, 2 Johns. & H. 67; 9 W. R. 331; 4 L. T., N. S. 112.

Charles I. granted by letters-patent to the lord of the manor of Swindon, his heirs and assigns, full and absolute license and authority to hold a market within the town of Swindon, with all liberties and free customs, tolls, stallage, picage, fines, and all other profits, commodities and emoluments whatsoever to such market appertaining. In 1866, the lord of the manor of Swindon, being seized of and entitled to the rights granted by Charles I., demised to a company for twenty-one years all the tolls, rates, dues and duties arising and to be collected and received at the Swindon market. The market was held in the public street, and no stalls or pens had ever been erected for the standing or separation of the cattle. Up to the time that the company acquired their rights in 1866, no payment was ever demanded except upon the sale of cattle, when a small sum was paid per head either by the buyer or the seller. The company made a charge upon the vendors for stallage upon all cattle brought to the market, in lieu of the tolls charged on the sale.—Held, in an action against a vendor of cattle to recover this stallage, that the company had no right to make such charge. *Swindon Central Market Company v. Panting*, 27 L. T., N. S. 578—Q. B.

**Rating.**—By the Manchester and Salford Police Act (33 Geo. 3, c. 60), the tenants or occupiers of all messuages, houses, shops, and other tenements, within the same towns, respectively, were liable to be rated.—Held, that the owner of the market kept in the streets, where various articles were exposed to sale by persons who paid him for that privilege, but had not any stalls fixed to the ground, was not the occupier of a tenement, within the meaning of the act, and, consequently, was not liable to be rated in respect of the profits of such market. *Rees v. Mosley*, 3 D. & R. 385; 2 B. & C. 226.

A lease for years was granted by the lord of a manor, of the tolls and duties payable at the market and fairs of A., and all rights and profits of stallage, picage, &c., incident to the market and fairs, together with the market-house, for all the purposes of the market and fairs. Tolls were collected and received at the market and fairs upon the sale of corn and cattle sold in the market and fairs, and also upon all goods and merchandise exposed for sale in the market and fairs, and also for stallage. Upon part of the market-square, and upon the sides of the streets leading thereto, stalls were placed on the market and fair days, on which stalls goods

were exposed for sale, but they were not in any way affixed to the soil. The tolls on the corn exposed for sale in the market-house were received in the toll-room of such house; but all other tolls and duties were collected and received where the cattle and merchandise were exposed for sale. The lessees were rated to the relief of the poor as occupiers of the market-house, with the ground belonging thereto, used and occupied for the tolls of the market and fairs.—Held, that they were ratable for stallage, which was a payment in respect of the use and occupation of the soil; but that they were not ratable for market tolls, which had no relation to the use of the soil. *Roberts v. Aylesbury (Churchwardens and Overseers)*, 17 Jur. 336; 22 L. J., M. C. 34; 1 El. & Bl. 423.

**Official returns.**—[By 23 & 24 Vict. c. 51, the amount of tolls and dues levied under the authority of parliament in respect of markets must be annually returned to a secretary of state, but this provision does not extend to any tolls or dues taken by a joint stock company as profits of their undertaking, or to any tolls or dues taken by prescription or otherwise as private property.]

### III. REGULATIONS; AND PENALTIES FOR BREACH.

**What amounts to an infringement of particular regulations; and liability to penalty.**—By a market act, every person who shall sell or expose for sale at any place within the limits of the act (other than in any existing market-place, or the market-house and market-places to be established under the act, or in his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by the act authorized to be taken, other than eggs, butter and fruit, shall forfeit 40s.—Held, that a vessel moored to a wharf on the old canal, within the limits, was not a shop within the exemption. *Wiltshire v. Baker*, 11 C. B., N. S. 237; 31 L. J., C. P. 10, n.; 10 W. R. 89; 5 L. T., N. S. 355.

So where an act enacted that every person who shall sell or expose for sale at any place within the limits of the act (other than his own dwelling-house, or in any shop attached to and being part of any dwelling-house) any article in respect of which tolls are by the act authorized to be taken, shall incur a penalty of 40s.—Held, that to bring it within the exemption the shop need not be attached to any part of the dwelling-house of the party himself. *Wiltshire v. Willett*, 11 C. B., N. S. 240; 31 L. J., C. P. 8; 10 W. R. 44; 5 L. T., N. S. 355.

Held, also, that a sale by auction in a shop attached to and being part of any dwelling-house was privileged. *Id.*

By 10 & 11 Vict. c. 14, s. 13, after the market-place is open for public use, every person other than a licensed hawkers who shall sell or expose for sale in any place

within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorized to be taken in the market, shall forfeit 40s. An improvement act, subsequently passed, enacted that the local board and their lessees may from time to time demand and take from any person occupying or using any shop, stall, stand, bench, or ground space in any market-place for the time being under the management of the local board, and used as a general market, such tolls as the local board or their lessees from time to time appoint, not exceeding the several tolls specified in the schedule A. annexed; and the schedule in terms imposed the toll on the occupier of every shop, stall, or ground space in the market, and not upon the commodities sold or exposed for sale there:—Held, that a person who sold fruit and fish, which are marketable articles, from door to door within the prescribed limits, did not thereby become liable to the penalty imposed by 10 & 11 Vict. c. 14, s. 13. *Caswell v. Cook*, 11 C. B., N. S. 637; 31 L. J., M. C. 185.

Held, also, that the "prescribed limits" meant the limits to which the local act applied, viz., the boundaries of the borough. *Id.*

By 10 & 11 Vict. c. 14, s. 13, after a market-place is open for public use, every person other than a licensed hawkers who shall sell or expose for sale, in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorized to be taken in the market, shall for every such offense be liable to a penalty; and in order to exempt from penalty under this section, a party must be shown to have sold the marketable articles in what is really his own private shop, and not in any such way as to constitute a different market from the legal one; and in order to determine this question, all the elements of the case must be taken into consideration, although not one of them alone might be conclusive upon it. *Pope v. Whalley*, 6 B. & S. 303; 11 Jur., N. S. 444; 34 L. J., M. C. 76; 13 W. R. 403; 11 L. T., N. S. 769.

A market act enacted, that every person who shall sell or expose for sale at any place within the limits of the act (other than in his own dwelling-house, or in any shop attached to and being part of any dwelling-house), any article in respect of which tolls are by this act authorized to be taken, shall forfeit and pay any sum not exceeding 40s. By a schedule a toll was imposed upon horses:—Held, that a horse was an article within this section. *Llandaff and Canton Market Company v. Lyndon*, 8 C. B., N. S. 515; 30 L. J., M. C. 105; 6 Jur., N. S. 1344; 8 W. R. 693.

Held, also, that a sale by auction of horses by A., a licensed auctioneer, in a yard attached to the dwelling-house of B., within the district, was an offense against the act. *Id.*

By a local act it was enacted, in language similar to 10 & 11 Vict. c. 14, s. 19, that "no

person shall slaughter any cattle, or dress any carcass, for sale as human food or food of man, in any places within the limits, other than" such slaughter-house as there described; and that every person who "shall offend by slaughtering any cattle, or dressing for sale any carcass within the limits in any place other than one of such slaughter-houses," shall be liable to a penalty:—Held, that this enactment applied only to the slaughtering of beasts intended by the person slaughtering for sale as human food. *Elias v. Nightingale*, 8 El. & Bl. 698; 4 Jur., N. S. 166; 27 L. J., M. C. 151.

A. was tenant of a dwelling-house and shop, and of a piece of ground in front of the shop. A wooden shed affixed to the house, and supported on wooden posts, had been erected and continued over the piece of ground for a period of eighteen years, and, previously to its erection, there had been stone flags built into and forming part of the house, and projecting three feet beyond it. The flags still remained beneath and assisted in supporting the shed, and were erected at the same time as the house and shop. A. having been convicted, under 10 & 11 Vict. c. 14, Market and Fairs Clauses Act, s. 13, for exposing tollable articles for sale on the ground beneath this shed:—Held, that there was not sufficient evidence to justify the conviction, as the structure must be considered as part of a dwelling-place or shop within the exception in that section. *Ashworth v. Heyworth*, 38 L. J., M. C. 91; 4 L. R., Q. B. 316; 10 B. & S. 309; 17 W. R. 608; 20 L. T., N. S. 439.

A by-law for regulating a market must not be so restrictive as to prevent, without leave, a frequenter of it from resorting to it. *Wortley v. Nottingham Local Board*, 21 L. T., N. S. 582—Q. B.

By the Markets and Fairs Clauses Act, 1847, s. 13, after a market-place is opened for public use every person other than a licensed hawkers, selling in a place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special act authorized to be taken in the market, is liable to a penalty. By the Peddlers Act, 1871, s. 6, a certificate under that act is to have the same effect as a hawkers's license for the purpose of the Markets and Fairs Clauses Act, 1847, and the term "licensed hawkers" in such act shall be construed to include a peddler holding such a certificate. A person holding a peddler's certificate both sold on foot and with a horse and four-wheeled wagon within the limits of a district formed by the adoption of the Local Government Act, 1858, under which act the local board had provided a market-place for potatoes and other vegetables liable to toll in the market:—Held, that he was exempted by the peddler's certificate from the penalty imposed by the Markets and Fairs Clauses Act, 1847, s. 13, though not acting strictly as a peddler, but rather as a hawkers. *Howard v. Lupton*, 44 L. J., M. C. 150; 10 L. R., Q. B. 598.



A person, not being a licensed hawker, was committed and fined under the Markets and Fairs Clauses Act, 1847, 10 Vict. c. 14, s. 13, for having sold corn by sample in a place, other than his own dwelling-place or shop, within the municipal boundary of the city of Londonderry, the bulk of the corn being at the time of sale within the municipal boundary:—Held, that the conviction was right. *Londonderry (Mayor) v. McElhinney*, 9 Ir. R., C. L. 71—C. P.

A local act regulating a market prohibited under a penalty, in terms identical with those in the Markets and Fairs Clauses Act, 1847, s. 13, any person from selling or exposing for sale within the limits of the market, "except in his own dwelling-place or shop," any articles in respect of which tolls were by that act authorized to be taken. A salesman resided within the limits, and occupied a large yard adjoining his residence, in which were sheds for the sale of cattle and sheep. The yard extended back about 160 feet, and the only entrance to it was through double doors from the street, and by passing underneath the small house, which consisted only of upper rooms supported on pillars over the entrance. Stairs led up from this covered entrance, which was thirty feet by twenty, to the house. He was summoned for exposing for sale 200 sheep in this yard, and convicted in a penalty:—Held, that the conviction was right, as the yard did not come within the exception, so as to be either his dwelling-place or his shop. *McHole v. Davies*, 1 L. R., Q. B. Div. 59; 45 L. J.; M. C. 30; 33 L. T., N. S. 503; 24 W. R. 843.

By 3 Geo. 4, c. 58, s. 42, any person who sells fish within the town of Rochdale, except in the market-place (unless such sale take place from a shop or dwelling-house), is liable to a penalty not exceeding 5*l*. N. sold four herrings in an open street, not in the market-place. The street was a main thoroughfare, with houses on both sides, in a populous part of the ancient municipal borough of Rochdale, and there was a continuous line of buildings from the market-place to the street, where the sale took place. When the act was passed the street in question was not made, and the site of it was in fact green fields. There was no definition in the act of the meaning of the expression "town of Rochdale." The justices refused to convict, being of opinion that the words "town of Rochdale," were limited to the town as it then existed:—Held, that the justices were wrong in refusing to convict, inasmuch as the section was intended to apply to all parts of what might be fairly termed the town of Rochdale, whether in existence at the time of the passing of the act or not. *Collier v. North*, 35 L. T., N. S. 845—D. C. A.

The Exmouth Market Act, 1867, 30 Vict. c. 19, which incorporated the Markets and Fairs Clauses Act, 1847, 10 & 11 Vict. c. 14, by s. 20, enacts that no unlicensed person shall sell in any open place within the limits of the market, not being the new market-

place or his own dwelling-house or shop, any articles, &c. A person sold articles of the description mentioned in the act in a skittle-ground let to him for two days. The place where the sale took place was covered with a roof and inclosed, but had a door leading into the street:—Held, that the place of sale was not his shop within the exception in the act. *Hooper v. Kenahole*, 2 L. R., Q. B. Div. 127; 4 L. J., M. C. 160; 36 L. T., N. S. 111; 25 W. R. 368.

H. was charged before the magistrates of a city for having infringed a private Market Act (6 & 7 Vict. c. 122, s. 3), which imposed a fine on any person selling, offering or exposing for sale any carcasses or meat within the limits of the city and county, except within the market. It was proved that, on the 12th January, 1877, H. delivered certain carcasses at a door within the limits, and that the carcasses were then weighed and paid for, but it was alleged that they were delivered in pursuance of a previous contract, entered into between the same parties at the same place on the 5th of the same month. The summons was taken out for the 12th January, and the magistrates found that there had been a previous sale and purchase on the 5th:—Held, that they should have convicted on the above facts, and that if they had thought it necessary they should have amended the summons by altering the date on which the offence was alleged to have been committed from the 12th to the 5th of the month. *Exeter (Mayor, &c.) v. Heaman*, 37 L. T., N. S. 584—C. P. Div.

By a local act of 1863 a company was empowered to erect a cattle market at Brecon, and by s. 65 the company from time to time, if and when they should think fit, and with, but not without, the consent of the corporation, testified by writing under the hand of the mayor or town clerk, might provide and maintain slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and the neighborhood, upon such sites as they should think expedient. In 1863 the corporation consented to the provision and maintenance by the company of slaughter-houses proper and sufficient for the slaughtering of cattle for the supply of the borough and its neighborhood, in pursuance of, and in accordance with, the above mentioned s. 65; the company built slaughter-houses accordingly, but absolutely abandoned the use of them in 1864. The company subsequently built other slaughter-houses a quarter of a mile off; but the corporation had always refused to give any further consent. Justices refused to convict under s. 19 of the Markets and Fairs Clauses Act, 1847, for slaughtering cattle on premises in the borough other than those leased by the appellant:—Held, that the slaughter-houses occupied by the appellant had not received the consent of the corporation under s. 65 of the local act of 1863, and that the justices were right. *Hughes v. Treu*, 36 L. T., N. S. 585—Q. B. Div.

## IV. SALES IN; MARKET OVERT.

**What constitutes a sale in market overt; and extent of protection to purchaser.**—A wholesale warehouse in London, used as a shop, and having glazed windows in which articles are exhibited for sale towards the street, is a market overt by the custom of London for goods commonly sold there. The custom is not confined to shops which are literally open to the street. *Lyons v. Depass*, 3 P. & D. 177; 11 A. & E. 326; 9 C. & P. 68; 4 Jur. 505.

A sale by sample is not entitled to the privileges of a sale in market overt. *Crane v. London Dock Company*, 5 B. & S. 818; 10 Jur., N. S. 984; 12 W. R. 745; 10 L. T., N. S. 872.

To constitute a sale in market overt, the goods sold must be present in the market during the whole of the transaction, from the making of the contract to the delivery. *Id.*

Where goods were stolen, and sold in market overt, and the thief was prosecuted to conviction, and the goods were, after a demand made for them by the original owner, converted by the defendant:—Held, that by virtue of 7 & 8 Geo. 4, c. 29, s. 57 [repealed by 24 & 25 Vict. c. 95, but similar provision re-enacted by 24 & 25 Vict. c. 96, s. 100], the owner might recover them in trover, and was not bound to obtain them only by the means pointed out in that statute, of a writ of restitution, or an order of the judge who tried the thief. *Scattergood v. Sylvester*, 15 Q. B. 506; 14 Jur. 977; 19 L. J., Q. B. 447.

The effect of 7 & 8 Geo. 4, c. 29, s. 57, is, upon conviction of the thief, besides giving to the original owner the summary methods pointed out by the statute, to restore to him the goods which were stolen, the right of property in them, and all the legal remedies incident to that right. *Id.*

An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere. *Metcalf v. Lumden*, 1 C. & K. 309—Rolfe.

A sale by public auction at a horse repository out of the city of London, is not a sale in market overt. *Lee v. Bayes or Robinson*, 18 C. B. 599; 2 Jur., N. S. 1093; 25 L. J., C. P. 249.

The defendant's mare, which he had turned out in a public park, was found out of the park, and was sold at a public auction by the pinner. After an intermediate sale she was sold in market overt to the plaintiff, and was subsequently taken possession of by the defendant. There was no proof that the formalities which the 13 Eliz. c. 12, requires upon the sale of horses at fairs and markets had been observed:—Held, that in the absence of such proof the court would not infer that such formalities had been observed, and that the plaintiff could not maintain an action for the mare against the defendant, the true owner. *Moran v. Pitt*, 42 L. J., Q. B. 47; 21 W. R. 525; 28 L. T., N. S. 554.

A salesmaster, who in market overt publicly sells and afterwards delivers a stolen beast, although he does so innocently and in the ordinary course of his business, is responsible, in trover, to the true owner for the value of the beast. *Ganly v. Ledwidge*, 10 L. R., C. L. 33—Q. B.

The protection attendant upon a sale in market overt is not confined to ancient markets created by charter or by prescription, but extends to modern markets established under powers conferred by act of parliament. *Id.*

As to sales of horses, in markets overt,—see HORSE.

## Market Overt.

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## Master.

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- III. MASTER AND SERVANT. See MASTER AND SERVANT.
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### I. HIRING AND DISMISSAL OF SERVANT.

#### 1. *Requisites and Validity of Contract of Hiring*.

##### (a) In General.

**What constitutes contract for employment, generally.]**—An agreement for the hiring of a servant may be proved by parol, although the terms of the agreement are, by the direction of the parties, written down by a third person; such writing, though read over to the parties, not being signed by them. *Rex v. Wrangle*, 4 N. & M. 375; 2 A. & E. 314; 1 H. & W. 41.

In 1859, R. was owner of a mine which he proposed to sell to a projected company. On the 12th February, 1859, there was a meeting of the promoters of the company, at which it was resolved that the plaintiff should be appointed captain of the mine at a salary, "such salary to commence at the completion of the contract with R.," who was one of the promoters of the company. The resolution was communicated to the plaintiff. On the 9th March the agreement for the sale of the mine to R. was executed. On the 25th March there was a meeting of the promoters of the company, at which the memorandum and articles of association were executed, and a prospectus was approved of, which described the plaintiff as captain and local manager of the mine. On the 28th March the company was registered. On the 31st March there was a meeting of the company, at which three directors were present, when the minutes of the meeting of the 25th March were read, and the prospectus approved at that meeting was submitted and approved. The plaintiff acted as manager of the mine, and in an action by him against the company for his salary, the jury found that he acted for the company and not for R. There was no conveyance of the mine to the company:—Held, that there was evidence of the appointment of the plaintiff, by the company, as manager of the mine, and that he was entitled to recover for his services in such capacity. *Browning v. Great Mining Central Company*, 5 H. & N. 856; 29 L. J., Exch. 399.

Action upon an agreement in writing be-

seen the plaintiff and the defendants, as foreign agents resident in London, on behalf of and representing P., resident at Havana, on the island of Cuba, by which the plaintiff agreed to proceed, as fireman or stoker, on board a steamer, about to leave London for Havana, to be placed in the service of P., and to discharge the duty and do the work of fireman or stoker on board, and to obey the orders and follow the directions of the engineers; that he should receive wages monthly, and during the outward voyage rations to be served out to him on account of P.; the contract to be in force for one year from its date, and should he be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms heretofore stated, or to discharge him, and find his passage back to England:—Held, that the defendants were personally liable for a breach of the agreement, before the ship reached Havana. *Wilson v. Zulueta*, 14 Q. B. 405; 14 Jur. 300; 19 L. J., Q. B. 49.

A. engaged B., under an agreement, dated 25th of September, 1865, as a file-forging, for two years, after the rate of the Sheffield list of prices for the time being. On the 24th of February, 1866, the master refused to give him work. On the 10th of March, 1866, B. entered a plaint in a county court against A., his master; and in his particulars alleged that A. "neglected and refused to perform, and had not performed, his agreement, whereby he had sustained damages to the amount of 7l. 14s., being four weeks' average wages in lieu of notice." A. paid 7l. 14s. and the costs into court on the 19th of April, 1866. On the next day, the 20th of April, B. again went to work for A., but was dismissed on the 21st of April. On the 4th of July, 1866, B. entered another plaint against A., and in his particulars alleged that A. "refused to employ him, and illegally discharged him from his service," and claimed 48l. 12s. At the trial, the jury found a verdict for B. for 33l. 12s. It was admitted that the agreement sued on in the first plaint was the same agreement as was sued on in the second plaint:—Held, that there was no evidence to go to the jury of such agreement, and that the judge ought to have directed a nonsuit. *Barnsley v. Taylor*, 37 L. J., Q. B. 39.

A. being in want of workmen, applied to the Free Labor Registration Society, and filled up and signed a form sent by them to him, containing the particulars of the employment and terms offered by him, and his address at S. This form was read over to B. by the secretary of the society, and B. then signed an agreement headed "Free Labor Society," by which he stated that he had accepted employment at S., and agreed that one half day's wages, "being the fee to the society for obtaining him the employment," should be deducted from his wages, and that he would not quit the service of his employer without just cause:—Held, that the documents suffi-

ciently referred to one another, and constituted a contract in writing signed by both parties. *Crane v. Powell*, 4 L. R., C. P. 123; 38 L. J., C. P. 43; 20 L. T., N. S. 703; 17 W. R. 161.

The plaintiff proposed to enter the defendant's service as salesman, and stated in a letter his willingness to come for a year on trial, and his terms. The defendant, in reply, assented generally, but in the course of his letter said that if some of the terms were defined more clearly it might prevent mistakes, and spoke of a list of customers which he would consider with the plaintiff. He, however, named a day for the plaintiff to enter on his duties, and said he should expect him then:—Held, that this was not an unqualified acceptance of the plaintiff's proposal, and that the two letters were not a complete and binding contract in writing. *Johnson v. Appleby*, 30 L. T., N. S. 201—C. P.

Held, also, that parol evidence of supplementary terms agreed to at a meeting of the parties subsequent to the letters, but prior to the plaintiff entering on the service, was admissible. *Id.*

B. entered into an agreement to serve a tramway company as a conductor, and deposited 5l. as security for the due discharge of his duties; among which he was to punch a ticket upon receipt of every passenger's fare, according to rules of which he had a copy. It was agreed also that the company's manager should be the sole judge between the company and the conductor whether the company was entitled to retain the whole or any part of the deposit; and his certificate in writing should be binding and conclusive evidence between the parties in all courts of justice, and should bar the conductor of all right under any circumstances to recover the same. The agreement expressly excluded its application from criminal offenses, and one of the rules stated that failure to punch on receipt of a fare was to be evidence of an attempt at embezzlement, and the act of failure would be dealt with accordingly. The manager certified that the company was entitled to retain the whole of B.'s deposit, on the ground that he had received certain passengers' fares without punching the tickets according to the rules. The company applied to a stipendiary magistrate to recover this amount under 6 & 7 Vict. c. 86, s. 22, and the magistrate decided that this agreement was not binding:—Held, that this agreement did not oust the jurisdiction of a court of justice, but merely rendered the certificate a condition precedent to the company's right to retain the deposit; and that the rule as to evidence of embezzlement was nugatory. The agreement was therefore valid, and the case was sent back to the magistrate. *London Tramways Company v. Bailey*, 37 L. T., N. S. 499—Q. B. Div.

**Consideration, mutuality and other requisites.**—By an agreement between A. and B., it was agreed that A. should manufacture

cement for the use of B., of a specified quality; that B. should pay A. a weekly sum for two years from the agreement, and another weekly sum for one year after; and should receive A. into partnership in the business of manufacturing cement at the end of three years; and that A. should instruct B. in the art of manufacturing cement:—Held, in an action brought by A., assigning, as a breach of this agreement, that B. wrongfully discharged him, the plaintiff, from his service, and from manufacturing cement for the use of the defendant, and from any longer instructing the plaintiff in the art of manufacturing cement, before the expiration of two years from the agreement, that this agreement did not raise an implied contract of hiring and service for three years between the parties, and therefore the action was not maintainable. *Aspdin v. Austin*, D. & M. 515; 5 Q. B. 671; 8 Jur. 355; 13 L. J., Q. B. 155.

A declaration stated, that, by a deed between the defendant, of the first part; D. of the second part; and the plaintiff, of the third part, the plaintiff covenanted with the defendant, that D. should, during the term of five years from the date of the deed, serve, abide, and continue with the defendant as his assistant in the art of a surgeon-dentist, and perform such service as the defendant should order to be done, in the way of his art, with stipulations for working nine hours per day; and that the defendant, in consideration of the services to be performed by D., covenanted with the plaintiff, that he, the defendant, during the term of five years (in case D. performed his part of the agreement, and particularly the work of nine hours per day), would pay to D. 83s. weekly for the first year of the term; 2l. weekly during the second and third years; 2l. 2s. weekly during the fourth and fifth years of the term, for wages and compensation for the services. The declaration alleged as a breach, that the defendant would not permit D. to continue in his service, but dismissed him:—Held, in arrest of judgment, that the breach was ill-assigned, as there was no implied covenant on the part of the defendant to retain D. in his service during the five years. *Dunn v. Sayles*, D. & M. 579; 5 Q. B. 635; 8 Jur. 358; 13 L. J., Q. B. 159.

By an agreement called a pit bond, the owners of a coal-pit retained and hired the plaintiff for a year, the plaintiff, "during all the times the pit shall be laid off work, to continue the servant of the owners, subject to their orders and directions, and liable to be employed by them at such work as they shall see fit," and at certain wages:—Held, that the pit-owners were not bound to employ the plaintiff for a reasonable number of working days during the year. *Williamson v. Taylor*, D. & M. 389; 5 Q. B. 175; 13 L. J., Q. B. 81.

The plaintiffs agreed in writing with L., that he should serve them for seven years as a crown-glass maker; that he should not during that term work for any other person with-

out their license; that they might deduct from his wages any fine he might incur for breach of their rules; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick or lame the plaintiffs should be at liberty to employ any other person in his stead, without paying him any wages; that the plaintiffs should pay him so long as he should be employed and work as a crown-glass maker certain wages by the piece, and 8l. a year in lieu of house-rent and firing, and that the plaintiffs should have the option of dismissing him from their service on giving him a month's notice or a month's wages:—Held, that this agreement bound the plaintiffs to employ L. during the seven years, subject to the power of dismissal; that there was, therefore, a good consideration for L.'s contract to serve for the seven years, and the agreement was not in unlawful restraint of trade. *Pilkington v. Scott*, 15 M. & W. 657; 15 L. J., Exch. 329.

Where A. contracts to furnish B. with a reasonable quantity of work at a fixed rate of wages, and B. is bound not to work for any other person or persons for a period of seven years:—Held, that there is a mutuality of contract implied, and that A. would be bound to furnish work for the whole period of seven years. *Hartley v. Cummings*, 2 C. & K. 433; 5 C. B. 247; 13 Jur. 57; 17 L. J., C. P. 84.

A first count alleged an agreement by a company to retain and employ the plaintiff as their permanent solicitor, and assigned, as a breach, the discharging of the plaintiff without just cause from being such solicitor. The evidence was, that, by a resolution of a committee, the plaintiff was appointed permanent solicitor to a company, which afterwards amalgamated with another company; and the plaintiff then acted as solicitor to such company until his dismissal:—Held, that, even assuming the amalgamated company had adopted the resolution appointing the plaintiff, the appointment was only meant to be as the general or ordinary solicitor of the company, as distinguished from an employment as solicitor in particular matters, so that he might be dismissed without cause; and that such, therefore, was not evidence to support the count. *Elderton v. Emmens*, 4 C. B. 496; 11 Jur. 612; 16 L. J., C. P. 209.

A second count stated an agreement, by which the plaintiff was to receive from the company a salary in lieu of rendering a bill of costs for general business done by him as their attorney and solicitor, and alleged, that, in consideration that the plaintiff promised the company to perform the agreement in all things on his part, the company promised the plaintiff to perform the same in all things on their part, and to retain and employ him as attorney and solicitor of the company. The count assigned, as a breach, the dismissal of the plaintiff from such employment; alleging also, that the company had, since such dismissal, refused to retain or employ



him as such attorney or to pay him the salary:—Held, by the House of Lords, affirming the judgment of the Exchequer Chamber, reversing the judgment of the Common Pleas, and in conformity with the opinions of eight out of nine of the judges who gave their opinions, that the plaintiff was entitled, after verdict, to judgment upon the count, for that it sufficiently alleged a consideration for the company to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise, on the part of the company, to perform the agreement. *Emmens v. Elderton (in error)*, 4 H. L. Cas. 624; 18 C. B. 495; 18 Jur. 21; in Exch. Cham., 6 C. B. 160; 17 L. J., C. P. 307.

W. agreed in writing with G., that in consideration of 3*l.* lent to him by G., and of the wages to be paid by G., he would work for and serve G. as a tin-plate worker, and would not work for or serve any one else without his leave for twelve months, and also until the expiration of three months' notice given by him to G.; and G., in consideration of the services of W., agreed to pay him on the Saturday night in every week, during the term, all such wages as the articles made by him should amount to, at their usual workmen's prices for similar articles; provided that after the expiration of twelve months either party might determine the service by three months' notice; and G. was authorized to deduct 10*s.* per week until the loan of 3*l.* was paid:—Held, that the agreement bound G. to employ W. during the period mentioned in it; that there was, therefore, a good consideration for W. to serve G.; and the agreement was valid. *Ileg. v. Welch*, 2 El. & Bl. 857; 17 Jur. 1007; 23 L. J., M. C. 145.

A workman entered into an agreement with a coal company to serve them as a collier, in consideration of wages to be paid to him fortnightly; and the company, in consideration of such service, agreed that he should not be discharged without twenty-eight days' notice in writing, unless in the case of misconduct:—Held, that this contract necessarily implied an obligation on the part of the master to find work for the servant, and to pay him wages every fortnight; and, consequently, was not bad for want of mutuality. *Whittle v. Frankland*, 2 B. & S. 49; 81 L. J., M. C. 81; 8 Jur., N. S. 882; 5 L. T., N. S. 639.

A. agreed to take B. as his servant, "at such wages as might from time to time be agreed on," and B., on his part, agreed to serve A., and not to set up trade for himself within certain limits. B. accordingly entered into and continued in A.'s service, at the wages agreed on:—Held, that there was a good and valuable consideration to support the agreement as against B., and a court of equity enforced it. *Bencell v. Inns*, 24 Beav. 807; 26 L. J., Chanc. 663.

The plaintiffs, lace merchants, employed travelers to visit certain parts of England, and where they had a business connection, and to each traveler they assigned a separate

journey. A vacancy having occurred on the Midland journey, the plaintiff told the defendant of it, he being at the time in their service in another capacity, and he verbally agreed with them to fill the vacancy, it being understood at the time that the agreement between them should be reduced into writing. The defendant accordingly entered their employ as traveler on the Midland journey; and after he had been traveling for them about a month, a list of places and of the customers whom he was to visit was sent down to him, and a written contract, which was as follows:—"In consideration of my entering upon your employ at a salary, &c., I herewith agree to do so, with the understanding that, in the event of my wishing to travel and doing so for any other house in the trade, on any part of the same ground, to pay you 50*l.*" This contract the defendant signed, and after having traveled for the plaintiffs about a year, he left them and traveled for a rival house in the same trade over the Midland journey. The plaintiffs having sued him for the 50*l.* penalty under the contract:—Held, first, that a good consideration to the defendant, for the agreement, appeared on the face of the contract. *Mumford v. Gething*, 7 C. B., N. S. 305; 6 Jur., N. S. 428; 29 L. J., C. P. 105; 1 L. T., N. S. 64; 8 W. R. 187.

Held, secondly, that the circumstances under which the defendant entered the plaintiffs' employ as traveler showed a good consideration for his part of the agreement, and that the written contract, therefore, which was drawn up in pursuance of the original understanding, was made on a good consideration. *Ib.*

Held, thirdly, that the contract was for the entire services of the defendant while in the plaintiffs' employ, and that the parties meant, therefore, that the penalty should attach if he traveled for another house after he left their employ. *Ib.*

Held, fourthly, that extrinsic evidence was admissible to identify the particular employment to which the agreement referred, viz., that of traveler, and also to identify the ground over which the defendant agreed to travel, viz., the Midland journey. *Ib.*

Held, fifthly, that the subject-matter of the contract being identified by the extrinsic evidence, the contract was not unlimited in point of space, and so void, as being in restraint of trade, inasmuch as the evidence showed that the restriction as to the same ground was limited to the ground, i. e., the Midland journey over which the defendant traveled. *Ib.*

Held, sixthly, that the written contract, even without the extrinsic evidence limiting the restriction to the Midland journey, was not void, as being in restraint of trade. *Ib.*

S., the agent of an insurance company, being indebted to the company, and being pressed for payment, it was arranged that the plaintiff should pay the money to the company, and that the company should appoint him and S. as joint agents, with the same rates of

payment and remuneration as before. A deed was executed containing a covenant that in case the company should at any time thereafter displace S. from his appointment as agent, then that they should and would forthwith repay to the plaintiff the money so paid by him. Subsequently the company transferred the whole of their business and liabilities to another company, and refused to pay the plaintiff the money so advanced by him:—Held, in an action to recover the amount, that there was an implied covenant on the part of the company that they would not do anything of their own voluntary act by which it should be impossible for them to keep S. in their employ any longer, and therefore they were liable in the action by the plaintiff. *Stirling v. Maitland*, 84 L. J., Q. B. 1; 5 B. & S. 840; 13 W. R. 76; 11 L. T., N. S. 337.

**Distinction between contracts of hiring and of partnership.**—C. having contracted with the government for the conveyance of mails by sea, agreed with H. to employ him during the existence of the contract at a fixed yearly salary, payable quarterly, and in addition thereto, a sum equivalent to 10% per cent. of the profits:—Held, that this was a contract of hiring and service, and not a partnership. *Harrington v. Churchward*, 6 Jur., N. S. 576; 29 L. J., Chanc. 521; 8 W. R. 802—V. C. W.

P., who was engaged as an underwriter at Lloyd's, entered into an agreement, before the passing of 28 & 29 Vict. c. 80, with R., who was not a member, that the underwriting account which commenced on a specified day, should be carried on for three years from that date in the name of P., and that the policies, losses, and averages should be signed and settled by P. or by R. as his agent; that a salary of 150*l.* per annum should be paid to R. by P., that four-fifths of the net profits of the business should be paid to P., and the remaining one-fifth to R., R. to be exempted from bearing any loss; with a provision for the refunding by R. of all or any part of what he might receive by way of profit in any one year if it should appear on the taking of the accounts as therein provided that there had been no profit in the business in that year:—Held, that the agreement was not a partnership contract, but a contract for hiring and service. *Ross v. Parkyn*, 24 W. R. 5; 44 L. J., Chanc. 610; 30 L. T., N. S. 331—R.

**Contracts for employment of infants.**—A contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chooses, and to retain the wages during stoppage, is wholly void, as not being beneficial to the infant. *Reg. v. Lord*, 12 Q. B. 757; 3 New Sess. Cas. 240; 12 Jur. 1001; 17 L. J., M. C. 181.

As to what will create a liability on the part of the master, to third persons, for the acts of the servant,—see this title, III., 4.

As to validity of contracts by infants, generally,—see INFANTS.

## (b) Requirements of the Statute of Frauds

**Statute.**—[By the Statute of Frauds (29 Car. 2, c. 3), s. 4, no action shall be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.]

**What contracts within the statute.**—A contract for a year's service, to commence at a subsequent day, is a contract not to be performed within the year, and must be in writing; therefore an action cannot be maintained for the breach of a verbal contract made on the 27th of May, for a year's service, to commence on the 30th of June following. *Bracegirdle v. Heald*, 1 B. & A. 722.

A., on the 20th of July, made proposals in writing (unsigned) to B., to enter his service as bailiff for a year. B. took the proposals and went away, and entered into the service on the 24th of July:—Held, that this was a contract on the 20th, not to be performed within the space of one year from the making thereof. *Snelling v. Huntingfield*, 1 C., M. & R. 20; 4 Tyr. 608.

A. entered the service of B. under a written agreement, as follows:—I agree to receive you as clerk in my establishment, in consideration of your paying me a premium of 300*l.*, and to pay you a salary at the following rates, namely, for the first year 70*l.*, for the second 90*l.*, for the third 110*l.*, for the fourth 140*l.*, and 150*l.* for the fifth and following years that you may remain in my employment:—Held, that the agreement was one that by the Statute of Frauds was required to be in writing; that there being a precise stipulation for yearly payments, evidence was not admissible to show, that, at or after the time the letter containing it was sent by B. to A., it was verbally agreed that the salary should be paid quarterly; and that the fact of the payments having usually been made quarterly, did not vary the rights of the parties under the agreement. *Giraud v. Richmond*, 2 C. B. 835; 10 Jur. 360; 15 L. J., C. P. 180.

The plaintiff having been in the defendant's employment as a traveler, entered in October, 1854, into a fresh verbal agreement with the defendant, whereby either party was to be at liberty to determine the agreement by giving to the other three months' notice before the 1st of September, 1855, otherwise the parties were to go on for another twelvemonth from that time:—Held, that this was a contract not to be performed within a year, and therefore was required to be in writing, under the Statute of Frauds. *Dobson v. Collis*, 1 H. & N. 81; 25 L. J., Exch. 267.

The plaintiff agreed on a Sunday to serve the defendant for a year, the service to commence on the Monday. On the Monday, the plaintiff, with the knowledge and consent of the defendant, commenced the service, and received 20*l.* on account:—Held, in an action

in a wrongful dismissal within the year, in which no objection was taken that this was a contract for a year's service to commence on a future day, that the jury might infer a new implied contract on the Monday for a year's service from that day. *Cawthorn v. Cordrey*, 3 L. J., C. P. 152; 13 C. B., N. S. 400.

*Semble*, also, per Willes, J., that a contract made on one day to serve for a year from the following day is not within the Statute of Frauds. *Id.*

### (c) Exemption from Stamp Duty.

**Statutes.**—[By 55 Geo. 3, c. 184, Schedule, lit. "Agreement," a memorandum or an agreement for the hire of any laborer or artificer, manufacturer or menial servant, was exempted from all stamp duty.

So a memorandum or an agreement made between the master and mariners of any ship or vessel, for wages, on any voyage coastwise from port to port in Great Britain was likewise exempt.

By 17 & 18 Vict. c. 83, s. 21, all contracts and agreements entered into in the United Kingdom, for or relating to the service in the colonies or possessions abroad, of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or laborer, were exempted from stamp duty.

By 33 & 34 Vict. c. 97, Schedule, Agreement, an agreement or memorandum for the hire of any laborer, artificer, manufacturer or menial servant, is exempt from stamp duty.]

#### What agreements within the exemption.

A. entered into the following agreement with B.: "A. engages to take charge of the glebe lands of B., his wife undertaking the dairy and poultry, at 15s. a week till Michaelmas, 1850, and afterwards at a salary of 25l. a year, and a third of the clear annual profit, after all expenses of rent and rates, labor, and interest on capital, are paid, on a fair valuation made from Michaelmas to Michaelmas; three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by A., who occupies it as bailiff, in addition to his salary."—Held, that this agreement constituted the relation of master and servant between B. and A., and not that of partners; that A. was not a menial servant, but a laborer; and that the agreement was admissible, though unstamped, as it fell within the exemption in 55 Geo. 3, c. 184, as an agreement for the hire of a laborer. *Reg. v. Wortley*, 2 Den. C. C. 383; 15 Jur. 1187; 21 L. J., M. C. 44.

The plaintiff and the defendant being resident in England, and P. at Havana; and the defendant being a foreign agent, a written agreement was entered into by the plaintiff with the defendant, on behalf and representation of P. of Havana, that the plaintiff would proceed as fireman and stoker on board a steamer, about to leave London for Havana, calling at intermediate ports, to be placed in

the service of P., and would faithfully do the work of fireman or stoker on board the steamer, and obey the orders of the engineers. In consideration of the service the plaintiff was to receive wages at 5l. per month, payable monthly, and 2l. per month for providing himself in provisions. During the outward passage, rations were to be served out to the plaintiff on account of P. The contract to be understood to be in force for one year certain from the date; and should the plaintiff be discharged before that time, three months' wages to be paid in advance, besides finding him a passage home; P. being at liberty to confirm and continue the engagement on the terms stated, or to discharge the plaintiff and to find him his passage back to England; the wages to be payable up to the day of the plaintiff's arrival in England, unless he should be discharged for misconduct; one month's pay to be advanced for the plaintiff's outfit for the voyage.—Held, that the agreement did not require a stamp, being within the exemption of a memorandum or agreement for the hire of any laborer, in 55 Geo. 3, c. 184. *Wilson v. Zulueta*, 14 Q. B. 405; 14 Jur. 366; 19 L. J., Q. B. 49.

An overseer in a printing office is an artificer, within the exemption in the stamp acts. *Bishop v. Letts*, 1 F. & F. 401—Pollock.

### 2. Term of Service or Employment; and how determined.

**What amounts to a yearly hiring.**—A hiring at so much per month is a hiring for a year. *Fauccett v. Cash*, 3 N. & M. 177; 5 B. & Ad. 904.

A general hiring, in the absence of any custom to rebut the presumption, is to be presumed to have been a hiring for a year. *Id.*

A clerk hired at 12l. 10s. per month for the first year, to advance 10l. per annum until the salary is 180l., is hired for at least one year. *Id.*

A general hiring for a year, and so on, particularly of clerks and of respectable servants, can only be put an end to at the end of the current year where no misconduct is imputed. *Beeston v. Collyer*, 4 Bing. 309; 12 Moore, 552; 2 C. & P. 607.

Such a hiring is a hiring for a year, and so on from year to year for so long time as the parties should respectively please, and may be so described in pleadings; and such an implied yearly hiring is not destroyed by the salary being paid monthly, nor is it within the Statute of Frauds. *Id.*

A clerk's salary paid for some years in quarterly, but afterwards in monthly payments, is evidence of a hiring from year to year. *Id.*

An appointment of clerk to a public company was by a resolution which stated the salary to be 200l. per annum, but said nothing as to the period of payment; the clerk acted as such, and was paid several sums of 50l. each, at periods just after the usual quarter days of the year.—Held, that proof of these

facts warranted a declaration in an action for salary, which alleged the contract to be at a salary of 200*l.* per annum, payable quarterly on the usual quarter days. *Ridgway v. Hungerford Market Company*, 4 N. & M. 797; 3 A. & E. 171; 1 H. & W. 244.

A contract to serve, as a reporter to a newspaper, one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties shall respectively please, is a yearly service so long as it lasts, and cannot be terminated except at the end of any current year. *Williams v. Byrne*, 2 N. & P. 139; 7 A. & E. 177; W., W. & D. 535; 1 Jur. 578.

In an action for the breach of such contract, if either party relies upon the existence of a custom authorizing him to determine the contract upon a reasonable notice previous to the end of a current year, such custom must be expressly alleged as a fact on the record, and it is not enough to aver simply that a reasonable notice was given. *Ib.*

S., a proprietor of a weekly newspaper, by a letter to F., an author, agreed that he should write two tales, extending over one year, at 10*l.* per week for each number, to contain about the same quantity as was sent under a former similar engagement, and to receive the first number on the 22d April, 1835, and to continue to receive one number weekly during one year, conditionally that he should not write for any other newspaper published at less than 6*d.* He accepted the engagement, received 20*l.* as a deposit, and wrote regularly for some weeks; then went to Paris, sent an abrupt conclusion of a current tale in a small quantity of manuscript, refused to proceed with his engagement with S., and entered into another engagement with C. S. thereupon stopped his payments to F., and employed another author to conclude the half-finished tale:—Held, first, that the engagement was a yearly engagement, and could not be terminated by F. as a weekly engagement. *Stiff v. Cassell*, 2 Jur., N. S. 348—V. C. W.

Held, secondly, that the condition as to F. not engaging elsewhere was valid. *Ib.*

The rule, that an indefinite hiring is a hiring for a year, is not an inflexible rule of law; it must be considered in connection with the circumstances of the particular case. *Baxter v. Nurse*, 6 M. & G. 935; 7 Scott, N. R. 801; 1 C. & K. 10; 8 Jur. 273; 13 L. J., Q. P. 82. S. P., *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J., Exch. 459.

A. was engaged as editor of a new periodical publication by B., at a salary to be paid weekly. The publication was abandoned by B. soon after its commencement. In an action by A. against B., for dismissing him before the termination of a year, a usage was proved that such a hiring was annual with regard to established periodicals:—Held, that the jury was properly directed to consider whether such usage was applicable to a newly-started publication. *Ib.*

In an action for wrongfully dismissing the editor of a newspaper, the declaration stated

that he was engaged for a year. There was no direct evidence as to the time for which he was engaged:—Held, that he might go into evidence to show a custom for editors of newspapers to be engaged for a year, unless there was an express stipulation to the contrary. *Holcroft v. Barber*, 1 C. & K. 4—Wightman.

The plaintiff was engaged as a clerk by the defendant, a ship-broker, at a yearly salary of 150*l.*, and was paid his wages weekly, and, on leaving the service at the defendant's instance, accepted a month's salary instead of notice. He subsequently re-entered the defendant's service at a yearly salary of 250*l.*, nothing being expressly said as to notice, and no time fixed for the duration of the service, but the plaintiff was paid weekly a sum equal to a week's salary. The plaintiff having been dismissed with a month's notice:—Held, that it was properly left to the jury to say whether the last hiring was on the same terms as the first, and whether the terms of the previous hiring were determined by the acceptance of a month's wages instead of notice. *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J., Exch. 459.

In an action by an assistant surgeon for wages, it was proved that he had served the defendant for nearly half a year, and that payments were made, during that time, on account of wages, but not according to any yearly amount or at any definite period of the year. The plaintiff afterwards fell ill and was taken to an hospital, and after his recovery did not return to his employment, nor did the defendant require him to do so:—Held, that there was no evidence of any hiring for a year, and that the plaintiff was entitled to recover wages on a quantum meruit for the time he served. *Bailey v. Rimmell*, 1 M. & W. 506; 2 Gale, 60.

A count stated, that in consideration that the plaintiff would enter into the defendant's employ, and serve him as servant in husbandry for a certain time, to wit, from a day named till the service should be determined by reasonable notice on either side, at 10*l.* 10*s.* per annum; the defendant promised to retain the plaintiff and pay him the wages, and continue him in the service till such determination; that the plaintiff entered the service, and was always ready to serve, but the defendant discharged him without reasonable cause, and refused longer to retain him:—Held, that proof that the plaintiff was hired generally as a laborer in husbandry did not support this count, such hiring being in law a hiring from year to year. *Lilley v. Elwin*, 11 Q. B. 742; 13 Jur. 623; 17 L. J., Q. B. 132.

Where a servant was hired for a year in the capacity of a clerk, and dismissed without notice:—Held, that he was entitled to recover compensation for the year, and that the fact of his wages being payable monthly was not inconsistent with a hiring for a year, short periodical payments being necessary to persons in that position of life. *Davis v. Mar-*

*all.* 9 W. R. 520; 4 L. T., N. S. 216—*Exch.*

When a clerk is hired at a certain sum per annum simply, the hiring is a hiring for a year, and in the absence of a custom to the contrary, he cannot be discharged before the end of the year. *Fozall v. International Land Credit Company*, 16 L. T., N. S. 637—*Byles*.

The custom must be general, of reasonable antiquity, uniform, and sufficiently notorious that people would make their contracts on the supposition that it exists. *Ib.*

As to dismissal in cases of yearly hiring,—see this title, I, 3.

**Weekly hiring.**—A hiring at two guineas a week for one year is a hiring by the week and not by the year. *Robertson v. Jenner*, 15 L. T., N. S. 514—*Bramwell*.

A entered the service of Messrs. Roe under a written memorandum, as follows: "April 13th, 1871. I agree to accept the situation as foreman of the works of Messrs. Roe, flock and shoddy manufacturers, and to do all that lays in my power to serve them faithfully, and promote the welfare of the firm, on my receiving a salary of 2*l.* per week and house to live in, from the 19th of April, 1871."—*Held*, a weekly hiring from the 19th of April, 1871; and that evidence of a conversation at the time of signing the contract showing that a hiring for a year was intended, was not admissible. *Evans v. Roe*, 7 L. R., C. P. 138; 20 L. T., N. S. 70.

**Hiring of domestic or menial servants.**—The contract between a master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages; subject to the implied condition, that the servant will obey all lawful orders of the master. *Turner v. Mason*, 14 M. & W. 112—*Parke*.

A governess engaged at a yearly salary is not within the rule relating to domestic or menial servants, by which the contract of service may be dissolved upon a month's warning or a month's wages. *Todd v. Kerrieh*, 8 Exch. 151; 17 Jur. 119; 23 L. J., Exch. 1.

A head gardener was engaged on an agreement that he should have yearly wages, and a house to live in rent-free. Several inferior gardeners were subject to his directions, and the house he lived in was not under the roof or a part of the master's dwelling-house. The jury having found that he was a menial servant:—*Held*, that the verdict was right, and that he was consequently liable to be discharged on a month's notice. *Noulan v. Abbat*, 2 C., M. & R. 54; 1 Gale, 72; 5 Tyr. 709.

So a huntsman is a menial servant, and therefore the hiring of a huntsman, though in terms for a year, and upon conditions which can only be fully carried out by a service inuring for the full period of a year, is subject to the ordinary condition that it may be determined by either party at a month's

notice. *Nicoll v. Grenves*, 17 C. B., N. S. 27; 10 Jur., N. S. 919; 33 L. J., C. P. 259; 12 W. R. 961; 10 L. T., N. S. 531.

By a written memorandum of agreement, the plaintiff was "to have 6*s.* a week, three bolls of wheat, to set potatoes for his family's use, to have a cow kept, house and firing, to keep the gardens and pleasure grounds in clean and good order, to assist in the stables, and, when required, at hay and corn harvest, and to make himself generally useful. To enter 12th May, 1838." The defendant dismissed the plaintiff upon a month's warning. In an action by the plaintiff to recover a quarter's wages, as being a yearly servant:—*Held*, that he was a menial servant, and was therefore, by the general rule of law, entitled to a month's notice only; and that the memorandum of agreement contained nothing which showed an intention in the parties to exclude that rule. *Johnson v. Blenkinsopp*, 5 Jur. 870—*Q. B.*

The housekeeper of a large hotel is not a menial servant, and cannot be dismissed on a month's notice in the absence of an express agreement. *Lawler v. Linden*, 10 Ir. R., C. L. 188—*C. P.*

**Determination upon option or notice.**—The defendant having established smelting works at Carthagena, in Spain, offered to employ the plaintiff as foreman, by letter, containing these passages:—"I should require you to enter into an engagement to remain with me for at least three years, at my option; salary 250*l.* per annum. I should require you to visit some of the best smelting works in England before you come out." The plaintiff accepted the employment, and on the 1st of February, 1850, proceeded to visit smelting works, and was so occupied until the 15th, when he departed for Carthagena, and arrived there on the 6th of March. He continued in the service of the defendant until the 15th of February, 1851, when he was discharged. He had been paid his first year's salary, as commencing on the 1st of February, 1850. In an action to recover the second year's salary:—*Held*, first, that the term "at my option" did not enable the defendant to put an end to the service at his will, but that it was a yearly hiring, with an option for the defendant to require the plaintiff's service for three years, or to put an end to it at the expiration of the first, second or third year; and secondly, that the service and the salary commenced when the plaintiff first proceeded to visit the smelting works in England. *Down v. Pinto*, 2 C. L. R. 547; 9 Exch. 327; 23 L. J., Exch. 103.

An agreement was entered into in the following terms:—"A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum, also, provided at the end of the year B. finds A. has done sufficient business to justify him in recompensing, by making up his salary to 180*l.*, to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*" It being proved at the trial, that, by



a general custom of the trade, a yearly hiring is determinable by a month's notice at any time:—Held, that there was nothing in the proviso to exclude the application of the custom to the particular case. *Parker v. Ibbetson*, 4 C. B., N. S. 346; 4 Jur., N. S. 536; 27 L. J., C. P. 236.

The defendant agreed with the plaintiff that he should serve him, as his commercial traveler, by a contract which contained these words: "This agreement to be binding between the parties for twelve months certain from the date thereof, and continue from time to time until three months' notice in writing be given to either party to determine the same."—Held, that the employment might be determined by either party by a three months' notice, ending with the first twelve months. *Brown v. Symons*, 6 Jur., N. S. 1079; 29 L. J., C. P. 251; 8 C. B., N. S. 208; 8 W. R. 460.

In 1846, the defendant entered into the service of the plaintiff, a solicitor at Amersham, as his clerk, and, in December, 1849, the plaintiff put an end to the service by a notice, to expire on the 25th March, 1850. On the 7th January, 1850, the defendant wrote to the plaintiff, asking to be paid his salary to Lady-day, and to be at once discharged, in order that he might go to London, and remain there until he could meet with another engagement. To this letter the plaintiff replied, assenting to the defendant's proposal, saying: "Of course I should have expected your services if you were in Amersham, but as you request me at once to pay your salary to Lady-day, in order that you may go to town until you meet with another engagement, I consent to your request;" and on the following day the plaintiff asked the defendant whether, if he paid him up to the 25th March, he intended going to town and remaining there till he got another engagement, to which the defendant answered that he did; whereupon the plaintiff said, "on these conditions I am prepared to pay your salary at once up to Lady-day; but if you remain in Amersham, I shall expect your services," and accordingly paid him the full quarter's salary. The defendant went to London, but shortly afterwards, and before Lady-day, returned to Amersham at the request of a client of the plaintiff's, in whose employ he remained, giving professional advice:—Held, that there was no evidence of a contract on the part of the defendant to go to London and remain there, or to forbear to give his services in Amersham to any person other than the plaintiff, or to render service to the plaintiff if he should return to Amersham. *Daniels v. Charsley*, 11 C. B. 739.

A defendant by deed appointed the plaintiff auditor of his estates at a yearly salary, and in consideration the plaintiff covenanted to give up his practice as a barrister, if required so to do, and not to accept any other office or employment whatever so long as he should hold the office. The defendant covenanted to pay the plaintiff the salary

during so long as he should hold the office; and in case the defendant should revoke the appointment without adequate and just cause (to be determined as thereafter mentioned), that the defendant should pay him a retiring pension of 1,000*l.*; and the adequacy and justice of the cause of any revocation by the defendant of the appointment should be determined by W.:—Held, that the defendant had no power of dismissing the plaintiff without giving him a right to the pension of 1,000*l.* a year, until the defendant had previously ascertained, by a reference to W., that he had adequate and just cause to revoke the appointment. *Lovndes v. Stamford and Warrington*, 16 Jur. 903; 21 L. J., Q. B. 371; 13 Q. B. 425; *S. C.* in Exch. Cham., 16 Jur. 973.

Held, also, that the jurisdiction of the court to enforce payment of the retiring pension was not ousted, and that the plaintiff might declare for it without showing that there had been any determination by W., or any excuse for his not having obtained such determination, or that a reasonable time for obtaining such determination had elapsed. *Id.*

P., in 1074, devised estates for support of a school for parish children, and directed that the trustees, with consent of the parishioners, should provide and keep an honest schoolmaster; and if at any time the schoolmaster should be idle, negligent, or abusive of his scholars, the trustees and parishioners should have power to dismiss him. On a vacancy occurring, the trustees resolved that they would give 60*l.* a year to a master, he finding certain things and paying for the service of a seamstress, or 55*l.*, if the trustees were to find the seamstress; that the appointment was to be for one year, commencing on the 25th of March next, and liable to be terminated by either party giving three months' notice; and that they would recommend the plaintiff for the post. At a vestry meeting of the parishioners, the latter adopted the recommendation, and appointed the plaintiff schoolmaster, subject to the regulations of the trustees. On the 17th of April the trustees wrote to the plaintiff, that they would pay him at the rate of 55*l.* per annum, so long as, by mutual consent, he should retain the office of master; the appointment to be subject to termination by three months' notice from either party. The plaintiff wrote back, assenting to hold on the terms mentioned. The plaintiff had entered into the office in March, previously, and performed the duties. On the 1st of March, 1854, at a meeting of the trustees, a resolution was adopted, by a majority, that a notice should be given to the plaintiff to quit his office at the end of three months from the 25th of March, 1854, and a notice to that effect, signed by a majority of the trustees, was forthwith served on him. Notwithstanding the notice, he continued to act as schoolmaster until the 25th of March, 1855, and sued a trustee for the three quarters' salary ending at that date:—Held, that the trustees, without the assent of the

mariners, had power to give the notice to determine the appointment, as the plaintiff's contract was with them alone; that the notice need not be one that required the plaintiff to quit at the end of a current year, but that his holding might be terminated by a three months' notice to quit at any period of the year; consequently, that the plaintiff was not entitled to recover the three quarters' salary which he claimed. *Ryan v. Jenkinson*, 25 L. J., Q. B. 11.

When the hiring is expressly for a term certain, a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract. *Peters v. Stately*, 15 L. T., N. S. 275—Q. B.

By an agreement between brewers and their traveler, the latter was engaged at a salary of 200*l.* a year, payable fortnightly, and it was stipulated "that the agreement between the parties shall be for twelve months certain, after which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice in writing." But if the employers "shall be desirous of terminating this agreement without notice, after twelve months, or before any notice shall have expired, they may do so on payment of 50*l.*:"—Held, per Bramwell, B., and Pigott, B. (Kelly, C. B., dissentiente), that the agreement ceased at the end of the first twelve months unless the parties allowed the engagement to continue beyond that time, in which event only did notice, or payment in lieu thereof, become necessary to determine it. *Langton v. Carleton*, 43 L. J., Exch. 54; 9 L. R., Exch. 57; 20 L. T., N. S. 650.

The plaintiff, jointly with L., was a commission agent for the defendants, wine and spirit merchants, under an agreement, by which they were to pay a certain commission on sales; a salary of 4*l.* per week; 18*s.* a day traveling expenses; and 15*l.* per annum for an office; the agreement to stand good for six months, and six months' notice from either side to terminate the agreement. The agreement was entered into on the 13th of June, 1866. Shortly afterwards, L. died; and the defendants, on the 11th August, 1866, wrote a letter in which they said: "The death of Mr. L. alters our arrangements altogether. You are at liberty to throw up our agency altogether, if you wish it; and to make all things in order, it would be as well that we hereby give you notice to terminate our agreement in six months from this date; this will give us the power to do so if we wish. We say not we shall do so; time and your own exertions will be the test:"—Held, that the engagement could be determined at any time by six months' notice, and that the letter was a sufficient notice to determine the engagement. *Keon v. Hart*, 2 Ir. R., C. L. 189.

A master mariner accepted the command of a ship under a written agreement, as follows:—"I hereby accept the command of the ship City Camp, on the following terms: salary to be at and after the rate of 180*l.* sterling per

annum. Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses traveling home. Wages to begin when captain joins the ship:"—Held, that the mariner could not (except under unusual circumstances) be dismissed without a reasonable notice. *Green v. Wright*, 1 L. R., C. P. Div. 591; 85 L. T., N. S. 839.

**Determination by entering into new contract.**—A contract, by which a servant hires himself to a master as a footman and a groom, is not dissolved by a subsequent contract, by which he engages to bind himself to serve in a different character at higher wages and in a foreign country, although the servant accompanies his master into such foreign country; the service performed abroad being the same as that originally contracted for. *Rez v. Buckingham*, 3 N. & M. 72.

On a contract to employ the plaintiff on board a particular ship on certain specified voyages, it is a breach to sell the ship before those voyages are completed without procuring him similar employment on board that particular vessel; and the mere acceptance of money on account of wages on board another ship, which was to sail for a different voyage, and on board which the plaintiff did not enter, is not conclusive evidence either of accord and satisfaction, or of a substituted contract. *Driscoll v. Australian Royal Mail Steam Navigation Company*, 1 F. & F. 458—Campbell.

**Determination by death.**—When a contract is for personal services, the death of the person who is to render the services determines the contract for the future, but it does not rescind it ab initio, or take away any right of action already vested. *Stubbs v. Holywell Railway Company*, 15 W. R. 869; 16 L. T., N. S. 631; 30 L. J., Exch. 166; 2 L. R., Exch. 811.

A contract of service as a farm bailiff is put an end to by the death of the master, unless the contrary is stipulated for by the terms of the contract. *Farrow v. Wilson*, 38 L. J., C. P. 326; 4 L. R., C. P. 744; 20 L. T., N. S. 810; 18 W. R. 43.

### 3. Grounds of Dismissal.

**What constitutes sufficient cause for dismissal of servant.**—A clerk and traveler, hired by the year, assaulted his employer's maid-servant, with intent to ravish her:—Held, to be good cause for his dismissal without any notice. *Atkin v. Acton*, 4 C. & P. 208—Tenterden.

If a servant, hired for a year, refuses to obey his master's orders, the latter is justified in dismissing him before the end of the year, and such servant cannot recover his wages for the time he served. *Spain v. Arnott*, 2 Stark. 256—Ellenborough.

Being the father of a bastard child is a good cause of a discharge by a master. *Rea v. Welford*, Cald. 57.

If a person, hired on an annual service as a clerk, to conduct an establishment for his master, sets up a claim to be a partner, although in a respectful manner and bonâ fide, it is a sufficient cause for the master to dismiss him without notice. *Amor v. Fearon*, 1 P. & D. 898; 9 A. & E. 548; 2 W., W. & H. 81.

To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, or, otherwise, willful disobedience or habitual neglect. *Callo v. Brouncker*, 4 C. & P. 518—Parks.

But if a master carpenter sends his men from London to work at a gentleman's house in the country, he may dismiss them for improper conduct, although it does not amount to either moral misconduct, willful disobedience, or habitual neglect. *Read v. Dunsmore*, 9 C. & P. 588—Coleridge.

In an action for wrongfully discharging the plaintiff and his wife from the service of the defendant, a plea that the wife of the plaintiff obstinately refused to work for him, wherefore he discharged them, is bad on general demurrer. *Jaquot v. Bourra*, 7 D. P. C. 848; 3 Jur. 776—Exch.

A person was employed as a traveler to a distillery company at a yearly salary, being bound by the terms of his agreement to remit immediately all sums collected. He sold some of the company's wines to a brothel-keeper, and neglected to remit immediately sums of money collected by him:—Held, that either circumstance was sufficient to justify his dismissal without notice. *Blencarn v. Hodges' Distillery Company*, 16 L. T., N. S. 408—Byles.

A clerk to a public company, who was hired at a yearly salary, having received on the 29th March a communication that it was the intention of the directors to make a new appointment to the situation of clerk, entered, on the 11th of April, on the minutes, a protest to an entry of that communication, together with an order for calling a special court on the 17th April, for the purpose of appointing a fit person to be clerk. On the 17th April the directors, by a resolution, declared the clerk to be displaced from his situation. It was put as a question to the jury, in an action for his salary, whether the entry of the protest was a sufficient ground to justify the dismissal, and they found that it was. A verdict having been found for the plaintiff, the court made absolute a rule for entering a nonsuit. *Ridgway v. Hungerford Market Company*, 4 N. & M. 707; 3 A. & E. 171; 1 H. & W. 244.

To an action against the proprietors of a manufactory, for refusing to employ the plaintiff as manager, pursuant to agreement, and discharging him from their service before the period mentioned in the agreement, they pleaded, that the plaintiff so wrongfully,

disobediently and unskillfully conducted himself as such manager, that they suffered and sustained great loss:—Held, that, in order to support such a plea, it was necessary to show not only disobedience, but such disobedience as occasioned a loss; and, there being no evidence of any loss, that the plea was not supported. *Cussons v. Skinner*, 11 M. & W. 161; 12 L. J., Exch. 847.

Action by a domestic servant, for discharging her without a month's notice or a month's wages. Plea, that the plaintiff requested the defendant to give her leave to absent herself from his house during the night; that the defendant refused such leave, and the plaintiff, against his will, absented herself. Replication, that the mother of the plaintiff was seized with sudden and violent sickness, and believing herself in imminent peril of death, had, requested the plaintiff to visit her; whereupon the plaintiff requested the defendant to allow her to absent herself from his house until the following day, for the purpose of enabling her to visit her mother in her sickness; and, because the defendant, without any reasonable cause, refused such assent, the plaintiff, for the purpose of visiting her mother, left his house:—Held, that the plea was good, and the replication bad. *Turner v. Mason*, 2 D. & L. 898; 14 M. & W. 112; 14 L. J., Exch. 311.

A. was engaged by B. as clerk, under a contract of hiring for two years, to conduct the business of a shipping agent at Southampton. In the course of such employ it was the duty of A. to pay freight, dock dues, &c., to meet which B. remitted the necessary funds. A. wrote to B. for a remittance of 140*l.*, inclosing an account of the purpose for which it was required, one of them being the payment of 30*l.* for salary due to himself. Ten days afterwards B. sent A. 100*l.*, inclosed in a letter, directing him to apply the money for business purposes. A. having appropriated 30*l.* of the money in satisfaction of his salary, B. discharged him. In an action by A. against B. for breach of the contract of hiring, B. pleaded a plea justifying the discharge of A. on the ground of his having wrongfully and improperly misappropriated the money remitted, and wrongfully and improperly disobeyed B.'s orders to apply the money to business purposes. The judge left it to the jury to say whether the plaintiff had been guilty of any wrongful and improper misappropriation of the moneys intrusted to him by the defendant, or of any wrongful or improper disobedience of orders:—Held, that this was a proper direction, and that the judge was not bound to tell the jury that it was not necessary to justify the dismissal of the plaintiff that he should have been guilty of any moral delinquency. *Smith v. Thompson*, 8 C. B. 44; 19 L. J., C. P. 314.

Held, also, that in awarding a sum equal to twelve months' salary, the plaintiff having been discharged after about one quarter's service, the jury had not given excessive damages. *Id.*

If a servant in the house of his master, at a late hour of the night, is violent in his manner and is making a great noise and abuses his master, and lays hold of him and struggles with him, the master will be justified in giving the servant into the custody of a policeman, to be dealt with according to law. *Shaw v. Chairitie*, 2 C. & K. 21—Campbell.

The defendant had been the clerk of the plaintiffs under an agreement for 140l. a year, determinable by three months' notice or payment of three months' salary, and had been dismissed without notice. In a plaint in a county court for money had and received, he claimed to set off three months' salary, which claim was disputed on the ground that his conduct to the plaintiffs justified his immediate dismissal:—Held, first, that whether his conduct justified his immediate dismissal was a question of fact. *East Anglian Railway Company v. Lythgoe*, 10 C. B. 727; 2 L. M. & P. 221; 20 L. J., C. P. 84.

Held, secondly, that the dismissal, for whatever cause, was not wrongful, inasmuch as it was authorized by the terms of the agreement. *Ib.*

Held, thirdly, that as the plaintiffs, upon such dismissal, became liable immediately to pay the defendant three months' salary, his claim for such salary was the proper subject of a set-off. *Ib.*

A declaration stated that it was agreed between the plaintiff and the defendant that the plaintiff should serve the defendant faithfully for three years in his business of a manufacturer of lard, and alleged as a breach the wrongful dismissal of the plaintiff before the expiration of that period:—Plea, that the plaintiff did not serve the defendant faithfully, as in the agreement stipulated. At the trial it appeared that bladders are essential in the business of a manufacturer of lard; and that the plaintiff, without the knowledge of the defendant, entered into a contract with C. for the purchase of several thousand bladders, which were invoiced and delivered to G., who allowed the plaintiff, from time to time, to have as many as were required for the defendant's business. C. having made a claim upon the defendant in respect of the bladders, he dismissed the plaintiff:—Held, first, that there was no misdirection in telling the jury that, so far as it was matter of law, the defendant was justified in dismissing the plaintiff. *Horton v. M'Murtry*, 5 H. & N. 667; 29 L. J., Exch. 260; 8 W. R. 295.

Held, secondly, that the facts were admissible in support of the plea, that the plaintiff did not serve the defendant faithfully. *Ib.*

In an action for the wrongful dismissal of a newspaper critic engaged for a year:—Held, that mere angry expressions, which neither support a plea of justification nor of rescission by mutual assent, and that an isolated instance of neglect or insolence, would be no ground of dismissal; at all events, unless the insolence was such as to be incompatible with the continuance of the employment. *Edwards v. Levy*, 2 F. & F. 94—Hill.

The bankruptcy of an agent is not per se a defense to an action for wrongful dismissal, even though the agent is to receive moneys on account of his principal. The fitness of the agent to perform his duties is a question for a jury. *McCall v. Australian Meat Co.*, 19 W. R. 183—Exch.

An artisan who has been engaged for a term to work in the art which he practices, upon his representing himself to possess the requisite skill, may, upon his proving to be incompetent, be discharged by his employer before the end of the term for which he was so engaged. *Harmer v. Cornelius*, 5 C. B., N. S. 236; 4 Jur., N. S. 1110; 28 L. J., C. P. 85.

A. was appointed surveyor or agent of B. for two years and a half, at a salary of 200l. per annum, payable quarterly, and he was, in addition, to receive a commission of 5 per cent. upon the first year's rent for every house which he should let on B.'s estate. The agreement contained a stipulation "that under no pretense whatsoever should A. contract any debt in the name of B., or be considered as his agent to receive any money on his account," and a proviso, that, in the event of a breach, the agreement should immediately cease and determine. To an action against B. for dismissing A. before the expiration of the term, he pleaded that A., while he was such surveyor, contrary to the agreement, and without his knowledge and authority, and against his will, received from divers persons divers sums of money then due and payable from them to B., as and under the pretense of being his agent in that behalf:—Held, that the receipt by A. of deposit money from persons to whom he had agreed to let houses on account of B., was a breach of the agreement, and a cause of dismissal, and that proof that he had done so sustained the plea. *Bray v. Chandler*, 18 C. B. 718.

The defendant pleaded to an action for dismissing a governess contrary to a contract between them, that she, intending thereby to induce the defendant to enter into the contract, concealed from him a fact material to her qualification as such governess, and material to be known by him in engaging her as such governess, and entering into such contract, viz., that she was a divorced woman; and she thereby induced the defendant to enter into the contract:—Held, that this plea was bad. *Fletcher v. Krell*, 28 L. T., N. S. 105; 42 L. J., Q. B. 55.

**Master's knowledge of facts justifying dismissal.**—Where there has been disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by showing that the fact existed, and that he knew it, justify such discharge; but, semble, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of

it. *Cussons v. Skinner*, 11 M. & W. 161; 12 L. J., Exch. 347. See *Spotwood v. Barrow*, 5 Exch. 110; 19 L. J., Exch. 226.

If an employer discharges his servant, and at the time of the discharge a good cause of discharge in fact exists, the employer is justified in discharging the servant, although at the time of the discharge the employer did not know of that cause. *Willets v. Green*, 3 C. & K. 59—Alderson.

To an action for breach of an agreement to continue to employ the plaintiff as an accountant, the defendants pleaded, in one plea, that the plaintiff received money for which he did not account; that he made improper payments with the defendants' money; that he made false entries and representations, and refused to obey his employers' commands; wherefore they discharged him:—Held, that the defendants were entitled to a verdict on the plea, though they proved only that the plaintiff had made a false entry and representation, and though the reason assigned for his discharge was disrespect towards his employers. *Baillies v. Kell*, 4 Bing. N. C. 638; 6 Scott, 370; 1 Arn. 245.

As to effect of dismissal upon right to wages, —see this title, II., 2, b.

As to punishment of misconduct or offenses by servants, —see this title, IV., 3.

## II. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF MASTERS AND SERVANTS.

### 1. Nature of Services; and the Relation, in General.

#### What services may be required by master.]

—When a workman is hired for a year to work at a particular trade, under a written agreement, which says nothing as to any periods of absence allowed to the workmen, parol evidence may be given that it is the custom of the particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work without the permission of their masters. *Reg. v. Stoke-upon-Trent*, 8 Jur. 34; 13 L. J., M. C. 41; 5 Q. B. 303.

P., who was known to be acting in the capacity of a lace buyer, was engaged by M., a lace dealer, under the following memorandum:—"M. agrees to engage P. for the term of three years from Monday, the 15th of August, 1859, at the yearly salary of 500*l.*, payable monthly, P. to give the whole of his services, and to be advised and guided by M. if necessary." In an action by P. against M. for a wrongful dismissal pending the term, on the alleged ground of disobedience of lawful orders:—Held, that evidence was admissible to show the capacity in which P. was engaged, viz., as lace buyer; and that it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed, were such as a person in his position was bound to obey. *Price v. Mouat*, 11 C. B., N. S. 508.

A declaration stated that on the 7th July, 1848, it was agreed between the plaintiff and the defendant that the defendant and his wife should from that day, for the term of three months, appear and perform as equestrians on the stage, and in the ring, in all performances and entertainments which might be produced at Astley's Amphitheater, or elsewhere, under the direction of the plaintiff, in such parts and in manner as the plaintiff should require, and should attend all rehearsals and calls when so required, for a certain weekly salary stated; and alleged for breach, that, although the plaintiff had an establishment at Peebles, in Scotland, under his direction, for equestrian performances and entertainments, and although under and in pursuance of the agreement, and during the subsistence of it, and before the expiration of the term of three months, the plaintiff gave notice to the defendant that he, the plaintiff, required the defendant and his wife to join the plaintiff's establishment at Peebles, and although a reasonable time had elapsed after the giving of the notice, and before the commencement of the suit, for the defendant and his wife to join the establishment at Peebles, for the purpose aforesaid, yet that the defendant and his wife would not, when required, or at any time afterwards, join the establishment of the plaintiff at Peebles, or appear or assist in the performances and entertainments to be produced there, but refused and neglected so to do:—Held, that the promise to appear in any place under the direction of the plaintiff, in the performances described, in such parts and manner as the plaintiff should require, and to attend all calls and rehearsals, involved an engagement so to join an establishment of the plaintiff for equestrian performances, as to be ready to accomplish the objects of the requisition, and a refusal to assist in such performances was sufficiently alleged to show a breach of the defendant's contract. *Batty v. Melillo*, 10 C. B. 282.

Held, also, that it sufficiently appeared that the performances at which the defendant and his wife were required to assist were performances of the description contracted for; that the absence of an averment that a reasonable time had elapsed after the notice, and before the expiration of the three months, was obviated by the statement in the declaration that the writ issued on the 23d August, 1848, and by the averment that such time had elapsed before the suit; and that the breach, substantially showing an entire refusal of the defendant to perform his contract, disclosed a good cause of action. *Id.*

**Rights of servant in respect of his own services.]**—A servant while in his master's service may solicit business from his customers for himself when his service is at an end, and he sets up on his own account. *Nichol v. Martyn*, 2 Esp. 732—Kenyon.

If a servant, while in the employ of his master, makes an invention, that invention



belongs to the servant, and not to the master. *Blackham v. Elsee*, 1 C. & P. 538; R. & M. 87—Abbott.

As to servants absenting themselves,—see his title, IV., 3.

**Servant's tenancy in premises of master.]—**A servant occupying a house cannot be said to hold it as servant, if it is not the master's house. *Reg. v. Lynn*, 8 A. & E. 879; 3 N. & P. 411.

A servant, who is allowed the use of premises belonging to his master, in order to enable him more effectually to perform the duties of his place, has thereby conferred on him no estate in the premises, and may be turned out at the pleasure of his master. *White v. Bayley*, 10 C. B., N. S. 227; 7 Jur., N. S. 948; 30 L. J., C. P. 253.

Agreement, by which, after reciting that the defendant was in possession of a messuage and premises whereon the sale of beer had been for some time past carried on by U. for and on the defendant's account, and that the plaintiff was desirous of carrying on such trade and business for the defendant, it was agreed that the plaintiff should from the date thereof enter upon the premises, and carry on thereon such trade or business for the defendant, in the place and stead, in the same manner, and with and upon the same privileges and terms as U. had theretofore done, until the agreement should be determined by the notice thereafter mentioned; that all the beer to be sold and consumed on the premises should be had and taken by the plaintiff from the defendant, and that the plaintiff should not part with the trade or the occupation of the premises without the license of the defendant; and that whenever either party should be desirous of determining the agreement, the plaintiff should, on receiving a month's notice in writing, without being paid any sum of money or consideration, quit and deliver up the trade and possession of the premises; and that the plaintiff should be at liberty to leave the trade and quit the occupation of the premises on giving one month's notice in writing:—Held, that the agreement did not create any tenancy between the plaintiff and defendant, but the occupation of the plaintiff was as servant to the defendant. *Mayhew v. Suttle*, 4 El. & Bl. 347; 1 Jur., N. S. 303; 24 L. J., Q. B. 54—Exch. Cham.

## 2. Wages or other Remuneration.

### (a) Right of Servant to Compensation, in General.

**Contracts for payment, generally.]—**Service, however long continued, creates no claim for remuneration without a bargain for it, either express or implied from circumstances showing an understanding on both sides that there should be payment. *Reece v. Reece*, 1 F. & F. 280—Martin.

So, when services have been rendered without any express contract for wages, but with

board and lodging, or other benefits for the party serving, a contract to pay for such services is not to be implied. *Foord v. Morley*, 1 F. & F. 496—Martin.

A servant who comes over from the West Indies, where he has been a slave, and who continues in the service of his master in England without any agreement for wages, is not entitled to any, unless there has been an express promise. *Alfred v. Fitzjames*, 3 Esp. 3—Kenyon.

A. having performed gratuitously services for B., received from him a promissory note, with an understanding that he would accept it not only as a gift for what was past, but that it should be a remuneration for future services to be rendered as long as B. should require them. A. continued to perform the services until B.'s death, when he sued B.'s executors upon the note:—Held, that as there was no contract binding A. to perform future services, there was no consideration. *Hulse v. Hulse*, 17 C. B. 711; 25 L. J., C. P. 177.

The plaintiff wrote to the defendant as follows:—“I agree to accept the appointment of secretary of the Lancashire Cotton Mill Company, upon the following terms, viz.: first, a salary of 300*l.* per annum, commencing at the present date, if the company be completely registered, and put into operation; if not, I shall be satisfied with any remuneration for my time and labor you may think me deserving of, and your means can afford.” The defendant wrote in answer accepting the terms, and adding, “It is distinctly agreed and understood, that if the company is not formed and carried out, that part of your letter which alludes to your salary be null and void, and that at the expiration of three months it is entirely left to me to give unto you such sum of money as I may deem right, as compensation for labor done, in the event of the company not being carried out.” The plaintiff rendered some service, but the company was never formed:—Held, that there was no contract upon which the plaintiff could recover any part of the salary. *Roberts v. Smith*, 4 H. & N. 315; 28 L. J., Exch. 164; 33 L. T. 320.

If A. agrees to serve B. as an apothecary's assistant, at such salary as C. should think reasonable, and it appears that no application has been made to C. to fix any salary, A. cannot recover anything for his services. *Owen v. Bowen*, 4 C. & P. 93—Tenterden.

A party entered into the service of another under the following contract:—“I hereby agree to enter into your service as a weekly manager, to commence from next Monday. The amount of payment I am to receive I leave entirely to you:”—Held, per Alderson and Maule, dissentiente Parke, that he was entitled to recover a reasonable remuneration for the services performed by him. *Bryant v. Flight*, 5 M. & W. 114; 2 H. & H. 84; 3 Jur. 681.

Commissioners appointed under an act of parliament to pave and light a parish, were empowered to appoint officers at such salaries

as they should think reasonable, and to remove such officers and appoint others. In some sections of the act the officers were spoken of as employed by the commissioners. The commissioners were empowered to make rates, which were vested in them, and they were directed to apply the moneys which should come to their hands under the act in paving and lighting the parish, and carrying the several purposes of the act into execution;—Held, that an action did not lie against them by one of their officers for arrears of salary. *Bogg v. Pearne*, 2 L. M. & P. 21; 10 C. B. 534; 20 L. J., C. P. 99.

An agreement by which a master promised his servant, in addition to his ordinary wages, a present of 20*l.*, the services to be at all events till the end of one year, was renewed in all its parts from year to year, by the servant having continued several years, and nothing being said to the contrary by either party:—Held, that the 20*l.* was due for every year of the service. *Manfield v. Scott*, 1 C. & F. 819.

The owner of a house desiring to make alterations, employed an architect to prepare plans. The architect having done so, employed the plaintiff, a surveyor, to take out the quantities, which were lithographed, and sent to various builders—including the defendant and his son, who were in partnership—to invite tenders, the circular informing them that the builder whose contract was accepted should pay the plaintiff's fees. The defendant and his son had themselves, previously to the employment of an architect, prepared a plan for the owner, but one with which he was not satisfied. The tender of the defendant and his son was the lowest, but, it being greatly in excess of the expenditure contemplated by the owner, the plaintiff prepared a bill of reduction, but this reduced plan the owner also considered too expensive, and then employed the defendant (whose son had since died) to execute a modification of the original plan prepared in his office. The works were eventually executed by the defendant under a contract, in which it was agreed between the owner and the defendant that the defendant should not be liable for the plaintiff's fees. The plaintiff brought an action for his fees against the defendant, relying on a custom of the building trade, by which the builder whose tender is accepted, or who is employed to carry out the plans, or any modification of them, is directly liable for the surveyor's fees, the owner being liable, if the work is abandoned altogether, or he adopts an entirely independent plan. Evidence to support this custom was given, but one of the plaintiff's witnesses stated that, in his opinion, the liability depended on the agreement between the owner and the builder. The defendant's foreman stated that the works were carried out according to the defendant's own original plan, and that the plaintiff's calculations were not used at all for them. The plaintiff's witnesses stated that there was the strongest similarity be-

tween the work as carried out and the plaintiff's reduced plan:—Held, that the plaintiff was not entitled to recover. *Taylor v. Hall*, 4 Ir. R., C. L. 467—C. P.

**Agreements to pay commissions, expenses, &c.; mode of computation.**—On a contract to pay a traveler by commission, no implication arises of a yearly hiring, nor without an express and a clear stipulation is there any obligation to pay the commission on orders from customers originally obtained by the agent, but sent after he has ceased to be so. *Naylor v. Yearsley*, 2 F. & F. 41—Wightman.

A written agreement between A. and his traveler provided for the payment of the traveling expenses of the latter, but did not lay down any mode in which they should be ascertained and stated. Before the agreement the traveler had been in the habit of stating after each journey those expenses as a gross sum, omitting all details, and this practice continued for some years after it:—Held, that a contract so to state and accept the amount of those expenses was to be implied from this course of conduct, and that the employer had no power to determine it during the stipulated term. *Hunter v. Belcher*, 10 L. T., N. S. 548—L. J.

The manager of a company was to receive as remuneration for his services a fixed salary and a moiety of the net profits on all sums realized on certain contracts:—Held, that he was entitled to a moiety of the profits on such contract, deducting only the expenses necessary on account of such contract, but not deducting any of the expenses incidental to the management of the company. *British Columbia and Vancouver Island Spar, Lumber, and Saw Mill Company, In re, Stamp's Claim*, 25 L. T., N. S. 653.

The defendant, in 1858, agreed that the plaintiff should act as the manager of his works, and should receive in each year  $7\frac{1}{2}$  per cent. of the profits of the business, to be made up to 500*l.* in any year in which the share of the profits should be less than that sum. In the same year a valuation of the buildings, stock, plant and good-will was made. In 1864 the defendant sold the buildings, stock and business at an increase over the valuation of 47,916*l.* In taking the accounts under this agreement:—Held, that the defendant was not entitled to charge the profit and loss account in every year with interest on his capital, nor with interest on old debts, nor with 500*l.* in respect of the plaintiff's salary. *Rishton v. Grissell*, 5 L. R., Eq. 326.

Held, also, that the defendant was entitled to charge the profit and loss account in every year with sums representing the depreciation arising from the running out of the lease, and the waste of plant and machinery. *Ib.*

Held, also, that the plaintiff was not entitled to treat as profit of the year in which the property was sold, the excess of the amount realized by the sale over the estimated value; but that the estimated value of stock

**first set down** must run through the whole account; the annual depreciations being calculated on that constant quantity. *Id.*

**Not apportionable.**—The salary of an auditor and a superintending manager of an estate holding office during the joint lives of the employer and himself, is not a payment apportionable under 4 & 5 Will. 4, c. 22, s. 2. *Lowndes v. Stamford and Warrington*, 18 Q. B. 425; 16 Jur. 903; 21 L. J., Q. B. 371.

**Bequests to servants.**—A bequest of a year's wages to each of the testator's servants, over and above what may be due to them at the time of the testator's decease, applies to such servants only as are usually hired by the year. *Booth v. Dean*, 1 Mylne & K. 560.

A testator gave to each person as a servant in his domestic establishment at the time of his decease, a year's wages beyond what should be due to him or her for wages:—Held, that a head gardener, who lived in one of the testator's cottages, and was not dieted by the testator, was not entitled to a year's wages under the will. *Ogle v. Morgan*, 1 De G., M. & G. 859; 16 Jur. 277. S. P., *Vaughan v. Booth*, 16 Jur. 808—R.

A bequest of a year's wages to each of the servants of the testator living with him at his decease, who should then have lived three years in his service, does not exclude servants of the testator living in a different house from that in which the testator lived, but excludes servants not hired by the year; and, therefore, a gardener, employed at weekly wages (although paid at irregular intervals), is not entitled to the benefit of the bequest. *Blackwell v. Pennant*, 9 Hare, 551; 16 Jur. 420.

A master bequeathed an annuity to his servant Sarah, "provided she shall be in my service at the time of my decease," and a few days before his decease he, without cause, dismissed her from his service, and at his death she was not in his service:—Held, that she was not entitled to the legacy. *Darlow v. Edwards*, 1 H. & C. 547; 9 Jur., N. S. 336; 32 L. J., Exch. 51; 10 W. R. 700; 6 L. T., N. S. 905—Exch. Cham.

#### (b) Dismissal or other Termination of Employment; Forfeiture of Wages.

**Right to compensation upon dismissal or discharge.**—If a master turns away a servant without a previous notice or warning, the servant is entitled to a month's wages. *Robinson v. Hindman*, 8 Esp. 235—Kenyon.

Except where there is some fault or misconduct to warrant it. *Id.*

The law founded upon usage, which justifies the discharge of domestic servants on giving a month's notice, though there was a yearly hiring, does not apply to a person in the situation of a clerk to an army agent, receiving a salary of 500*l.* a year. *Beeton v. Collyer*, 4 Bing. 309; 12 Moore, 552; 2 C. & P. 607.

The custom of putting an end to a service by giving a month's warning, or paying a

month's wages, only holds in the case of menial servants. *Brozham v. Wagstaffe*, 5 Jur. 845—Exch.

Where a servant, under a general hiring, at the rate of so much per annum, is dismissed for misconduct, he is not entitled to any portion of the wages of the current year. *Turner v. Robinson*, 2 N. & M. 829; 6 C. & P. 15; 5 B. & Ad. 789.

So, although the master has previously recovered damages against him for the same act of misconduct. *Id.*

Where a yearly servant is dismissed by his master before the year is expired, for a cause which in law is sufficient to justify such dismissal, he cannot recover any wages; even pro rata for such a period as has elapsed before his dismissal. *Ridgway v. Hungerford Market Company*, 4 N. & M. 797; 3 A. & F. 171; 1 H. & W. 244.

Where a justifiable cause of dismissal exists, it is sufficient to prevent the recovering of wages, though the servant might not in fact have been dismissed upon that ground; and it is not necessary that the cause relied on in answer to an action for wages should have been stated at the time of the dismissal. *Id.*

A domestic servant discharged without reason is entitled to the wages accruing up to the time of her discharge, and to a calendar month's wages in addition, but not to board wages for the month. *Gordon v. Potter*, 1 F. & F. 644—Hill.

The plaintiff agreed with the defendant to enter the service of the latter, a railway contractor, as general superintendent of station buildings to be erected, and for general works; his salary to be at a fixed yearly sum, to be paid monthly; two months' notice in writing on either side to be given to terminate the agreement. Before the end of the first month the defendant complained of the plaintiff's incompetency, and gave him notice in writing under the agreement. During the second month, the defendant obtained further proof of the plaintiff's incompetency and discharged him. The plaintiff sued in a county court and obtained judgment for one month's salary; he afterwards sued again in the same court for a second month's salary; the judge found as a fact that he was incompetent to do the work for which he had contracted, and gave judgment on the second claim for the defendant:—Held, that the plaintiff was not entitled to more than one month's salary. *Searle v. Ridley*, 28 L. T., N. S. 411—Q. B.

As to grounds of dismissal,—see this title, I., 3.

**Termination of contract by consent.**—A clerk, hired generally by the year at a certain salary, may, upon a dissolution of the contract, by mutual consent within the year, recover salary pro rata, without any express agreement to that effect. *Thomas v. Williams*, 8 N. & M. 545; 1 A. & E. 685.

So, also, he may recover pro rata where the contract has been dissolved by mutual con-

sent within the the year, but after the issuing of a commission of bankruptcy. *Ib.*

The departure of the clerks upon the ceasing of the trade is evidence of a dissolution of such contract. *Ib.*

Where a servant was engaged at a yearly salary, payable quarterly, and, a month after the termination of one of the years of the service, he tendered his resignation; after another month the resignation was accepted, nothing being said about remuneration for the time elapsed since the termination of the last year's service:—Held, that the law would not imply an engagement to pay for the services performed since the last quarter. *Lamburn v. Cruden*, 2 M. & G. 253; 2 Scott, N. R. 533; 5 Jur. 151.

Held, however, under the circumstances, that it ought to have been left to the jury to say whether the parties had come to an agreement that those services should be paid for. *Ib.*

**Winding up of company.**—A person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10% per cent. on all business transacted. Before the five years were expired, the company was wound up voluntarily:—Held, that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years. *English and Scottish Marine Insurance Company, In re, Maclure, Ex parte*, 5 L. R., Ch. 737; 39 L. J., Chanc. 685.

By the articles of association of a company a manager was appointed; and it was provided that if he should at any time be deprived of or removed from his office for any other cause than gross misconduct the directors should pay to him a certain sum within one month from the time of his removal. The company was ordered to be wound up:—Held, that he was entitled to prove in the winding-up for the sum specified by the articles, without any deduction being made on the ground that he might have obtained another appointment. *London and Scottish Bank, In re, Logan, Ex parte*, 9 L. R., Eq. 149—R.

An agent who has been engaged by a company for a fixed term, and who is to receive a commission on all orders obtained through him, as remuneration for his services, is entitled upon the determination of the agreement by the winding up of the company, to claim compensation in respect of the commission which he might otherwise have earned during the unexpired portion of the term. *Patent Floor Cloth Company, In re, Dean and Gilbert's Claim*, 26 L. T., N. S. 407; 41 L. J., Chanc. 476—V. C. B.

By articles of association of a company it was provided that, in case of the dismissal of the manager, he should be paid the full amount of money paid upon his shares. A resolution was passed to wind up the com-

pany, and he was appointed liquidator. He had paid 2,000% on his shares, and received 400% for remuneration as liquidator:—Held, that the winding up was equivalent to his dismissal, and that he was entitled to prove in the winding up for 2,000% subject to a set off of the 400%. *Imperial Wine Company, In re, Shirreff's Case*, 14 L. R., Eq. 417; 20 W. R. 966—R.

**Refusal of master to supply work.**—A person having been retained as a traveler on an oral contract for more than a year at a quarter's salary, and his employer at the end of a quarter having given up his business, but not having expressly dismissed him, is entitled to recover the next quarter's salary under an indebitatus count. *Cook v. Sherwood*, 3 F. & F. 729—Cockburn. Ruling upheld by the court of Common Pleas, 11 W. R. 595.

**Grounds of forfeiture of wages.**—By one of the rules of a cotton-mill, any person absenting himself on account of sickness or any other cause was immediately to give notice to the overlooker; in default thereof all wages then earned were to be forfeited. A weaver in the mill, in the middle of the day, asked the overlooker for leave of absence for half a day, promising to return to work next morning at six. The weaver did not return the next day till half-past one in the afternoon:—Held, that the weaver did not forfeit her wages under this rule, as she could not be said to be absent without notice merely by continuing her absence longer than the period which she had mentioned. *Taylor v. Carr*, 30 L. J., M. C. 201; 9 W. R. 699; 4 L. T., N. S. 414—B. C.—Wightman.

The plaintiff sued for commission and wages due to him on a contract, whereby he agreed with the defendants to sail for them to Bonny River, and purchase for them 1,200 tons of palm oil, and ship it on board of their ships; that he would faithfully abide by their instructions, and would not aid or assist, directly or indirectly, the trading of any other ships or cargoes, by giving advice for the purpose of selling or bartering such cargoes for palm oil, except so far as it might be rendered necessary for carrying the agreement into effect, and for the defendant's benefit, under the penalty of the forfeiture of his commission and wages. The defendants pleaded, that they were merchants in Liverpool, trading to the coast of Africa, and having trading establishments there; that they were desirous of sending out an agent there, to purchase and ship for them palm oil, and to conduct exclusively their trading and take charge of their property there, which the plaintiff and H. and A. well knew; and that he and those persons contriving to defraud the defendants, fraudulently conspired and agreed together that H. and A. should fit out two ships for the coast of Africa, and that the plaintiff should obtain the employment as agent for the defendants, and under color and by means of such employment, and without the defendant's knowledge, and in fraud of

s agreement with them, should assist and advise H. and A. in the trading of their ships, and the selling and bartering the cargoes for palm oil, and should assist the ships by employing workmen and servants of the defendants upon them, and endeavor to establish a trade for H. and A., in competition with, and to the prejudice of the defendants; but in pursuance of such conspiracy they fitted out ships, and the plaintiff obtained the employment as agent, and induced the defendants to enter into the agreement, for the purposes before stated; and that he did, under the color of his employment, and without the defendants' knowledge, and in fraud of his agreement, aid and assist H. and A. in the trading of their ships, and supplied them with palm oil, by employing the defendants' workmen and servants upon them, and in other ways assisted them in the bartering their cargoes for palm oil, and in establishing a rival trade to the defendants:—Held, that the plea was bad; for that the mere conspiracy to enter into the agreement, for the purposes therein stated, could not vitiate the agreement itself when carried into effect; and the actual aiding and assisting of H. and A., which was charged against the plaintiff, was not such as was specified in the agreement. *Hemingway v. Hamilton*, 4 M. & W. 115.

A weaver was employed as a weekly servant, his wages being regulated by the number of pieces which he wove and delivered to his masters. The wages of their workmen were ascertained and fixed at noon on Thursday in each week, but were not paid till the next Saturday. By rules embodied in the contract of hiring, the workmen were required to give, before leaving, fourteen days' notice at the time of booking up on Thursday. "Persons leaving without notice will forfeit all wages due." On a Thursday, the sum earned by the weaver in the preceding week, was ascertained and fixed at 15s. He commenced another week on the afternoon of the same day, and worked during the morning of Friday, and earned 7s. He left during the forenoon of Friday without having given any notice:—Held, that he had forfeited, by leaving before the Saturday, the wages due on the Thursday, but not payable till the Saturday, as well as the wages earned between noon of Thursday and Friday morning. *Walsh v. Walley*, 9 L. R., Q. B. 367; 43 L. J., Q. B. 102; 22 W. R. 571.

A painter was hired by the week, his wages to be 7d. per hour, payable every Saturday at noon. The full week consisted of fifty-four and a half hours. Overtime was paid for at the same rate. A week's notice from either party was required. He left the service at noon on Friday, before the week was up, and without giving any notice, having worked, including overtime, since the previous Friday, fifty-seven hours:—Held, that he was not entitled to recover his wages for the current week of his leaving service. *Saunders v. Whittle*, 24 W. R. 406; 83 L. T., N. S. 810—D. C. A.

A factory winder was paid every Saturday for the number of sets she had wound off during the week ending on the preceding Wednesday; one of the rules of the factory, in which she worked, was that fourteen days' notice in writing was required previously to leaving the employment, such notice to be given on a Thursday; and all persons leaving without notice would forfeit the whole of the wages to which they would otherwise have been entitled, and also render themselves liable to be proceeded against according to law. She earned 3s. 7d. on the first two days of one week of her employment, was absent with leave on the Saturday, did not return, and wholly left the service, without leave or notice, on Monday. In an action by her for 3s. 7d. earned, the county court judge held that hers was a weekly hiring, and that, although her master's damage by reason of her absence was only 8s., she could not recover anything under the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 96, s. 11:—Held, that, notwithstanding the fortnight's notice required, the facts justified the finding that the service was weekly; that she had no claim for wages or other sum due for work done; and that the county court judge was right. *Gregson v. Watson*, 84 L. T., N. S. 148—D. C. A.

As to deductions from wages for absence or misconduct,—see this title, IV., 3.

(c) Payment of Wages; Deductions; Provisions of The Truck Act against Payment other than by Money.

**Presumption of payment.**—If a servant has left his service for a considerable time, the presumption is that all his wages have been paid. *Sellon v. Norman*, 4 C. & P. 80—Gaselee.

**Advances, deductions, &c.**—A master advanced money to his female servant, who was under age, for her to purchase a silk dress and other articles not necessary for her:—Held, that these advances formed no defense to an action for her wages. *Hedgeley v. Holt*, 4 C. & P. 104—Bayley.

Money paid by a master for coach-fares, for the mother of his servant, who was under age, cannot be deducted from the wages of the servant. *Ib.*

**Paying wages otherwise than by money, contrary to The Truck Act (1 & 2 Will. 4, c. 37).**—The 1 & 2 Will. 4, c. 37, is applicable only to those persons who contract as laborers, viz., such as contract to use their personal services, and to receive payment for such services in wages. *Riley v. Warden*, 2 Exch. 50; 18 L. J., Exch. 120.

One who contracts to do work upon a large scale, employing laborers under him, is not an artificer, workman or laborer within the act, though he superintends the work, and from time to time labors personally therein. *Sharman v. Sanders*, 13 C. B. 166; 17



Jur., N. S. 765; 22 L. J., C. P. 86; 3 C. & K. 298.

The plaintiff was employed by the defendant as a frame-work knitter, or weaver of gloves in frames provided by the defendant, and paid according to the quantity of work he performed, at an agreed price per dozen pairs, subject to certain charges and deductions, according to the usage of the trade, which was known to the plaintiff. Those deductions were, charge for frames and standing room, for a boy winding, and a small percentage when the weekly wages of the plaintiff exceeded a certain sum:—Held, first, that they were not within the prohibition in section 8 of 1 & 2 Will. 4, c. 37, being the mode of calculating the amount of wages. *Chawner v. Cummings*, 8 Q. B. 311; 10 Jur. 454; 15 L. J., Q. B. 161.

Held, secondly, that, if they had been within that prohibition, they would, by virtue of s. 4, be recoverable under a count for work and labor, and, by s. 5, would not be available for the defendant in the shape of a set-off. *Id.*

The provisions of the 1 & 2 Will. 4, c. 37, apply only to agreements for personal service, and not to agreements for the performance of a certain quantity of work, which the contractor cannot perform except by making use of the labor of others. *Floyd v. Weaver*, 16 Jur. 289; 21 L. J., Q. B. 151.

The mode of paying the wages, as specified in the agreement, will not prevent a case from coming within the act. *Id.*

By an agreement with a mine-owner, two persons were engaged as butty colliers. These colliers get the produce of the mine at so much a yard; they employ others under them, to increase the quantity; but they must work personally, and are treated as workmen:—Held, that these colliers were artificers within the act; the distinction between contractors and artificers depending on the fact, whether, by the engagement, they were laborers. *Bowers v. Lovelock*, 6 El. & Bl. 534; 2 Jur., N. S. 1187; 25 L. J., Q. B. 371.

The plaintiff, an illiterate laboring man, attached his mark to a written contract with the defendant, by which he engaged to make as many bricks as the defendant required, in his brick-field, finding all labor, the defendant finding the materials. Payment to be 10s. 6d. per thousand for the bricks, when complete. The plaintiff, assisted by others, made bricks, having worked at them personally. In payment, he accepted tickets for goods. Afterwards he sued for the full price, contending that he was an artificer, and that, consequently, the payment by tickets was void:—Held, that the plaintiff, not being bound by his contract to do any part of the work personally, was not an artificer under the Truck Act. *Ingram v. Barnes*, 7 El. & Bl. 115; 8 Jur., N. S. 150; 26 L. J., Q. B. 82; affirmed, 7 El. & Bl. 132; 26 L. J., Q. B. 830; 8 Jur., N. S. 801—Exch. Cham.

Deductions or stoppages made from the wages of an artificer in the hosiery trade in

respect of frame rent, machine rent, standing of frames and machines, winding the material, fines for irregular attendance, gas for lighting the factory, and fire in waiting-room, amounting to about 3s. 9d. per week, fixed charges, are not illegal. *Archer v. James*, 3 B. & S. 61; 8 Jur., N. S. 163; 31 L. J., Q. B. 153; 10 W. R. 489; 6 L. T., N. S. 167; 1 L. T., N. S. 26—Exch. Cham.

A butty collier, who undertakes for the performance of a piece of work by the day, or ton, or yard, and employs others to assist him, to whom he pays wages, is not an artificer. *Sleemyn v. Barrett*, 2 H. & C. 934; 10 Jur., N. S. 476; 33 L. J., Exch. 153; 13 W. R. 411; 9 L. T., N. S. 834.

A framework knitter is an artificer. *Moorhouse v. Lee*, 4 F. & F. 455—Byles.

The wife of an artificer received, as his agent, from the master, in payment of wages due to her husband, a written order, which, by the master's direction she took to his office and exchanged for another, given her by the clerk there; this she presented at a shop close by, named to her by the clerk, and received goods only. The master was convicted for paying wages otherwise than in current coin. The place where the first order was given to her was within the jurisdiction of the justices; but the office where the second order was given, and the shop, were not:—Held, that the conviction was right, and that the offense was complete at the time of the delivery of the first order. *Athermill v. Drury*, 1 El. & Bl. 46; 5 Jur., N. S. 433; 23 L. J., M. C. 5.

To constitute an offense against the 1 & 2 Will. 4, c. 37, it is not necessary that the payment of wages in goods instead of money should be the result of any contract or understanding between the employer and the workman; the mere payment is enough. *Wilson v. Cookson*, 13 C. B., N. S. 496; 9 Jur., N. S. 177; 32 L. J., M. C. 177; 11 W. R. 426; 8 L. T., N. S. 53.

The offense is not purged by a subsequent payment in money, whether made voluntarily or compulsorily under an order of justices. *Id.*

The 1 & 2 Will. 4, c. 37, s. 23, permits an employer of an artificer to contract to supply the artificer with medicine, medical attendance, and materials to be employed in his occupation, if a minor, and to demise to the artificer a tenement at any rent reserved; and to contract to make stoppages or deductions from the wages in respect of rent, medical attendance, &c., provided the contract for such stoppages is in writing, and signed by the artificer:—Held, that the amount to be deducted in respect of each head of deduction need not be specified in the written contract. *Cutts v. Ward*, 2 L. R., Q. B. 357; 8 B. & S. 277; 36 L. J., Q. B. 161; 15 W. R. 445; 15 L. T., N. S. 614.

Under a contract in writing, allowing a stoppage to be made for medicine and medical attendance, the employer may deduct 6d. a week, which by the practice of the trade was

paid by each minor towards a club kept by the employer for the purpose of providing medicine and medical attendance, for such minors as required them. *1b.*

The contract as to the supply of materials, in order to be within s. 23, must be shown to be an absolute contract of sale, and not a mere contract of hiring by the artificer. *1b.*

A workman who works for a coal and iron company, and whose personal skill and labor are of the essence of the contract between him and them, is an artificer within the Truck Act, 1 & 2 Will. 4, c. 37, although part of his work for the company is piece work, which he could do at home, and, in fact, get others to do for him, and although he works sometimes for other people. *Pillar v. Llynvi Coal and Iron Company*, 4 L. R., C. P. 752; 38 L. J., C. P. 294; 20 L. T., N. S. 928; 17 W. R. 1123.

An employer stopped part of the wages of an artificer as a contribution to funds established by him to provide medicine and medical attendance for the artificers employed by him, and schools for their children, without any written agreement with the artificer:—Held, that the artificer was entitled to recover the whole of the deductions under 1 & 2 Will. 4, c. 37, s. 24. *1b.*

W. was a cotton manufacturer, and S. a power-loom weaver in his employ. A complaint was made by W.'s manager to S. of a defect in a piece of cloth woven by him, and he was cautioned; but at the end of the week received his full wages without abatement. In the following week a similar defect was discovered in another piece of cloth woven by S.; and S. was told by W.'s bookkeeper, first, that something would have to be deducted from his wages for the defective pieces of cloth, or that he would have to take the piece of cloth home; and, on a second occasion, that he would have to take one of the pieces of cloth home, and that there were no wages for him. S. ultimately took away one of the damaged pieces of cloth, the value of which in a perfect condition was 1*l.* 1*s.* 8*d.*, and left W.'s employ at the end of the week following that in which the dispute had arisen. The full wages earned by him during that time were 2*l.* 1*s.* 3*d.*, of which amount 1*l.* 2*s.* 0½*d.* was earned during the week in which the last damaged piece was delivered, and 18*s.* 8½*d.* during the last week. On applying for his wages he received 1*l.* in cash and retained the damaged piece of cloth:—Held, that these facts disclosed amounted to a payment of wages in goods, and that the Truck Act, 1 & 2 Will. 4, c. 37, s. 9, had been infringed. *Smith v. Walton*, 37 L. T., N. S. 437—C. P. Div.

**Deductions from wages, contrary to the Hosiery Manufacture (Wages) Act, 1874,** (37 & 38 Vict. c. 48), s. 3.—By 37 & 38 Vict. c. 48, s. 3, if any employer . . . shall deduct, directly or indirectly, from the wages of any artificer in his employ any part of such wages for frame rent and standing or

other charges, or shall refuse or neglect to pay the same, or any part thereof, in the current coin of the realm, he shall forfeit 5*l.* for every offense. A person was in the employment of hosiery manufacturers, as a hand-frame worker. By the regulations of the factory he was liable to a fine of 8*d.* a day for staying away from work without permission. He had been fined for so absenting himself, and the amount was deducted by his employers from his wages:—Held, that the deduction of fines from wages was not within section 3, and they were not liable to a penalty. *Willis v. Thorp*, 10 L. R., Q. B. 383; 44 L. J., Q. B. 137; 33 L. T., N. S. 11; 23 W. R. 730.

As to deductions for absence or misconduct,—see this title, IV., 3.

**Attachment of wages.**—[By 33 & 34 Vict. c. 30, s. 1, *no order for the attachment of the wages of any servant, laborer, or workman shall be made by the judge of any court of record or inferior court.*]

(d) **Recovery of Wages or of Damages for Wrongful Dismissal.**

**Time when right of action accrues.**—A declaration stated, that in consideration that the plaintiff would agree to enter into the service of the defendant as a courier on the 1st June, and travel with him on the continent of Europe as a courier for three months, and to be ready to start with him on such travels on that day, for a monthly salary, the defendant agreed to employ the plaintiff, on and from the 1st June, for three months, to travel with him on the continent of Europe, and to start on such travels with the plaintiff on that day, and to pay him the monthly salary during the continuance of such service. Averment of readiness and willingness of the plaintiff to perform the agreement. Breach, that the defendant, before the 1st June, refused to employ the plaintiff, and wholly discharged the plaintiff from his agreement, and from being ready and willing to perform it; and the defendant broke, put an end to, and determined his promise and engagement:—Held, that the plaintiff was entitled to commence an action before the 1st June to recover damages for breach of the agreement. *Hochster v. De Lauro*, 2 El. & Bl. 678; 17 Jur. 973; 22 L. J., Q. B. 455.

If an agreement is entered into for the employment of a clerk for four years from the 1st of January, 1823, at a salary of 400*l.* a year, and the salary is paid up to the 1st of January, 1825, the clerk, upon being dismissed in July, 1825, may commence an action in Michaelmas term, 1825, though at that time, according to the agreement, a year's salary would not be due. *Pugani v. Gandolfi*, 2 C. & P. 370—Best.

The defendant wrote to the plaintiff, offering to engage him for the command of a steamer destined for an exploring and a trad-

ing voyage up the river Niger, paying him at the rate of 50*l.* a month, commencing from the 1st of December, 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied, that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the net proceeds of the trade." The plaintiff received 50*l.* a month for seven months, and afterwards proceeded on the voyage in command of the vessel, but before the expiration of the ninth month wrongfully abandoned the vessel:—Held, that the contract, whether taken as constituted by the plaintiff's letter, or by the defendant's letter as explained by the plaintiff's, gave a cause of action at the expiration of each month, and that the plaintiff was entitled to recover the 50*l.* for the eighth month on an indebitatus count. *Taylor v. Laird*, 1 H. & N. 266; 25 L. J., Exch. 329.

A servant was retained for a year, his wages to be paid quarterly; he was dismissed at the end of a month from the commencement of the second quarter; he then, before the expiration of the quarter, brought an action for work and labor; money was paid into court sufficient to satisfy for the work done:—Held, that the defendant was entitled to a verdict, as, at all events, the plaintiff could not maintain an action until the end of the quarter. *Smith v. Haward*, 2 N. & P. 432; 7 A. & E. 544; W., W. & D. 635; 2 Jur. 232.

**When recovery is barred by award or judgment.**—A declaration stated, that, in consideration that the plaintiff would enter into the employ of the defendant, in a certain capacity for a year, at the rate of five guineas per week throughout the year, the defendant undertook to employ him for a year, and alleged as a breach, that he dismissed the plaintiff from his employ before the end of the year, without any reason or probable cause. The action, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages which he would have been entitled to receive from the defendant on the day the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal, might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages, in consequence of the dismissal from the defendant's employ, before the end of the year:—Held, that the award was a bar to such action. *Dunn v. Murray*, 9 B. & C. 780; 4 M. & R. 571.

A servant in husbandry being hired for a quarter of a year, entered the service, and was discharged before the end of the quarter; she immediately sued her master in a county court for discharging her without reasonable cause; and a verdict was given for her master. After the quarter had elapsed she took out a sum-

mons before justices against the master, to recover the quarter's wages:—Held 1. that the question to be decided was essentially the same in the two courts, viz., whether the discharge was wrongful, and that the decision in the county court was conclusive between the parties. *Routledge v. Hislop*, 6 Jur., N. S. 398; 28 L. J., M. C. 90; 8 W. R. 363; 2 El. & El. 549.

A clerk dismissed in the middle of a quarter brought an action for a wrongful dismissal, the declaration containing a special count for such dismissal. The jury was directed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except under a common count, and they gave damages accordingly. The plaintiff then brought a second action to recover under a common count for his services during the broken quarter:—Held, that the action was not maintainable, because the plaintiff by his former action on the special contract had treated it as an open contract, and he could not afterwards recover under the common count as for services under a rescinded contract. *Goodman v. Pocock*, 15 Q. B. 576; 14 Jur. 1042; 19 L. J., Q. B. 410. S. P., *Lilly v. Elwin*, 11 Q. B. 742; 12 Jur. 623; 17 L. J., Q. B. 152.

Held, also, that in the former action the jury ought to have been directed to take the services rendered during the broken quarter into account, in awarding damages under the special count for the wrongful dismissal. *Id.*

Two journeyman painters took out a summons, returnable before a justice of the peace, for the recovery of a sum of money alleged to be due to them for wages from C., claiming also a further sum as damages for the detention of such wages. The justice heard the summons under the Master and Servant Act, 1867, 30 & 31 Vict. c. 141, s. 9, and dismissed the same upon the merits. They afterwards issued plaints in the county court against C. to recover the wages alone, but judgment was given for C. on the ground that the case was *res judicata*:—Held, that the county court judge was right, and that the justice of the peace having jurisdiction under the Master and Servant Act, 1867, ss. 4 and 9, and having exercised that jurisdiction, the matter was *res judicata*. *Millett v. Coleman*, *Davson v. Coleman*, 44 L. J., Q. B. 194; 33 L. T., N. S. 204.

**Nature and form of action.**—If the contract between master and servant is the usual one for a year, determinable at a month's notice, the servant, if turned away improperly, cannot recover on a count stating the contract to have been for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he has served. *Archard v. Horner*, 3 C. & P. 349—Tenterden.

A performer at a theater, who is to be paid for nights of performance on which he does not perform, as well as for those on which he does perform, should not declare for work

and labor, but for arrears of salary as a hired performer. *Frazer v. Dunn*, 8 C. & P. 704—*Abinger*.

If A., being employed by B. as a clerk, at a salary of 200*l.* per annum, payable quarterly, is discharged in the middle of a quarter, and paid proportionably; he is entitled to recover his salary for the remainder of the quarter, under a count for work and labor. *Gandall v. Pontigny*, 1 Stark. 198; 4 Camp. 375—*E. lenborough*.

Where a declaration stated a contract of service for certain wages per annum, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof the plaintiff lost all the wages, profits, &c. he might have acquired from being continued in the service:—Held, that he was only entitled to recover, as damages, wages for one month, and that the arrears of salary due to him at the time of dismissal could only be recovered in an action for work and labor. *Hurtley v. Harman*, 3 P. & D. 567; 11 A. & E. 798.

A domestic servant entered into the defendant's service on the 19th November. On the 15th January, her mistress caused her to be taken before a magistrate, on a charge of stealing some small articles of plate. The magistrate remanded her till the 20th, when she was again brought up and discharged. On the 22d she went to demand her clothes and wages, including 1*l.* 1*s.* in lieu of a month's warning. The defendant tendered 2*l.* 2*s.* for the two months' actual service, but refused to pay the additional guinea:—Held, that inasmuch as the placing her in custody, on a charge that was afterwards abandoned, was no dissolution of the contract of hiring, she was, under the circumstances, entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labor. *Smith v. Kingsford, or Gainsford*, 3 Scott, 279; 2 Hodges, 109.

A party working under a yearly contract at wages payable quarterly, having been discharged for misconduct after the commencement of the quarter, agreed to finish his month's work:—Held, that, although he could not recover a quarter's wages, still he was entitled to a month's wages under the common count, although the particulars of demand stated that he sought to recover under those counts for a quarter's work. *Herum v. Stericker*, 10 M. & W. 553; 12 L. J., Exch. 17.

The additional month's wages to which a menial servant, hired by the year, is entitled if discharged without cause and without a month's warning, cannot be recovered under a common count, but must be declared for specially. *Feavings v. Tisdall*, 1 Exch. 295; 5 D. & L. 196; 11 Jur. 977; 17 L. J., Exch. 18.

Where by the terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare for the value of the

service, but must sue on the special contract. *Keys v. Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

But if B. by his own act renders the delivery of the goods impossible, A. may sue for the value of the service. So, if B. allows the goods to be sold under an execution against him. *Ib.*

**Pleadings, evidence, and trial of actions.]**

—A declaration stated, that, on the 15th October, 1845, in consideration that the plaintiff would enter into the service of the defendant, and serve him for a certain time, to wit, from the day and year aforesaid, until the service should be determined by reasonable notice in that behalf on either side, the defendant promised the plaintiff to retain and employ him, and to continue him in such service until such service should be determined, to wit, by reasonable notice in that behalf as aforesaid. Averment, that the plaintiff afterwards entered into the service of the defendant, and has always, from the commencement thereof, been ready and willing to remain and continue in his service; and during all that time tendered and offered himself to serve the defendant. Breach, that he did not nor would continue the plaintiff in his service, but, on the contrary thereof, did afterwards refuse to suffer him to continue any longer in his service, and wrongfully discharged him therefrom without previous notice in that behalf:—Held, first, that it was not necessary for the plaintiff to show that he gave no notice to determine the service. *Wilkinson v. Gaston*, 9 Q. B. 137; 10 Jur. 804; 15 L. J., Q. B. 340.

Held, secondly, that the discharge sufficiently appeared to have been after the commencement of the service. *Ib.*

A declaration stated that in consideration that the plaintiff would enter the service of the defendant as a commercial traveler for one year, the defendant agreed to employ him in that capacity at a yearly salary, and to continue him in such service for one year. Breach, that the defendant wrongfully dismissed the plaintiff before the expiration of the year. At the trial it appeared that by the usage of trade such yearly hiring might be put an end to by either party giving three month's notice:—Held, that the contract was incorrectly described, and that the objection was properly raised by non assumpsit. *Metzner v. Bolton*, 9 Exch. 518; 2 C. L. R. 685. See also *Wheeler v. Buvidge*, 9 Exch. 668; 2 C. L. R. 1077.

Under the plea of non assumpsit to a count on a quantum meruit for services, the defendant may show what the services were worth, and the jury give damages accordingly. *Smith v. Howard*, 2 N. & P. 432; 7 A. & E. 544; W., W. & D. 635; 2 Jur. 232.

A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly; the party making default to pay to the other 500*l.* by way or in nature of specific damages.

A. was dismissed, he became bankrupt, and after his bankruptcy brought an action on the agreement, to which B. and C. pleaded his bankruptcy:—Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees. *Beckham v. Druke*, 2 H. L. Cas. 579; 13 Jur. 921.

To an action for work and services, the defendants pleaded that the claim was in respect of wages for work done by the plaintiff, as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that it was agreed that the plaintiff, as master of the boat, should be chargeable for all pilferings, losses, and damages to goods under his charge, and that the amount should be deducted from his wages, and might be pleaded as a set-off. The plea alleged the pilferage of a pipe of wine, while under the plaintiff's charge, and claimed to set off the damages sustained by the defendants in consequence against the plaintiff's claim:—Held, that the plea was bad, as amounting to the general issue. *Gleworth v. Pickford*, 8 D. P. C. 873.

In an action by a servant for dismissing him during the period for which he was hired, the declaration stated that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom. Plea, that before the discharge and dismissal, the plaintiff conducted himself in an improper and a disobedient manner, and disobeyed the defendant's lawful orders, without this, that he wrongfully dismissed and discharged the plaintiff without reasonable cause:—Held, that although the plea might be bad on special demurrer, as putting in issue an immaterial allegation in the declaration, yet as issue had been taken on the plea, the plaintiff's misconduct as well as the fact of his dismissal was in issue, and consequently that evidence of such misconduct offered at the trial by the defendant was improperly rejected, and that the onus of such proof lay on the defendant. *Lush v. Russell*, 1 L. M. & P. 369; 5 Exch. 203; 7 D. & L. 228; 14 Jur. 435; 19 L. J., Exch. 214.

To an action for wrongfully discharging the plaintiff from the defendants' service, as a traveler and salesman, the defendants pleaded that the plaintiff refused to obey their lawful and reasonable commands with reference to the plaintiff's conduct and proceedings in their employ, and that the plaintiff received from customers of the defendants moneys which he wrongfully appropriated to his own use, wherefore the defendants did, by reason of the premises, refuse to continue the plaintiff in their employ, and therefore discharged him. At the trial it was proved that the plaintiff had misappropriated the defendants' moneys, but the fact of such misappropriation was not known to the defendants until after they had discharged him:—Held, that the defendant, having justifiable cause for discharging the plaintiff, the judge was wrong

in leaving it to the jury to say whether they discharged him for that cause, for that their motive and intention were not in issue under the replication de injuria. *Spotswood v. Barrow*, 5 Exch. 110; 19 L. J., Exch. 226.

A declaration stated that the plaintiff agreed with the defendants to act as their salesman for one year, and not to be connected with any other house in disposing of their goods, and that they agreed to pay the plaintiff 200*l.* for such servitude: that the plaintiff entered into the defendants' employ and continued therein, and was not connected with any other house, and had always, until the expiration of one year from the agreement, been ready and willing, and offered to remain in such employ, and not to be connected with any other house. Breach, that the defendants would not suffer the plaintiff to act as salesman for the remainder of the year, but discharged the plaintiff, and had not paid the 200*l.* The defendants pleaded, as to the non-payment of the 200*l.*, that after the plaintiff ceased to be in their employ, and during the year, the plaintiff entered into the service of the house of other persons, and became connected with it in disposing of their goods:—Held, bad, on special demurrer, as an argumentative denial of the plaintiff's readiness and willingness to remain in defendants' employ. *Spotswood v. Barrow*, 1 Exch. 804; 5 D. & L. 373; 17 L. J., Exch. 98.

A declaration stated an agreement, whereby the defendant agreed to employ the plaintiff, as a journeyman baker, for four years, and to pay him weekly wages, and also additional sums in the last three years of the term. Breaches, that the defendant, before the expiration of the term, wrongfully discharged the plaintiff from his employ; that the defendant did not pay the plaintiff the weekly wages for the remainder of the term, and that the defendant did not pay the plaintiff the additional sums which he would have been entitled to, if he had continued in the employ of the defendant. General demurrer, and joinder therein, to the two last breaches:—Held, that the proper course was to have applied to a judge to strike out those breaches, and that, upon this record, they could not be treated as surplusage. *Lush v. Russell*, 4 Exch. 637.

In an action for a breach of a contract to employ the plaintiff for a given time, charging the defendant for having wrongfully and without reasonable and probable cause dismissed the plaintiff, the defendant pleaded that he did not wrongfully, without reasonable or probable cause, dismiss the plaintiff as alleged:—Held, that this merely put in issue the fact of the dismissal, the rest being immaterial. *Powell v. Bradbury*, 7 C. B. 201; 13 Jur. 349; 18 L. J., C. P. 116.

A plaintiff declared upon a breach of contract, by which the defendant agreed to make her an annual allowance for her maintenance and instruction, until he should require her services as a governess of his



children. The defendant pleaded, that he entered into the agreement in the belief and on the representation by the plaintiff that she was an honest and moral person, and a fit and proper person for the situation: that the defendant discovered that she had become and was an immoral and dishonest person, and wholly unfit and improper for the situation, and a person whom it would have been very improper and wrong to employ as governess of his children; and that he therefore rescinded the contract, and gave her notice:—Held, that the plea was bad, as being too general and uncertain. *Burgess v. Beumont*, 2 D. & L. 590; 8 Scott, N. R. 669; 7 M. & G. 962; 9 Jur. 14; 14 L. J., C. P. 18.

In an action by an attorney's clerk, for improperly dismissing him, plea, that he conspired with A., and, in pursuance of that conspiracy, was guilty of acts of misconduct which came to the defendant's knowledge, who thereupon dismissed him:—Held, that, to support the plea, it was necessary for the defendant to show that he knew and acted upon the misconduct when he dismissed the plaintiff. *Mercer v. Whall*, 5 Q. B. 447; 9 Jur. 576; 14 L. J., Q. B. 267.

Where, in a declaration, it was stated, that by agreement, after reciting that the defendant had requested the plaintiff to enter into his employment, it was witnessed that the parties mutually agreed as follows: first, the plaintiff agreed to serve the defendant for seven years, at a salary of 100*l.* a year; secondly, the defendant agreed, during the continuance of the term, that he would pay the salary, and if the defendant should, from any cause whatever, give up the business, or not require the plaintiff's services, then he would use his best endeavors to procure for him employment in some similar business, at an equal salary, or, in case he should be unable to do so, the defendant would pay to the plaintiff 100*l.* a year during the residue of the term; and the declaration averred general performance, and that the plaintiff entered the service; and that although the plaintiff was ready and willing to continue, yet the defendant would not continue the plaintiff in his employ until the expiration of the term, but during the term wrongfully discharged him, without reasonable or probable cause; and although the defendant, during the term, did not nor would continue the plaintiff in his employ, but discharged him, yet the defendant did not use his best or any endeavors to procure, nor did he procure, the plaintiff employment in some similar business, at an equal salary, but had wholly failed:—Held, first, that it was a breach well a-signed to say that the defendant had not used his best endeavors to procure for the plaintiff employment in some similar business, and that it was not necessary to negative that the defendant had paid a salary of 100*l.* a year, for that the undertaking to use his best endeavors was absolute and independent, and that there was not merely an alternative undertaking either to use his best endeavors, or to pay 100*l.* a

year. *Rust v. Nottidge*, 1 El. & Bl. 99; 17 Jur. 278; 22 L. J., Q. B. 73.

Held, secondly, that it was not necessary to aver a request by the plaintiff to the defendant to use his best endeavors, nor that he was ready and willing to accept a situation. *Id.*

Held, that a plea, that when the plaintiff was discharged the defendant was, and thence hitherto has been, wholly unable to procure for the plaintiff any such employment, was bad on general demurrer, for it tendered an immaterial issue, assuming a breach of the agreement to be charged in the declaration which was wholly different from the breach actually there assigned. *Id.*

A declaration alleged that, in consideration that the plaintiff would enter into the employ of the defendant in the capacity of European correspondent of a newspaper called the New York Courier and Inquirer, until the service should be determined by due and customary notice on either side, and for a salary, the defendant promised to retain the plaintiff and to pay the salary, and to continue him in such service until determined as aforesaid. Breach, the wrongful discharge of the plaintiff without notice, and without reasonable or probable cause. Plea, that the engagement and promise were upon the terms and condition that the plaintiff should by every steamer from Liverpool to New York, forward a letter to the newspaper office containing European news; and that while so employed the plaintiff wrongfully neglected to forward any letter containing such news by several steamers, wherefore the defendant discharged him. And a second plea alleged the engagement to have been upon the terms and condition, that the plaintiff might draw and negotiate bills of exchange upon the defendant for his salary when due, but not for any sum not due or before it was due; and that he wrongfully drew and negotiated divers bills of exchange for sums of money not due, which bills were dishonored, to the damage of the defendant's credit, wherefore he discharged him:—Held, that the pleas showed only a breach by the plaintiff of stipulations in the contract, for which he might be liable in a cross action for damages, and were therefore no bar to the action. *Gould v. Webb*, 4 El. & Bl. 933; 1 Jur., N. S. 821; 24 L. J., Q. B. 205.

A declaration stated that the plaintiff entered into the service of the defendant for three years, under an agreement that he, the plaintiff, would, during that time, use his best endeavors to promote the interests of the defendant, and would attend to and carry out all reasonable requests:—Held, in an action for a wrongful dismissal, before the end of the term, that a plea that the plaintiff did not, while in the defendant's employ, use his best endeavors to promote the interests of the defendant, according to the contract, wherefore he was dismissed, disclosed a good defense. *Irving v. Lomas*, 10 Exch. L. J., Exch. 80.

In an action for a wrongful dismissal, there being a plea of justification, the plaintiff is entitled to have a verdict taken on that plea, even although he would, on the declaration alone, be liable to a nonsuit, and the defendant was held to be precluded from taking advantage, on the plea of justification, of a special contract, which he had himself succeeded in excluding, as not being in writing. *Brett v. Philips*, 1 F. & F. 398—Cockburn.

A count was framed on a contract of hiring determinable on reasonable notice, alleging a breach in discharging the plaintiff without such notice. There was a count for work and labor, to which the only plea was nonassumpsit. Third plea stated a discharge by the defendant for disobedience of orders in not working during harvest till eight o'clock at night. Fourth plea stated that the plaintiff unlawfully quitted his work, and a discharge by a magistrate, under 4 Geo. 4. c. 34, s. 3:—Held, that the plaintiff, having been guilty of disobedience of orders, and unlawfully absenting himself from his work, so as to justify his discharge, he could not recover for the time of his actual service on the common count; and that the discharge by the magistrate was sufficiently the act of the defendant to entitle him to a verdict on the third plea, and on the plea of non assumpsit to the common count. *Lilly v. Elwin*, 11 Q. B. 742; 12 Jur. 623; 17 L. J., Q. B. 132.

A plaintiff agreed to serve the defendant for the term of ten years, in the capacity of a brewer; in consideration of the premises, and of the due, full, and complete service of the plaintiff, the defendant agreed to pay him 20*l.* on execution of the agreement, to furnish him with a house and coals during the whole of the term of ten years, and to pay him the weekly sum of 2*l.* 10*s.* during the term of ten years. The plaintiff entered into the service under the agreement. Some years afterwards he fell ill, and was unable to attend personally to business; but during that time he instructed the defendant in the art of brewing. The defendant refused to pay the plaintiff his wages for the period during which he had been ill, but retained him in the service; and after he was able to attend again personally to business, paid him as before under the agreement. To an action by the plaintiff to recover wages for the period during which he had been ill, the defendant pleaded that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing, or able to render and did not in fact during any part of such time render, the agreed or any service:—Held, a good plea; the readiness and willingness to perform the service being a condition precedent to the right to wages; and the gist of the plea being that the plaintiff willfully refused or omitted to serve. *Cuckson v. Stones*, 1 El. & Bl. 248; 5 Jur., N. S. 337; 28 L. J., Q. B. 25; 7 W. R. 134.

On showing cause against a rule to enter a verdict for the plaintiff on the plea:—Held, that the averment that the plaintiff was not

ready and willing, or able, was not supported by his physical inability, for a time only, and not through his own default, to attend personally to the business; and that the contract not having been rescinded, the defendant was not entitled to suspend the weekly payments during that time; and the plaintiff was therefore entitled to the verdict. *Id.*

In an action for wages as a female servant, the defendant pleaded non assumpsit, and the plaintiff gave evidence of acts of service. The defendant proposed to go into evidence to show that the plaintiff had cohabited with him:—Held, that he might do so, as this went to show that there was no contract between the parties, and not to invalidate any contract on the ground of illegality. *Bradshaw v. Hayward*, Car. & M. 591—Cresswell.

In an action for a wrongful dismissal of a servant, who had been retained under an annual salary, but had assented to a proposal not to be paid further salary until works should be resumed, which had not in fact been resumed:—Held, that it was for the jury to say whether the original contract had been put an end to, and if so, the defense arose under a plea of rescission. *Hopkins v. Westrocht*, 2 F. & F. 368—Wightman.

In an action for a wrongful dismissal from an employment, the dismissal being justified, it is for the jury not only whether matter of fact existed which would be a valid ground of dismissal, but whether the dismissal was bona fide and really on such a ground. *Smith v. Allen*, 3 F. & F. 157—Cockburn.

#### Amount of recovery; measure of damages.]

—An agreement contained in letters was entered into between the plaintiff and the defendant, by which the former was to be employed by the latter as "commission agent, at a salary of 50*l.* a year, the engagement to be terminated at the expiration of any year, on giving three clear months' notice." The terms as to the duration of the engagement and the mode of terminating it, were settled in the earlier letters; the amount of salary was agreed to in the later letters of the series, which later letters contained no mention of the three months' notice. The plaintiff entered on his duties on 1st April, 1860, and was discharged on 25th March, 1861, without any previous notice, receiving only one year's salary. In an action for a wrongful dismissal, in which he claimed to recover 50*l.*, the amount of a second year's salary:—Held, first, that the arrangement as to notice, which had been previously agreed to, was not affected by the subsequent letters about the remuneration. *McKean v. Cowley*, 7 L. T., N. S. 828—Exch.

Held, secondly, that the damages were unliquidated, and the plaintiff was not entitled to recover the whole of the second year's salary, but so much as would compensate him for the loss of an opportunity of earning 50*l.*, against which should be set something for the saving of his time and labor by his not having had to earn it. *Id.*

The plaintiff was engaged by the defendant to superintend some draining operations upon his estate, at a salary of 2*l.* per week and a house to live in, or 13*l.* per annum in lieu of it, and was also to receive a gift of 20*l.* if he remained till Lady-day. Before the expiration of the term the plaintiff was wrongfully dismissed, and ordered to leave the house which the defendant had elected to put him into; but he refused to do so, and the defendant accordingly removed his goods and furniture into a barn, from which the plaintiff might have taken them if he had chosen to do so. During the time that the goods were there the barn was broken into, and some of the goods damaged, and 70*l.* taken from a bureau. In an action for a wrongful dismissal:—Held, that in assessing the damages, the jury had a right to take into consideration the gift of 20*l.* which the plaintiff would have earned if he had been allowed to do so, but not the sum for the damage to the goods, or the money lost from the bureau, as there was no relationship of landlord and tenant existing, and therefore that the defendant had a right to remove the goods, and could not be held liable for the damage or loss which happened. *Lake v. Campbell*, 5 L. T., N. S. 583—C. P.

In estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary and not any commission obtained by him. *Hartland v. General Exchange Bank*, 14 L. T., N. S. 863—Willes.

A servant is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during such period. *Ib.*

The employer being a company, afterwards ordered to be wound up, that fact also should be taken into consideration in estimating the loss sustained by the servant through his dismissal. *Ib.*

The directors of a mining company in South America agreed to employ the plaintiff as superintendent of mines, for three years, at a salary increasing yearly; and the directors were at liberty to dissolve the agreement at any time, on giving him twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and, if he served the three years, he should be entitled to the expenses attending the return of himself and family. The directors dismissed him before the expiration of the second year, without giving him notice or paying him the year's salary:—Held, that he was only entitled to one year's salary from the date of his dismissal, and to his own expenses for his return to England; and not to expenses incurred for the return of his family, or to the salary which would have accrued from the time of his dismissal to the end of the third year. *French v. Brooke*, 4 M. & P. 11; 6 Bing. 354.

In an action for breach of an agreement to employ the plaintiff at a salary, the jury, in

assessing the damages, may look to all that has happened, or is likely to happen, to increase or mitigate the loss of the plaintiff down to the day of the trial. *Hochster v. De Latour*, 2 El. & Bl. 678; 17 Jur. 972; 22 L. J., Q. B. 455.

As to proceedings before justices against master for non-payment of wages,—see this title, IV.. 2.

### 3. Support and Medical Attendance for Servant.

**Support of servant becoming pauper.]**—A servant whose limb is fractured by a fall, when sitting on the shafts of his master's wagon, is a casual pauper in the parish in which he falls, and must be supported and cured at their expense, and not at that of his master. *Newby v. Wiltshire*, Cald. 527; 2 Esp. 739; 4 Dougl. 284; 3 B. & P. 247.

**Medical attendance in case of illness or accident.]**—Although a master is not bound to provide a menial servant with medical attendance and medicine during sickness, if a servant falls ill, and a master calls in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there is a special contract between master and servant that he should do so. *Sellen v. Norman*, 4 C. & P. 80—Gaselee. But see *Rez v. Winterset*, Cald. 298.

A master is not by the general law bound to provide medical advice for his servant; but the case is different with respect to an apprentice; and a master is bound, during the illness of his apprentice, to provide him with proper medicines. *Reg. v. Smith*, 8 C. & P. 153—Vaughan and Patteson.

As to liability of master to other persons for medical attendance, &c., upon servant,—see this title, III., 1.

### 4. Giving Character to Servant.

**Duty and liability of master.]**—An action will not lie at the suit of the servant against his master for not giving him a character. *Carrol v. Bird*, 3 Esp. 201—Kenyon. And see *Hendley v. Moffatt*, 21 W. R. 231; 7 Ir. R., C. P. 104.

If a servant obtains a place upon the strength of a character, given by his master, and the master afterwards discovers circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the communication made concerning them is a privileged communication. *Gardner v. Slade*, 13 Q. B. 706; 13 Jur. 826; 18 L. J., Q. B. 334.

If a servant, when he is taken into a service, brings a written character, and is afterwards dismissed for ill behavior:—Semble, that the master does no wrong, if before he returns the character to the servant he writes upon it

that the person was afterwards in his service and dismissed for ill behavior. *Taylor v. Ryeon*, 7 C. & P. 70; 1 M. & Rob. 490. See *Hurrell v. Ellis*, 2 C. B. 295; 15 L. J., C. P. 18; and *Rogers v. Macnamara*, 14 C. B. 27; 23 L. J., C. P. 1.

**Punishment of false personation, pretenses or representations.**—[By 32 Geo. 3, c. 56, s. 1, if any person or persons shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant of any such master or mistress, and shall, either personally or in writing, give any false, forged or counterfeited character to any person offering him or herself to be hired as a servant into the service of any person or persons, then and in such case every such person or persons so offending shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.]

By s. 2, if any person or persons shall knowingly or willfully pretend, or falsely assert in writing, that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he, she, or they shall have hired or retained such servant in his, her, or their service or employment, or for the service of any other person or persons, then, and in either of the said cases, such person or persons so offending, shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 3, if any person or persons shall knowingly or willfully pretend, or falsely assert, in writing, that any servant was discharged or left his, her, or their service at any other time than that at which he or she was discharged or actually left such service, or that any such servant had not been hired or employed in any previous service, contrary to truth, that then and in either of the said cases such person or persons shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 4, if any person shall offer himself or herself as a servant, asserting or pretending that he or she hath served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeited certificate of his or her character, or shall in anywise add to or alter, efface or erase any word, date, matter, or thing contained in or referred to in any certificate given to him or her by his or her last or former actual master or mistress, or by any other person or persons duly authorized by such master or mistress to give the same, then and in either of the said cases such person or persons shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 5, if any person or persons, having before been in service, shall, when offering to hire himself, herself, or themselves as a servant or servants in any service whatsoever, falsely or willfully pretend not to have been hired or retained in any previous service as a servant, then and in such case such person or persons

shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 6, the penalty is 20l., and imprisonment in the house of correction, with hard labor, for any time not exceeding three months, and not less than one month, until paid.

By s. 7, a form of conviction is provided.

As to defamation by giving character,—see DEFAMATION.

### 5. Injury to Servant in Course of Employment.

(a) By Acts or Negligence of Master or of Servant himself.

**Principles of liability or immunity.**—A master is bound to take all reasonable precautions to secure the safety of his workmen. *Brydon v. Stewart*, 2 Macq. H. L. Cas. 50. S. P., *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748.

It is no answer to a claim of damages by the surviving relatives of a workman accidentally killed in a mine, "which was not in a safe and sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own. *Id.*

A master who lets a workman down his mine is bound to bring him up safely, even though he comes up on his own business, and not for that of his master. *Id.*

A master of dangerous works is bound to be careful to prevent accidents to those employed by him. If his machinery or apparatus is not stanch and appropriate, or if he permits it to be used without proper guards, and mischief consequently arises, he will be responsible. *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215.

All that a master is bound to do is to provide machinery fit and proper for work, and to have it superintended by himself or by his workmen in a fit and proper manner. *Id.*

From the mere relation of master and servant no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of his employment. *Riley v. Baxendale*, 6 H. & N. 445; 30 L. J., Exch. 87; 9 W. R. 347.

In order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine. *Potts v. Port Carlisle Dock and Railway Company*, 8 W. R. 524; 2 L. T., N. S. 283—Q. B.

The owners of dangerous machinery, who by their foreman employ a young person about it unacquainted with its nature and use, are bound to take due care that such person is duly instructed therein; and if they either neglect this, or if express directions are given by the foreman to use the machinery in a manner that must lead to danger, of

which the young person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner. *Grizzle v. Frost*, 3 F. & F. 622—Cockburn.

In an action by a laborer against his employers, for an injury caused by the fall of a scaffold-pole, proved to have fallen through the rottenness of the end put into the earth, it appeared that it had been in the earth two years, and that though some poles might last as long without being rotten others would not, and that no one was employed from time to time to take up the poles to see if they were sound:—Held, that if the jury thought the pole was left in the ground an unreasonable time without examination, there was evidence of negligence to sustain the action.

*Wish v. Rennie*, 4 F. & F. 608—Cockburn.

Where an employer, the owner of premises, allows them to remain and be used for the purpose for which they are erected and designed, in a state unsafe and insufficient for that purpose, and an accident occurs in the use of them, not through the particular manner of user, but by reason of such unsafe and insufficient state, he is liable for any injury thus caused to his servants using them. Thus, where an engineer had a crane worked on a tramway, supported on piers of brickwork, which were of insufficient strength, and which gave way, and thus caused an accident to one of the men engaged in working the crane:—Held, that there was evidence of negligence, for which the employer was liable. *Feltham v. England*, 4 F. & F. 460—Cockburn.

A chain broke, partly from wear and partly from bad welding, and injured the servant using it. His master had not had it examined or tested, although there are well-known methods for doing so:—Held, that the master was liable for the injury caused to the servant. *Murphy v. Phillips*, 24 W. R. 647; 35 L. T., N. S. 477—Exch. Div.

**Master's knowledge of danger or personal interference.**—A master is responsible to his servant for an injury received in the course of his service, if it is shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master, by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident; but, in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence. *Ormond v. Holland*, El., Bl. & El. 102.

A master is not liable to an action at the suit of his servant, for an injury sustained by the latter, caused by the breaking down of a carriage in which the servant was riding on his master's business, through a defect in the carriage of which the master was not aware. *Priestley v. Fowler*, 3 M. & W. 1; M. & H. 805; 1 Jur. 987.

A declaration stated that the plaintiff was

a servant of the defendant in his trade of a butcher; that the defendant desired and directed the plaintiff to go with and take goods of the defendant in a van of the defendant then used by him, and conducted by another of his servants, in carrying goods for him upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the van, with the goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties the van gave way and broke down, and the plaintiff was thrown on the ground and his thigh fractured:—Held, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable. *Id.*

A count alleged that one of the defendants was a contractor for the supply of beef to the navy, and the other his foreman, having the control and management of the supply of cattle, and of the slaughter of the same; that it was the duty of the defendants to take care that sound and healthy beasts should be supplied and slaughtered, and that none others should be supplied for the purpose; yet that they supplied and slaughtered diseased cattle, whereby the plaintiff, who was employed to cut up the carcasses of the cattle, became infected with the disease of the cattle. A second count alleged, that the defendants, by representing slaughtered carcasses of cattle to be sound, caused and procured the plaintiff to cut up the same; that the beasts were unsound and diseased, whereby he contracted the disease and was permanently injured:—Held, that the counts were bad. *Davies v. England*, 10 Jur., N. S. 1235; 33 L. J., Q. B. 321.

A third count, stating that the defendants, well knowing that certain carcasses of slaughtered cattle were diseased and dangerous to persons cutting up the same, invited and employed the plaintiff, who was ignorant of the diseased state of the carcasses, to cut up the same; that he, not knowing the premises, did, on the invitation and request, and on the employment of the defendants, cut up the carcasses, whereby he became infected and was injured, is a good count. *Id.*

The principle, that a servant sustaining an injury from the negligence of a fellow-servant, while engaged in the common employment, cannot recover in an action against the common master, does not exempt from liability a master who himself takes part in the servant's work and while so doing injures the servant through negligence. *Ashwin v. Stanwix*, 3 El. & El. 701; 7 Jur., N. S. 467; 30 L. J., Q. B. 183; 4 L. T., N. S. 85.



If the master is a member of a partnership by whom the servant is employed, and the work in which he so takes part is within the scope of the common undertaking of the partnership, his copartners are jointly liable with him for the injury thus caused to the servant by his negligence. *Ib.*

A master cannot be rendered liable on the ground of negligence by showing that the work was essential to the safety of a ship on which the servant was employed by the master, and that he permitted the ship to leave port without its being done, and without having on board a skilled machinist to do it, and that it was outside the scope of the servant's employment, and that he was unfit to do it, unless it is also shown that the work was dangerous, and that the master knew or ought to know that it was so. *Smyly v. Glasgow and Londonderry Steam Packet Company*, 16 W. R. 483—*Ir. Exch.*

Where a master builder personally interferes, and directs his workmen to make a scaffolding out of poles which he knows to be unsound, he is liable to make compensation if the scaffolding gives way, and a workman upon it, in his employ, who has notice of the unsoundness, is injured thereby. *Roberts v. Smith*, 2 H. & N. 213; 3 Jur., N. S. 469; 26 L. J., *Exch.* 319—*Exch. Cham.*

A master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the builder were in bad condition. The workman broke several of the putlogs (the pieces of wood between the wall and the upright poles), but was ordered by the builder not to break any more, as they would do very well. The scaffolding having been erected by A., of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs:—Held, in an action by B. against the builder, to recover compensation for the injuries received, that there was evidence to go to the jury in support of B.'s case, and that such evidence ought to have been left to the jury. *Ib.*

In an action for negligence by the servants of the defendant in hauling timber, so that it struck the plaintiff, who was passing at the time, the evidence being that the hauler was not in the defendant's general service, but was engaged for that particular piece of work, and brought his own horses for it; and that although it was being performed with the assistance of the defendant's workmen, and under the general superintendence of his foreman, the only mode in which the latter had interfered was by telling the men to make the horses go on dragging the timber, which, on their moving, casually swerved, and so struck the plaintiff. Willes, J., directed a nonsuit, which the court only set aside because the point was not taken that both parties might be liable if there was evidence of negligence, the court, however, doubting if

there was any such evidence; and on a second trial, the jury, under the direction of Chancellor, B., found for the defendant. *Dalton v. Bachelor*, 1 F. & F. 15.

A workman cannot recover damages from his employers for injuries sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence is proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly intrusted the execution of the work to an incompetent person. *Brown v. Accrington Cotton Spinning and Manufacturing Company*, 3 H. & C. 511; 34 L. J., *Exch.* 208; 13 L. T., N. S. 94.

A declaration stated that the defendants were owners of a coal mine, and that the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by them; that by their negligence the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which they well knew; and by reason of the premises, and also by reason, as they well knew, of no sufficient or proper apparatus having been provided by them to protect the plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on his head, and he was dangerously wounded. At the trial it was proved that S., one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence; and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence:—Held, first, that on the finding of the jury, S. was liable, and therefore the other defendant was liable also. *Mellers v. Shaw*, 1 B. & S. 437; 7 Jur., N. S. 845; 30 L. J., Q. B. 333.

Held, also, in arrest of judgment, that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable. *Ib.*

In an action by a widow of a laboring man, who had been employed, with others, by the defendant, to shore up an arch, which had sunk, and was killed by its falling upon him:—Held, that the question was not as to the original construction of the arch, but as to the knowledge of the danger at the time of the accident, and whether the defendant had any better means of knowing of it than the deceased; and if not, then the jury should find for the defendant. *Ogden v. Rummens*, 3 F. & F. 751—*Bramwell*.

Servant's own negligence or knowledge of danger.]—When a servant is injured or killed, while in the employ of his master, by an accident resulting from the habitual negligence of his fellow-servants, known to and acquies-

ed in by the master, the master is not liable to an action by the servant, or, if killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident. Unless there is such contributory negligence by the servant, the master is liable. *Senior v. Ward*, 1 El. & El. 385; 5 Jur., N. S. 172; 23 L. J., Q. B. 139; 7 W. R. 261.

Where an injury happens to a servant while in the actual use of an instrument, an engine, or a machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is therefore the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor, in case of his dying from the injury, can his representative recover against his master, there being no evidence that the injury arose through the personal negligence of his master; nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or a machine less safe than some other which is in general use. *Dynen v. Leach*, 26 L. J., Exch. 221.

Therefore, where a laborer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on it a clip, and the clip had slipped off it:—Held, that there was no case to go to the jury in an action by his representative, against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the orders of the master. *Id.*

A declaration stated that the defendant was possessed of a granary, and a ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into the granary; that the plaintiff, believing the ladder to be fit for use, and not knowing the contrary, did carry corn up the ladder into the granary, and by reason of the ladder being unsafe he fell from it:—Held, that the declaration, without an averment that the plaintiff had no notice that the ladder was unsafe, was sufficient. *Williams v. Clough*, 8 H. & N. 258; 27 L. J. Exch. 325.

A declaration against a master, alleged that he knowingly, carelessly, and negligently erected a hoarding in a street, and left a machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hoarding, and knocked down the machine against the plaintiff. The hoarding had been erected by the defendant, a builder, and projected too far into the street, but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding, and close to it. A cart in passing struck against the hoarding, and knocked down the machine against the

plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work, though the machine was not moved:—Held, that there was no evidence to go to the jury of the master's liability. *Assop v. Yates*, 2 H. & N. 708; 27 L. J., Exch. 156.

A workman employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was imperfect, not being pulled with a safe hook, and that a jiddy should have been used. He worked with the hook, making no complaint of it; a jiddy had been provided by the master, who had directed that it should be used when earth was raised. In his master's presence he had complained that the jiddy was not used for water. The master was at the workings several times each day:—Held, that the master was not liable; first, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shown that the injury was not caused by his own rashness; secondly, because, assuming it to have arisen from the neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of the fellow-workmen in omitting to use it. *Griffiths v. Gidlow*, 8 H. & N. 648; 27 L. J., Exch. 404.

The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced:—Held, that the defendant was liable for the injury. *Clarke v. Holmes*, 7 H. & N. 937; 8 Jur., N. S. 992; 31 L. J., Exch. 356; 10 W. R. 405—Exch. Cham.

When a servant, knowing of a defect in machinery which he has to work in his master's employ, complains of it to him, but continues in the use of it in the reasonable expectation of its being repaired, and an accident happens through its defective condition, he is not precluded from recovering against his master. *Holmes v. Worthington*, 2 F. & F. 533—Willes.

Where work is being carried on, part of which is unsafe without certain precautions which the employer promises to provide, and he goes away leaving general directions to get on with the work, and in his absence the dangerous work is carried on before the precautions have been taken, and an injury results to a workman engaged on another part of the work, while knowing of the danger, the latter cannot recover against the employer. *Smith v. Dowell*, 3 F. & F. 238—Martin.

A declaration by the administratrix of W.

ing voyage up the river Niger, paying him at the rate of 50*l.* a month, commencing from the 1st of December, 1854, and also 20*l.* per cent. on the proceeds of the trade. The plaintiff replied, that he accepted the proposal, "to be paid 50*l.* a month, and 20*l.* per cent. on the net proceeds of the trade." The plaintiff received 50*l.* a month for seven months, and afterwards proceeded on the voyage in command of the vessel, but before the expiration of the ninth month wrongfully abandoned the vessel:—Held, that the contract, whether taken as constituted by the plaintiff's letter, or by the defendant's letter as explained by the plaintiff's, gave a cause of action at the expiration of each month, and that the plaintiff was entitled to recover the 50*l.* for the eighth month on an indebitatus count. *Taylor v. Laird*, 1 H. & N. 266; 25 L. J., Exch. 329.

A servant was retained for a year, his wages to be paid quarterly; he was dismissed at the end of a month from the commencement of the second quarter; he then, before the expiration of the quarter, brought an action for work and labor; money was paid into court sufficient to satisfy for the work done:—Held, that the defendant was entitled to a verdict, as, at all events, the plaintiff could not maintain an action until the end of the quarter. *Smith v. Howard*, 2 N. & P. 432; 7 A. & E. 544; W., W. & D. 635; 2 Jur. 232.

**When recovery is barred by award or judgment.**—A declaration stated, that, in consideration that the plaintiff would enter into the employ of the defendant, in a certain capacity for a year, at the rate of five guineas per week throughout the year, the defendant undertook to employ him for a year, and alleged as a breach, that he dismissed the plaintiff from his employ before the end of the year, without any reason or probable cause. The action, which was commenced before the expiration of the year, was referred to an arbitrator, who awarded to the plaintiff a sum of money equivalent in amount to the wages which he would have been entitled to receive from the defendant on the day the action was commenced. No claim was made before the arbitrator for any compensation in damages for the dismissal, except so far as the special count in the declaration, and the evidence of the employment and the dismissal, might amount to such a claim. The plaintiff having afterwards brought an action to recover a compensation in damages, in consequence of the dismissal from the defendant's employ, before the end of the year:—Held, that the award was a bar to such action. *Dunn v. Murray*, 9 B. & C. 780; 4 M. & R. 571.

A servant in husbandry being hired for a quarter of a year, entered the service, and was discharged before the end of the quarter; she immediately sued her master in a county court for discharging her without reasonable cause; and a verdict was given for her master. After the quarter had elapsed she took out a sum-

mons before justices against the master, to recover the quarter's wages:—Held 1, that the question to be decided was essentially the same in the two courts, viz., whether the discharge was wrongful, and that the decision in the county court was conclusive between the parties. *Routledge v. Hislop*, 6 Jur., N. S. 398; 28 L. J., M. C. 90; 8 W. R. 363; 3 El. & El. 549.

A clerk dismissed in the middle of a quarter brought an action for a wrongful dismissal, the declaration containing a special count for such dismissal. The jury was directed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except under a common count, and they gave damages accordingly. The plaintiff then brought a second action to recover under a common count for his services during the broken quarter:—Held, that the action was not maintainable, because the plaintiff by his former action on the special contract had treated it as an open contract, and he could not afterwards recover under the common count as for services under a rescinded contract. *Goodman v. Pocock*, 15 Q. B. 576; 14 Jur. 1042; 19 L. J., Q. B. 410. S. P., *Lilly v. Elwin*, 11 Q. B. 742; 12 Jur. 623; 17 L. J., Q. B. 133.

Held, also, that in the former action the jury ought to have been directed to take the services rendered during the broken quarter into account, in awarding damages under the special count for the wrongful dismissal. *Id.*

Two journeyman painters took out a summons, returnable before a justice of the peace, for the recovery of a sum of money alleged to be due to them for wages from C., claiming also a further sum as damages for the detention of such wages. The justice heard the summons under the Master and Servant Act, 1867, 30 & 31 Vict. c. 141, s. 9, and dismissed the same upon the merits. They afterwards issued plaints in the county court against C. to recover the wages alone, but judgment was given for C. on the ground that the case was *res judicata*:—Held, that the county court judge was right, and that the justice of the peace having jurisdiction under the Master and Servant Act, 1867, ss. 4 and 9, and having exercised that jurisdiction, the matter was *res judicata*. *Millett v. Coleman*, *Dawson v. Coleman*, 44 L. J., Q. B. 194; 33 L. T., N. S. 204.

**Nature and form of action.**—If the contract between master and servant is the usual one for a year, determinable at a month's notice, the servant, if turned away improperly, cannot recover on a count stating the contract to have been for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he has served. *Archard v. Horner*, 3 C. & P. 349—Tenterden.

A performer at a theater, who is to be paid for nights of performance on which he does not perform, as well as for those on which he does perform, should not declare for work

not labor, but for arrears of salary as a hired performer. *Fraser v. Dunn*, 8 C. & P. 704—*Alinger*.

If A., being employed by B. as a clerk, at a salary of 200*l.* per annum, payable quarterly, is discharged in the middle of a quarter, and paid proportionably; he is entitled to recover his salary for the remainder of the quarter, under a count for work and labor. *Gandall v. Pontigny*, 1 Stark. 198; 4 Camp. 375—*E. tenborough*.

Where a declaration stated a contract of service for certain wages per annum, subject to be determined at a month's notice, and alleged that the defendant dismissed the plaintiff without a month's notice, by means whereof the plaintiff lost all the wages, profits, &c. he might have acquired from being continued in the service:—Held, that he was only entitled to recover, as damages, wages for one month, and that the arrears of salary due to him at the time of dismissal could only be recovered in an action for work and labor. *Hurtley v. Harman*, 3 P. & D. 567; 11 A. & E. 798.

A domestic servant entered into the defendant's service on the 19th November. On the 15th January, her mistress caused her to be taken before a magistrate, on a charge of stealing some small articles of plate. The magistrate remanded her till the 20th, when she was again brought up and discharged. On the 22d she went to demand her clothes and wages, including 1*l.* 1*s.*, in lieu of a month's warning. The defendant tendered 2*l.* 2*s.* for the two months' actual service, but refused to pay the additional guinea:—Held, that inasmuch as the placing her in custody, on a charge that was afterwards abandoned, was no dissolution of the contract of hiring, she was, under the circumstances, entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labor. *Smith v. Kingsford*, or *Gainsford*, 3 Scott, 279; 2 Lodge, 109.

A party working under a yearly contract at wages payable quarterly, having been discharged for misconduct after the commencement of the quarter, agreed to finish his month's work:—Held, that, although he could not recover a quarter's wages, still he was entitled to a month's wages under the common count, although the particulars of demand stated that he sought to recover under those counts for a quarter's work. *Hereum v. Stericker*, 10 M. & W. 553; 12 L. J., Exch. 17.

The additional month's wages to which a menial servant, hired by the year, is entitled if discharged without cause and without a month's warning, cannot be recovered under a common count, but must be declared for specially. *Fewings v. Tisdall*, 1 Exch. 295; 5 D. & L. 196; 11 Jur. 977; 17 L. J., Exch. 18.

Where by the terms of a contract a service to be performed by A. for B. is to be paid for in goods, A. cannot declare for the value of the

service, but must sue on the special contract. *Keys v. Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

But if B. by his own act renders the delivery of the goods impossible, A. may sue for the value of the service. So, if B. allows the goods to be sold under an execution against him. *Ib.*

#### Pleadings, evidence, and trial of actions.]

—A declaration stated, that, on the 15th October, 1845, in consideration that the plaintiff would enter into the service of the defendant, and serve him for a certain time, to wit, from the day and year aforesaid, until the service should be determined by reasonable notice in that behalf on either side, the defendant promised the plaintiff to retain and employ him, and to continue him in such service until such service should be determined, to wit, by reasonable notice in that behalf as aforesaid. Averment, that the plaintiff afterwards entered into the service of the defendant, and has always, from the commencement thereof, been ready and willing to remain and continue in his service; and during all that time tendered and offered himself to serve the defendant. Breach, that he did not nor would continue the plaintiff in his service, but, on the contrary thereof, did afterwards refuse to suffer him to continue any longer in his service, and wrongfully discharged him therefrom without previous notice in that behalf:—Held, first, that it was not necessary for the plaintiff to show that he gave no notice to determine the service. *Wilkinson v. Gaston*, 9 Q. B. 137; 10 Jur. 804; 15 L. J., Q. B. 340.

Held, secondly, that the discharge sufficiently appeared to have been after the commencement of the service. *Ib.*

A declaration stated that in consideration that the plaintiff would enter the service of the defendant as a commercial traveler for one year, the defendant agreed to employ him in that capacity at a yearly salary, and to continue him in such service for one year. Breach, that the defendant wrongfully dismissed the plaintiff before the expiration of the year. At the trial it appeared that by the usage of trade such yearly hiring might be put an end to by either party giving three month's notice:—Held, that the contract was incorrectly described, and that the objection was properly raised by non assumpsit. *Metzner v. Bolton*, 9 Exch. 518; 2 C. L. R. 685. See also *Wheeler v. Buvidge*, 9 Exch. 668; 2 C. L. R. 1077.

Under the plea of non assumpsit to a count on a quantum meruit for services, the defendant may show what the services were worth, and the jury give damages accordingly. *Smith v. Howard*, 2 N. & P. 432; 7 A. & E. 544; W., W. & D. 635; 2 Jur. 232.

A. entered into an agreement with B. and C. to serve them for seven years, at fixed wages, at the rate of three guineas weekly; the party making default to pay to the other 500*l.* by way or in nature of specific damages.

A. was dismissed, he became bankrupt, and after his bankruptcy brought an action on the agreement, to which B. and C. pleaded his bankruptcy:—Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to his assignees. *Beckham v. Drake*, 2 H. L. Cas. 579; 13 Jur. 921.

To an action for work and services, the defendants pleaded that the claim was in respect of wages for work done by the plaintiff, as master of a boat used by the defendants for the carriage of goods, they being common carriers, and that it was agreed that the plaintiff, as master of the boat, should be chargeable for all pilferings, losses, and damages to goods under his charge, and that the amount should be deducted from his wages, and might be pleaded as a set-off. The plea alleged the pilferage of a pipe of wine, while under the plaintiff's charge, and claimed to set off the damages sustained by the defendants in consequence against the plaintiff's claim:—Held, that the plea was bad, as amounting to the general issue. *Uleworth v. Pickford*, 8 D. P. C. 873.

In an action by a servant for dismissing him during the period for which he was hired, the declaration stated that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom. Plea, that before the discharge and dismissal, the plaintiff conducted himself in an improper and a disobedient manner, and disobeyed the defendant's lawful orders, without this, that he wrongfully dismissed and discharged the plaintiff without reasonable cause:—Held, that although the plea might be bad on special demurrer, as putting in issue an immaterial allegation in the declaration, yet as issue had been taken on the plea, the plaintiff's misconduct as well as the fact of his dismissal was in issue, and consequently that evidence of such misconduct offered at the trial by the defendant was improperly rejected, and that the onus of such proof lay on the defendant. *Lush v. Russell*, 1 L. M. & P. 369; 5 Exch. 203; 7 D. & L. 228; 14 Jur. 435; 19 L. J., Exch. 214.

To an action for wrongfully discharging the plaintiff from the defendants' service, as a traveler and salesman, the defendants pleaded that the plaintiff refused to obey their lawful and reasonable commands with reference to the plaintiff's conduct and proceedings in their employ, and that the plaintiff received from customers of the defendants moneys which he wrongfully appropriated to his own use, wherefore the defendants did, by reason of the premises, refuse to continue the plaintiff in their employ, and therefore discharged him. At the trial it was proved that the plaintiff had misappropriated the defendants' moneys, but the fact of such misappropriation was not known to the defendants until after they had discharged him:—Held, that the defendant, having justifiable cause for discharging the plaintiff, the judge was wrong

in leaving it to the jury to say whether they discharged him for that cause, for that their motive and intention were not in issue under the replication de injuria. *Spotwood v. Barrow*, 5 Exch. 110; 19 L. J., Exch. 226.

A declaration stated that the plaintiff agreed with the defendants to act as their salesman for one year, and not to be connected with any other house in disposing of their goods, and that they agreed to pay the plaintiff 200*l.* for such servitude: that the plaintiff entered into the defendants' employ and continued therein, and was not connected with any other house, and had always, until the expiration of one year from the agreement, been ready and willing, and offered to remain in such employ, and not to be connected with any other house. Breach, that the defendants would not suffer the plaintiff to act as salesman for the remainder of the year, but discharged the plaintiff, and had not paid the 200*l.* The defendants pleaded, as to the non-payment of the 200*l.*, that after the plaintiff ceased to be in their employ, and during the year, the plaintiff entered into the service of the house of other persons, and became connected with it in disposing of their goods:—Held, bad, on special demurrer, as an argumentative denial of the plaintiff's readiness and willingness to remain in defendants' employ. *Spotwood v. Barrow*, 1 Exch. 804; 5 D. & L. 373; 17 L. J., Exch. 98.

A declaration stated an agreement, whereby the defendant agreed to employ the plaintiff, as a journeyman baker, for four years, and to pay him weekly wages, and also additional sums in the last three years of the term. Breaches, that the defendant, before the expiration of the term, wrongfully discharged the plaintiff from his employ; that the defendant did not pay the plaintiff the weekly wages for the remainder of the term, and that the defendant did not pay the plaintiff the additional sums which he would have been entitled to, if he had continued in the employ of the defendant. General demurrer, and joinder therein, to the two last breaches:—Held, that the proper course was to have applied to a judge to strike out those breaches, and that, upon this record, they could not be treated as surplusage. *Lush v. Russell*, 4 Exch. 637.

In an action for a breach of a contract to employ the plaintiff for a given time, charging the defendant for having wrongfully and without reasonable and probable cause dismissed the plaintiff, the defendant pleaded that he did not wrongfully, without reasonable or probable cause, dismiss the plaintiff as alleged:—Held, that this merely put in issue the fact of the dismissal, the rest being immaterial. *Powell v. Bradbury*, 7 C. B. 201; 13 Jur. 349; 18 L. J., C. P. 116.

A plaintiff declared upon a breach of contract, by which the defendant agreed to make her an annual allowance for her maintenance and instruction, until he should require her services as a governess of his



children. The defendant pleaded, that he entered into the agreement in the belief and on the representation by the plaintiff that she was an honest and moral person, and a fit and proper person for the situation; that the defendant discovered that she had become and was an immoral and dishonest person, and wholly unfit and improper for the situation, and a person whom it would have been very improper and wrong to employ as governess of his children; and that he therefore rescinded the contract, and gave her notice:—Held, that the plea was bad, as being too general and uncertain. *Burgess v. Beccumont*, 2 D. & L. 590; 8 Scott, N. R. 669; 7 M. & G. 962; 9 Jur. 14; 14 L. J., C. P. 18.

In an action by an attorney's clerk, for improperly dismissing him, plea, that he conspired with A., and, in pursuance of that conspiracy, was guilty of acts of misconduct which came to the defendant's knowledge, who thereupon dismissed him:—Held, that, to support the plea, it was necessary for the defendant to show that he knew and acted upon the misconduct when he dismissed the plaintiff. *Mercer v. Whall*, 5 Q. B. 447; 9 Jur. 576; 14 L. J., Q. B. 267.

Where, in a declaration, it was stated, that by agreement, after reciting that the defendant had requested the plaintiff to enter into his employment, it was witnessed that the parties mutually agreed as follows: first, the plaintiff agreed to serve the defendant for seven years, at a salary of 100*l.* a year; secondly, the defendant agreed, during the continuance of the term, that he would pay the salary, and if the defendant should, from any cause whatever, give up the business, or not require the plaintiff's services, then he would use his best endeavors to procure for him employment in some similar business, at an equal salary, or, in case he should be unable to do so, the defendant would pay to the plaintiff 100*l.* a year during the residue of the term; and the declaration averred general performance, and that the plaintiff entered the service; and that although the plaintiff was ready and willing to continue, yet the defendant would not continue the plaintiff in his employ until the expiration of the term, but during the term wrongfully discharged him, without reasonable or probable cause; and although the defendant, during the term, did not nor would continue the plaintiff in his employ, but discharged him, yet the defendant did not use his best or any endeavors to procure, nor did he procure, the plaintiff employment in some similar business, at an equal salary, but had wholly failed:—Held, first, that it was a breach well assigned to say that the defendant had not used his best endeavors to procure for the plaintiff employment in some similar business, and that it was not necessary to negative that the defendant had paid a salary of 100*l.* a year, for that the undertaking to use his best endeavors was absolute and independent, and that there was not merely an alternative undertaking either to use his best endeavors, or to pay 100*l.* a

year. *Rust v. Nottidge*, 1 El. & Bl. 99; 17 Jur. 278; 22 L. J., Q. B. 73.

Held, secondly, that it was not necessary to aver a request by the plaintiff to the defendant to use his best endeavors, nor that he was ready and willing to accept a situation. *Id.*

Held, that a plea, that when the plaintiff was discharged the defendant was, and thence hitherto has been, wholly unable to procure for the plaintiff any such employment, was bad on general demurrer, for it tendered an immaterial issue, assuming a breach of the agreement to be charged in the declaration which was wholly different from the breach actually there assigned. *Id.*

A declaration alleged that, in consideration that the plaintiff would enter into the employ of the defendant in the capacity of European correspondent of a newspaper called the New York Courier and Inquirer, until the service should be determined by due and customary notice on either side, and for a salary, the defendant promised to retain the plaintiff and to pay the salary, and to continue him in such service until determined as aforesaid. Breach, the wrongful discharge of the plaintiff without notice, and without reasonable or probable cause. Plea, that the engagement and promise were upon the terms and condition that the plaintiff should by every steamer from Liverpool to New York, forward a letter to the newspaper office containing European news; and that while so employed the plaintiff wrongfully neglected to forward any letter containing such news by several steamers, wherefore the defendant discharged him. And a second plea alleged the engagement to have been upon the terms and condition, that the plaintiff might draw and negotiate bills of exchange upon the defendant for his salary when due, but not for any sum not due or before it was due; and that he wrongfully drew and negotiated divers bills of exchange for sums of money not due, which bills were dishonored, to the damage of the defendant's credit, wherefore he discharged him:—Held, that the pleas showed only a breach by the plaintiff of stipulations in the contract, for which he might be liable in a cross action for damages, and were therefore no bar to the action. *Gould v. Webb*, 4 El. & Bl. 933; 1 Jur., N. S. 821; 24 L. J., Q. B. 205.

A declaration stated that the plaintiff entered into the service of the defendant for three years, under an agreement that he, the plaintiff, would, during that time, use his best endeavors to promote the interests of the defendant, and would attend to and carry out all reasonable requests:—Held, in an action for a wrongful dismissal, before the end of the term, that a plea that the plaintiff did not, while in the defendant's employ, use his best endeavors to promote the interests of the defendant, according to the contract, wherefore he was dismissed, disclosed a good defense. *Irving v. Lomas*, 10 Exch. 734; 24 L. J., Exch. 80.

In an action for a wrongful dismissal, there being a plea of justification, the plaintiff is entitled to have a verdict taken on that plea, even although he would, on the declaration alone, be liable to a nonsuit, and the defendant was held to be precluded from taking advantage, on the plea of justification, of a special contract, which he had himself succeeded in excluding, as not being in writing. *Brett v. Philips*, 1 F. & F. 398—Cockburn.

A count was framed on a contract of hiring determinable on reasonable notice, alleging a breach in discharging the plaintiff without such notice. There was a count for work and labor, to which the only plea was non assumpsit. Third plea stated a discharge by the defendant for disobedience of orders in not working during harvest till eight o'clock at night. Fourth plea stated that the plaintiff unlawfully quitted his work, and a discharge by a magistrate, under 4 Geo. 4. c. 34, s. 3:—Held, that the plaintiff, having been guilty of disobedience of orders, and unlawfully absenting himself from his work, so as to justify his discharge, he could not recover for the time of his actual service on the common count; and that the discharge by the magistrate was sufficiently the act of the defendant to entitle him to a verdict on the third plea, and on the plea of non assumpsit to the common count. *Lilly v. Elwin*, 11 Q. B. 742; 12 Jur. 623; 17 L. J., Q. B. 132.

A plaintiff agreed to serve the defendant for the term of ten years, in the capacity of a brewer; in consideration of the premises, and of the due, full, and complete service of the plaintiff, the defendant agreed to pay him 20*l.* on execution of the agreement, to furnish him with a house and coals during the whole of the term of ten years, and to pay him the weekly sum of 2*l.* 10*s.* during the term of ten years. The plaintiff entered into the service under the agreement. Some years afterwards he fell ill, and was unable to attend personally to business; but during that time he instructed the defendant in the art of brewing. The defendant refused to pay the plaintiff his wages for the period during which he had been ill, but retained him in the service; and after he was able to attend again personally to business, paid him as before under the agreement. To an action by the plaintiff to recover wages for the period during which he had been ill, the defendant pleaded that the plaintiff was not, during any part of the time for which such wages were claimed, ready and willing, or able to render and did not in fact during any part of such time render, the agreed or any service:—Held, a good plea; the readiness and willingness to perform the service being a condition precedent to the right to wages; and the gist of the plea being that the plaintiff willfully refused or omitted to serve. *Cuckson v. Stones*, 1 El. & Bl. 248; 5 Jur., N. S. 337; 28 L. J., Q. B. 25; 7 W. R. 134.

On showing cause against a rule to enter a verdict for the plaintiff on the plea:—Held, that the averment that the plaintiff was not

ready and willing, or able, was not supported by his physical inability, for a time only, and not through his own default, to attend personally to the business; and that the contract not having been rescinded, the defendant was not entitled to suspend the weekly payments during that time; and the plaintiff was therefore entitled to the verdict. *Id.*

In an action for wages as a female servant, the defendant pleaded non assumpsit, and the plaintiff gave evidence of acts of service. The defendant proposed to go into evidence to show that the plaintiff had cohabited with him:—Held, that he might do so, as this went to show that there was no contract between the parties, and not to invalidate any contract on the ground of illegality. *Bradshaw v. Hayward*, Car. & M. 591—Cresswell.

In an action for a wrongful dismissal of a servant, who had been retained under an annual salary, but had assented to a proposal not to be paid further salary until work should be resumed, which had not in fact been resumed:—Held, that it was for the jury to say whether the original contract had been put an end to, and if so, the defense arose under a plea of rescission. *Hopkins v. Westrocht*, 2 F. & F. 368—Wightman.

In an action for a wrongful dismissal from an employment, the dismissal being justified, it is for the jury not only whether matter of fact existed which would be a valid ground of dismissal, but whether the dismissal was bona fide and really on such a ground. *Smith v. Allen*, 8 F. & F. 157—Cockburn.

#### Amount of recovery; measure of damages.]

—An agreement contained in letters was entered into between the plaintiff and the defendant, by which the former was to be employed by the latter as "commission agent, at a salary of 50*l.* a year, the engagement to be terminated at the expiration of any year, on giving three clear months' notice." The terms as to the duration of the engagement and the mode of terminating it, were settled in the earlier letters; the amount of salary was agreed to in the later letters of the series, which later letters contained no mention of the three months' notice. The plaintiff entered on his duties on 1st April, 1860, and was discharged on 25th March, 1861, without any previous notice, receiving only one year's salary. In an action for a wrongful dismissal, in which he claimed to recover 50*l.*, the amount of a second year's salary:—Held, first, that the arrangement as to notice, which had been previously agreed to, was not affected by the subsequent letters about the remuneration. *M'Kean v. Cowley*, 7 L. T., N. S. 828—Exch.

Held, secondly, that the damages were unliquidated, and the plaintiff was not entitled to recover the whole of the second year's salary, but so much as would compensate him for the loss of an opportunity of earning 50*l.*, against which should be set something for the saving of his time and labor by his not having had to earn it. *Id.*

The plaintiff was engaged by the defendant to superintend some draining operations upon his estate, at a salary of 2*l.* per week and a house to live in, or 13*l.* per annum in lieu of it, and was also to receive a gift of 20*l.* if he remained till Lady-day. Before the expiration of the term the plaintiff was wrongfully dismissed, and ordered to leave the house which the defendant had elected to put him into; but he refused to do so, and the defendant accordingly removed his goods and furniture into a barn, from which the plaintiff might have taken them if he had chosen to do so. During the time that the goods were there the barn was broken into, and some of the goods damaged, and 70*l.* taken from a bureau. In an action for a wrongful dismissal:—Held, that in assessing the damages, the jury had a right to take into consideration the gift of 20*l.* which the plaintiff would have earned if he had been allowed to do so, but not the sum for the damage to the goods, or the money lost from the bureau, as there was no relationship of landlord and tenant existing, and therefore that the defendant had a right to remove the goods, and could not be held liable for the damage or loss which happened. *Lake v. Campbell*, 5 L. T., N. S. 582—C. P.

In estimating damages for the wrongful dismissal of a servant, the jury should take into account the salary and not any commission obtained by him. *Hartland v. General Exchange Bank*, 14 L. T., N. S. 863—Willes.

A servant is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during such period. *Ib.*

The employer being a company, afterwards ordered to be wound up, that fact also should be taken into consideration in estimating the loss sustained by the servant through his dismissal. *Ib.*

The directors of a mining company in South America agreed to employ the plaintiff as superintendent of mines, for three years, at a salary increasing yearly; and the directors were at liberty to dissolve the agreement at any time, on giving him twelve months' notice, or paying him twelve months' salary in lieu of such notice, and a reasonable sum towards defraying his expenses to England; and, if he served the three years, he should be entitled to the expenses attending the return of himself and family. The directors dismissed him before the expiration of the second year, without giving him notice or paying him the year's salary:—Held, that he was only entitled to one year's salary from the date of his dismissal, and to his own expenses for his return to England; and not to expenses incurred for the return of his family, or to the salary which would have accrued from the time of his dismissal to the end of the third year. *French v. Brooke*, 4 M. & P. 11; 6 Bing. 354.

In an action for breach of an agreement to employ the plaintiff at a salary, the jury, in

assessing the damages, may look to all that has happened, or is likely to happen, to increase or mitigate the loss of the plaintiff down to the day of the trial. *Hochster v. De Latour*, 2 El. & Bl. 678; 17 Jur. 972; 22 L. J., Q. B. 455.

As to proceedings before justices against master for non-payment of wages,—see this title, IV., 2.

### 3. Support and Medical Attendance for Servant.

**Support of servant becoming pauper.**—A servant whose limb is fractured by a fall, when sitting on the shafts of his master's wagon, is a casual pauper in the parish in which he falls, and must be supported and cured at their expense, and not at that of his master. *Newby v. Wiltshire*, Cald. 527; 2 Esp. 739; 4 Dougl. 284; 3 B. & P. 247.

**Medical attendance in case of illness or accident.**—Although a master is not bound to provide a menial servant with medical attendance and medicine during sickness, if a servant falls ill, and a master calls in his own medical man to attend such servant, the master will not be allowed to deduct the charge for such medical attendance out of the servant's wages, unless there is a special contract between master and servant that he should do so. *Sellen v. Norman*, 4 C. & P. 80—Gaselee. But see *Rex v. Winterset*, Cald. 298.

A master is not by the general law bound to provide medical advice for his servant; but the case is different with respect to an apprentice; and a master is bound, during the illness of his apprentice, to provide him with proper medicines. *Reg. v. Smith*, 8 C. & P. 153—Vaughan and Patteson.

As to liability of master to other persons for medical attendance, &c., upon servant,—see this title, III., 1.

### 4. Giving Character to Servant.

**Duty and liability of master.**—An action will not lie at the suit of the servant against his master for not giving him a character. *Carrol v. Bird*, 3 Esp. 201—Kenyon. And see *Handley v. Moffatt*, 21 W. R. 231; 7 Ir. R., C. P. 104.

If a servant obtains a place upon the strength of a character, given by his master, and the master afterwards discovers circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the communication made concerning them is a privileged communication. *Gardner v. Slade*, 13 Q. B. 796; 13 Jur. 826; 18 L. J., Q. B. 334.

If a servant, when he is taken into a service, brings a written character, and is afterwards dismissed for ill behavior:—Semble, that the master does no wrong, if before he returns the character to the servant he writes upon it

that the person was afterwards in his service and dismissed for ill behavior. *Taylor v. Reenan*, 7 C. & P. 70; 1 M. & Rob. 490. See *Murrell v. Ellis*, 2 C. B. 295; 15 L. J., C. P. 19; and *Rogers v. Macnamara*, 14 C. B. 27; 23 L. J., C. P. 1.

**Punishment of false personation, pretenses or representations.**—[By 32 Geo. 3, c. 56, s. 1, if any person or persons shall falsely personate any master or mistress, or the executor, administrator, wife, relation, housekeeper, steward, agent, or servant of any such master or mistress, and shall, either personally or in writing, give any false, forged or counterfeited character to any person offering him or herself to be hired as a servant into the service of any person or persons, then and in such case every such person or persons so offending shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 2, if any person or persons shall knowingly or willfully pretend, or falsely assert in writing, that any servant has been hired or retained for any period of time whatsoever, or in any station or capacity whatsoever, other than that for which or in which he, she, or they shall have hired or retained such servant in his, her, or their service or employment, or for the service of any other person or persons, then, and in either of the said cases, such person or persons so offending, shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 3, if any person or persons shall knowingly or willfully pretend, or falsely assert, in writing, that any servant was discharged or left his, her, or their service at any other time than that at which he or she was discharged or actually left such service, or that any such servant had not been hired or employed in any previous service, contrary to truth, that then and in either of the said cases such person or persons shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 4, if any person shall offer himself or herself as a servant, asserting or pretending that he or she hath served in any service in which such servant shall not actually have served, or with a false, forged, or counterfeit certificate of his or her character, or shall in anywise add to or alter, efface or erase any word, date, matter, or thing contained in or referred to in any certificate given to him or her by his or her last or former actual master or mistress, or by any other person or persons duly authorized by such master or mistress to give the same, then and in either of the said cases such person or persons shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 5, if any person or persons, having before been in service, shall, when offering to hire himself, herself, or themselves as a servant or servants in any service whatsoever, falsely or wilfully pretend not to have been hired or retained in any previous service as a servant, then and in such case such person or persons

shall forfeit and undergo the penalty or punishment hereinafter mentioned and in that behalf provided.

By s. 6, the penalty is 20l., and imprisonment in the house of correction, with hard labor, for any time not exceeding three months and not less than one month, until paid.

By s. 7, a form of conviction is provided.]

As to defamation by giving character,—see DEFAMATION.

## 5. Injury to Servant in Course of Employment.

(a) By Acts or Negligence of Master or of Servant himself.

**Principles of liability or immunity.**—[A master is bound to take all reasonable precautions to secure the safety of his workmen: *Brydon v. Stewart*, 2 Macq. H. L. Cas. 32. S. P., *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748.

It is no answer to a claim of damages by the surviving relatives of a workman accidentally killed in a mine, "which was not in a safe and sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own. *Id.*

A master who lets a workman down his mine is bound to bring him up safely, even though he comes up on his own business, and not for that of his master. *Id.*

A master of dangerous works is bound to be careful to prevent accidents to those employed by him. If his machinery or apparatus is not stanch and appropriate, or if he permits it to be used without proper guards, and mischief consequently arises, he will be responsible. *Weems v. Mathieson*, 4 Macq. H. L. Cas. 215.

All that a master is bound to do is to provide machinery fit and proper for work, and to have it superintended by himself or by his workmen in a fit and proper manner. *Id.*

From the mere relation of master and servant no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of his employment. *Riley v. Bazendale*, 6 H. & N. 445; 30 L. J., Exch. 87; 9 W. R. 347.

In order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine. *Potts v. Port Carlisle Dock and Railway Company*, 8 W. R. 524; 2 L. T., N. S. 283—Q. B.

The owners of dangerous machinery, who by their foreman employ a young person about it unacquainted with its nature and use, are bound to take due care that such person is duly instructed therein; and if they either neglect this, or if express directions are given by the foreman to use the machinery in a manner that must lead to danger, of

which the young person is not likely to be fully aware, they are liable for any injury sustained by such person in the use of the machinery in that manner. *Grizzle v. Frost*, 3 F. & F. 622—Cockburn.

In an action by a laborer against his employer, for an injury caused by the fall of a scaffold-pole, proved to have fallen through the rottenness of the end put into the earth, it appeared that it had been in the earth two years, and that though some poles might last as long without being rotten others would not, and that no one was employed from time to time to take up the poles to see if they were sound:—Held, that if the jury thought the pole was left in the ground an unreasonable time without examination, there was evidence of negligence to sustain the action.

*Wibb v. Rennie*, 4 F. & F. 608—Cockburn.

Where an employer, the owner of premises, allows them to remain and be used for the purpose for which they are erected and designed, in a state unsafe and insufficient for that purpose, and an accident occurs in the use of them, not through the particular manner of user, but by reason of such unsafe and insufficient state, he is liable for any injury thus caused to his servants using them. Thus, where an engineer had a crane worked on a tramway, supported on piers of brickwork, which were of insufficient strength, and which gave way, and thus caused an accident to one of the men engaged in working the crane:—Held, that there was evidence of negligence, for which the employer was liable. *Feltham v. England*, 4 F. & F. 460—Cockburn.

A chain broke, partly from wear and partly from bad welding, and injured the servant using it. His master had not had it examined or tested, although there are well-known methods for doing so:—Held, that the master was liable for the injury caused to the servant. *Murphy v. Phillips*, 24 W. R. 647; 83 L. T., N. S. 477—Exch. Div.

**Master's knowledge of danger or personal interference.**—A master is responsible to his servant for an injury received in the course of his service, if it is shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master, by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants, whose incompetency was the cause of the accident; but, in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence. *Ormond v. Holland*, El., Bl. & El. 102.

A master is not liable to an action at the suit of his servant, for an injury sustained by the latter, caused by the breaking down of a carriage in which the servant was riding on his master's business, through a defect in the carriage of which the master was not aware. *Priestley v. Fowler*, 3 M. & W. 1; M. & H. 805; 1 Jur. 987.

A declaration stated that the plaintiff was

a servant of the defendant in his trade of a butcher; that the defendant desired and directed the plaintiff to go with and take goods of the defendant in a van of the defendant then used by him, and conducted by another of his servants, in carrying goods for him upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the van, with the goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties the van gave way and broke down, and the plaintiff was thrown on the ground and his thigh fractured:—Held, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable. *Ib.*

A count alleged that one of the defendants was a contractor for the supply of beef to the navy, and the other his foreman, having the control and management of the supply of cattle, and of the slaughter of the same; that it was the duty of the defendants to take care that sound and healthy beasts should be supplied and slaughtered, and that none others should be supplied for the purpose; yet that they supplied and slaughtered diseased cattle, whereby the plaintiff, who was employed to cut up the carcasses of the cattle, became infected with the disease of the cattle. A second count alleged, that the defendants, by representing slaughtered carcasses of cattle to be sound, caused and procured the plaintiff to cut up the same; that the beasts were unsound and diseased, whereby he contracted the disease and was permanently injured:—Held, that the counts were bad. *Davies v. England*, 10 Jur., N. S. 1235; 83 L. J., Q. B. 821.

A third count, stating that the defendants, well knowing that certain carcasses of slaughtered cattle were diseased and dangerous to persons cutting up the same, invited and employed the plaintiff, who was ignorant of the diseased state of the carcasses, to cut up the same; that he, not knowing the premises, did, on the invitation and request, and on the employment of the defendants, cut up the carcasses, whereby he became infected and was injured, is a good count. *Ib.*

The principle, that a servant sustaining an injury from the negligence of a fellow-servant, while engaged in the common employment, cannot recover in an action against the common master, does not exempt from liability a master who himself takes part in the servant's work and while so doing injures the servant through negligence. *Ashwiz v. Stanwix*, 3 El. & El. 701; 7 Jur., N. S. 467; 80 L. J., Q. B. 183; 4 L. T., N. S. 85.



fore, although B. served under the agreement till April, 1886, when he left the service and worked for the defendant, who was shown the agreement in question, and warned that B. was the plaintiff's hired servant, that in an action against the defendant for harboring the plaintiff's servant, it was competent to the defendant to show that the contract of hiring was altogether void, under 29 Car. 2, c. 3, s. 4. *Sykes v. Dixon*, 1 P. & D. 463; 9 A. & E. 693; 1 W., W. & H. 120.

In order to support an action for enticing away the plaintiff's servant, it is sufficient if a contract of service can be implied from the position in which the plaintiff stood towards the person enticed away. Therefore, where the plaintiff was a publican, and his daughter lived with him, and acted in the capacity of barmaid, but without any express contract of service, and was induced by the defendant to leave the plaintiff's house:—Held, that it might be inferred from the circumstances of the case that the relation of master and servant existed between the plaintiff and his daughter, and that therefore the plaintiff was entitled to sue the defendant for enticing his daughter away. *Evans v. Walton*, 15 W. R. 1062; 36 L. J., C. P. 307; 2 L. R., C. P. 615; 17 L. T., N. S. 92.

A declaration by the lessee of a theater, alleged in the first and second counts that W. contracted with the plaintiff to sing at his theater, and not elsewhere, during a certain term, without the plaintiff's consent, and that the defendant, during the term, maliciously enticed and procured W. to depart from her contract, against the will of the plaintiff, whereby W. refused to sing for the plaintiff at his theater during the term. A third count alleged that W. had been hired by the plaintiff as and was his dramatic artiste for a term, and that the defendant maliciously enticed and procured her to depart from her employment during the term:—Held (by Wightman, J., Erle, J., and Crompton, J.), that the action was maintainable at common law, as the maliciously procuring W. to break her contract was a wrongful act, from which damage accrued to the plaintiff; that the rule of law giving a remedy for enticing away servants is not confined to menial servants, or to such as fall within the Statute of Laborers (23 Edw. 3), but extends to all cases where there is an unlawful or a malicious enticing away of a person employed to give his exclusive personal services for a given time, under the direction of the employer, who is injured by the wrongful act, and that the action for maliciously persuading a servant to quit his service is maintainable wherever there is, at the time of the persuading, a binding contract of hiring and service existing between the two parties, whether the service is then actually subsisting or not. *Lumley v. Gye*, 2 El. & Bl. 216; 17 Jur. 827; 23 L. J., Q. B. 463.

Semble, per Crompton, J., that the contract need not be for exclusive service, and that an action will lie for maliciously inducing

another to break a contract of any description, whereby damage accrues to the party with whom the contract has been made. *Id.*

But, by Coleridge, J., that the persuading or procuring, whether maliciously or not, a free contracting party to break his contract, to the damage of the party with whom he has contracted, is not actionable; the general rule of the law being to confine the remedy for breaches of contract to the contracting parties. That between master and servant there is an exception to this law, founded solely on the Statute of Laborers, and limited by it, and that W. not falling within the class of persons provided for in that statute, the action was not maintainable. *Id.*

**Pleadings in actions.**—In an action for the seduction of the plaintiff's daughter and servant, the plea of not guilty puts in issue the fact of seduction only, and not the fact of service. *Torrence v. Gibbins*, D. & M. 226; 5 Q. B. 297; 7 Jur. 1158; 13 L. J., Q. B. 34.

**Measure of damages.**—In an action for enticing away the plaintiff's servants, the measure of damages is not to be ascertained at the actual loss which he sustained at the time, but for the injury done him by causing them to leave his employment. *Gunter v. Ash*, 4 Moore, 12. S. P., *Dixon v. Bell*, 1 Stark. 287; 5 M. & S. 198.

### 3. Injuries to Servants by Third Persons.

**Right of action of master.**—A master may maintain an action for debauching his servant, though he is no way related to her in blood. *Fores v. Wilson*, Peake, 55—Kenyon.

So he may justify an assault in preventing his servant from being beaten. *Titchell v. Read*, Loft, 215.

If the plaintiff's son, who was in fact his servant, in delivering parcels from a stage coach, receives an injury, by which the father is deprived of his services, the father is not entitled, as part of the damages, for loss of his son's services, to have compensation for the injury done to his parental feelings. *Fleming v. Smithers*, 2 C. & P. 292—Abbott.

The plaintiffs sued the defendant in case for loss of services of their traveler from an accidental collision with the defendant:—Held, that the action was maintainable, and the damages not too remote, though case and not trespass would have been the proper remedy had the servant been the plaintiff. *Martinez v. Geber*, 3 Scott, N. R. 386; 3 M. & G. 88; 5 Jur. 463.

Held, also, that the plaintiffs need not allege in their declaration that the servant was hired at wages or salary. *Id.*

A master cannot maintain an action per quod servitium amisit against a railway company for an injury to his servant, while a passenger on the railway, caused by neglect of their duty to safely carry the servant according to their contract with him as such passenger, unless the master was a party to

the contract. *Alton v. Midland Railway Company*, 19 C. B., N. S. 213; 11 Jur., N. S. 672; 84 L. J., C. P. 292; 13 W. R. 918; 12 L. T., N. S. 703.

A servant took a ticket to travel on a railway, and was injured on his journey through the negligence of the railway company. The master brought an action against the company for the loss of his servant's services through their negligence; but there was no contract between the railway company and the master:—Held, that inasmuch as the servant was injured, not by a simple wrong, but by a wrong arising out of a breach of duty imposed on the railway company by their contract with the servant, the action was founded on the contract, and would not lie. *Id.*

A master cannot maintain an action for injuries which cause the immediate death of his servant. *Osborn v. Gillett*, 8 L. R., Exch. 88; 42 L. J., Exch. 53; 21 W. R. 409; 28 L. T., N. S. 197.

To a declaration against the defendant for injuries caused to the plaintiff's daughter and servant, by the negligent driving of the defendant's servant, by reason whereof she afterwards died; claiming as special damage the loss of her services, and her burial expenses, the defendant pleaded that she was killed on the spot; and a second plea that the acts complained of amounted to a felonious act, and that the person committing them had not been prosecuted:—Held, (by Kelly, C. B., and Pigott, B.; Bramwell, B. dissentiente), that the first plea was good; and (by the whole court), that the second plea was bad. *Id.*

As to action for seduction of servant,—see **INFANT**.

#### 4. Injuries to Third Persons by Servants.

##### (a) Liability of Master.

**Principles of liability or immunity.**—For complaints by the public the master is responsible. Thus, if a servant drives his master's carriage over a bystander; or if a gamekeeper, employed to kill game, fires at a hare so as to shoot a bystander; or if a workman employed in building negligently drops a stone from the scaffold and so hurts a bystander; in all these cases the bystander is entitled to claim reparation from the master, because the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself or of his servants. *Bartonshill Coal Company v. Reid*, 3 Macq. H. L. Cas. 266; 4 Jur., N. S. 767.

In all cases where a master gives the direction and control over a carriage or an animal to a rational agent, the master is only responsible in an action on the case for want of skill or care of the agent. *Sharrod v. London and North-Western Railway Company*, 6 Railw. Cas. 239; 7 D. & L. 213; 14 Jur. 23; 29 L. J., Exch. 185.

A railway train, driven at the rate of forty miles an hour, according to the general directions of the railway company to the driver,

ran over and killed some sheep, which had strayed on the line in consequence of the defective fences of the company:—Held, that the train being under the direction and control of a rational agent, the company was not liable in trespass for the injury, but that the proper form of action was by action on the case, either for permitting the fences to be out of repair, or for directing the servant to drive at such a rate as to interfere with the right of the sheep to be on the line of railway. *Id.*

A master is not liable in trespass for an injury done without his knowledge by his servant, though in the course of his employ. *Gordon v. Rolt*, 4 Exch. 365; 7 D. & L. 87; 18 L. J., Exch. 432.

A declaration which charges the defendant with having negligently driven his cart against the plaintiff's horse, is supported by evidence that the defendant's servant drove the cart. *Brucker v. Fromont*, 6 T. R. 659.

According to the principles of English law the responsibility of a master for the negligence of his servant is founded on the presumption that the owner chooses his servant, and gives him orders which he is bound to obey. *The Halley*, 18 L. T., N. S. 879; 10 W. R. 998; 2 L. R., P. C. 193; 37 L. J., Adm. 33; 5 Moore P. C. C., N. S. 202.

C. owned a mischievous dog which was kept at his stables under the care and control of his coachman, who knew the dog to be mischievous. C. supposed the dog to be quite harmless. B. having been bitten by the dog, and having brought an action for the injuries, the judge directed the jury that there was evidence of the scienter, since the knowledge of such a servant was enough to make the master liable:—Held, that the direction was right. *Baldwin v. Casella*, 41 L. J., Exch. 167; 7 L. R., Exch. 325; 21 W. R. 16; 26 L. T., N. S. 707.

**From what employment or authority, or other contract or relationship, liability as master arises.**—The defendant employed P. to clean out a drain which was on the defendant's land. P. was not in the defendant's service, but was a common laborer, selected by the defendant on account of his having dug the drain originally. P. cleaned out the drain without assistance from any other person, and without the further direction or inspection of the defendant. He received five shillings for the job from the defendant. In the course of cleaning out the drain, P. took up part of an adjoining highway and replaced the same in an improper manner and with insufficient materials, in consequence of which the plaintiff's horse, passing along the highway, was injured:—Held, that under these circumstances P. was not an independent contractor, but was acting as the servant and under the control of the defendant, and consequently that the defendant was responsible for the injury. *Sadler v. Henlock*, 4 El. & Bl. 570; 3 C. L. R. 760; 1 Jur., N. S. 677; 24 L. J., Q. B. 138.

The defendants sent a barge, under the

management of their lighterman, to a wharf, for the purpose of being loaded. He was unable to get up to it, in consequence of a barge belonging to the plaintiff lying in the way, without any one in charge of it. The foreman of the wharf told him to shove the other barge away, as it had no business there, and to bring his alongside. He then moved the plaintiff's barge from the wharf, and made it fast to a pile in the river. When the tide went down, the barge settled upon a projection in the bed of the river, and was injured:—Held, that the defendants were responsible, as the lighterman in doing the act complained of was acting as their servant. *Page v. Defries*, 7 B. & S. 187.

A master porter, employed by a merchant at Liverpool to hoist or lower goods, cannot be considered in the light of a bailee, but of a servant; and the party employing him is liable for any injury caused through his negligence or want of skill. *Randless v. Murray*, 3 N. & P. 239; 8 A. & E. 109; 1 W. & H. 149; 2 Jur. 324.

A person occasionally employed by the defendant as his servant, being sent out by him on his business, took the horse of another person, in whose service he also worked, and, in going, rode over the plaintiff. At the trial, it was left for the jury to say, whether or not the horse was taken by the servant with the implied consent or authority of the defendant; and they having found a verdict for the plaintiff, the court refused to grant a new trial. *Goodman v. Kennell*, 1 M. & P. 241; 3 C. & P. 167.

A lessee of a ferry hired of the defendant a steamer, with a crew to ply to and fro. The plaintiff purchased of the lessee of the ferry a season ticket, and, while on board the vessel, was injured by the breaking of a rope, through the negligence of the crew:—Held, that the crew remained the servants of the defendant, and that he was therefore liable to the plaintiff for the negligence. *Dalyell v. Tyrer*, 5 Jur., N. S. 335; 28 L. J., Q. B. 52; El., Bl. & El. 890.

Held, also, that the liability of the defendant in such a case is independent of any contract, and it was immaterial whether the purchase of the ticket was from the lessee or the defendant. *Id.*

A butcher, who had purchased a beast at Smithfield, in the city of London, employed a licensed drover to drive it home. By the by-laws of the city, such beasts must, within the limits of the city, be driven by licensed drovers, unless driven by the purchasers themselves. The drover employed a boy to drive the beast, and through the boy's negligently driving the beast, after it had passed the limits of the city, ran into the plaintiff's premises and damaged his property:—Held, that, although the damage was not done within the city, the boy was not to be deemed the servant of the owner of the beast, and that the owner therefore was not liable. *Milligan v. Wedge*, 4 P. & D. 714; 1 Q. B. 714.

The defendant sent some bales of cotton to a warehouse, and they were piled there by his men, under the direction of the warehouseman's foreman. Owing to a fault in the piling, the pile fell and hurt the plaintiff:—Held, that the defendant was not liable. *Murphy v. Caralli*, 10 Jur., N. S. 1207; 2 L. J., Exch. 14; 13 W. R. 165; 3 H. & C. 462.

The defendant engaged the services of S., a thatcher, for a certain period, at weekly wages, for the purpose of hiring him out to do thatching work for his profit. S. having, during the period, thatched some stacks of wheat for the plaintiff, for which work the defendant claimed and received payment:—Held, that the defendant was responsible to the plaintiff for injury to the wheat, occasioned by the negligent manner in which S. did the work. *Holmes v. Onion*, 2 C. B., N. S. 790; 26 L. J., C. P. 261.

A captain of a vessel employed a stevedore to unload his vessel. The stevedore employed his own laborers, amongst whom was the plaintiff, and also one of the crew, named Davis, whom he paid, and over whom he had entire control, to assist them in unloading. The plaintiff, while engaged in the work, was injured through the negligence of Davis:—Held, that the captain was not responsible for the injury. *Murray v. Currie*, 6 L. R. C. P. 24; 40 L. J., C. P. 26; 23 L. T., N. S. 557; 19 W. R. 104.

When a cab-driver was furnished by a cab-owner with a horse and cab for the day, on the terms that he was to pay a fixed sum for their use, and have the earnings for himself, and the cab-owner personally furnished the cabman with a horse which he had lately bought and not tried in a cab, and which (though he did not know it) was unfit for the required purpose, and ran away and injured a person:—Held, by a majority of the court, that the relation between the persons was that of bailor and bailee, with a warranty that the horse was reasonably fit; and also, per Byles, J., that even if it was that of master and servant, the personal interference of the cab-owner was evidence of such negligence as would make him liable; but per Willes, J., that the relation was that of master and servant, and that in the absence of knowledge the cab-owner was not liable. *Fowler v. Lock*, 41 L. J., C. P. 99; 7 L. R. C. P. 272; 20 W. R. 672; 26 L. T., N. S. 476.

The relation existing between the chairman and stewards or managers of a public meeting is not that of master and servant, or principal and general agent, and though it is the duty of the chairman to do his best to preserve order, and the duty of those who are acting as stewards or managers to assist him in so doing, yet the nature and extent of this duty on both sides must arise out of, and in character and extent depend upon, the emergencies which may from time to time arise, and there is no ground for extending by implication an express authority given by the chairman and

mitted in its terms. *Lucas v. Mason*, 28 W. L. 924; 33 L. T., N. S. 13; 10 L. R., Exch. 51; 44 L. J., Exch. 145.

On the trial, in an action for assault, the plaintiff proved that he was present in the gallery of a large hall where there was a meeting convened by members of an association, and that the defendant acted as chairman. There was an interruption in the gallery near to the place where the plaintiff was standing, upon which the defendant said, "I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front." The plaintiff was making no disturbance, but, according to his statement, he was seized by a man with a white ribbon in his coat and two policemen, and dragged over some benches to the front part of the gallery, and thereby injured. There was nothing to show the position or duty of those who seized him, or whether any instructions as to keeping order had been given them by the defendant, before the act complained of:—Held, that there was no evidence of any liability on the part of the defendant, as there was not the ordinary relation of master and servant between him and those who assaulted the plaintiff, but only a particular direction as to a particular matter; and that the words used by the defendant did not authorize the officers to act upon their judgment as to who were the persons making the disturbance. *Ib.*

**Liability of master for acts of servant within his authority or the course of his employment, in general.**—A master is liable in trespass for any act done by his servant, in the course of executing his orders with ordinary care; and, therefore, where a master ordered his servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same, and the servant used ordinary care in executing the orders of his master, but some of the rubbish naturally ran against the wall:—Held, that the master was liable in trespass. *Gregory v. Piper*, 9 B. & C. 591; 4 M. & R. 500.

A local board of health, being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to B. A ditch ran between the farm and the land of the plaintiff. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon the plaintiff's land and pared away his side of the ditch, and cut down so much of the brushwood and underwood on the plaintiff's side as impeded the flow of drainage along the ditch:—Held, that the acts so done by B. were not within the scope of his employment; and consequently the local board was not liable for them at the suit of the plaintiff, there being no implied authority from the board to do them. *Bolingbroke v. Swindon New Town Local Board*, 9 L. R., C. P. 575; 43 L. J., C. P. 575; 23 W. R. 47; 30 L. T., N. S. 723.

A master is civilly responsible for the fraud

or negligence of his servant acting in the course of his employment; but not for an act of willful fraud or negligence done by him out of the scope of his authority, or inconsistent with the course of his employment. *Coleman v. Riches*, 16 C. B. 104; 3 C. L. R. 705; 1 Jur., N. S. 596; 24 L. J., C. P. 125.

Therefore, where the servant of a wharfinger fraudulently signed a receipt purporting to be an acknowledgment that wheat had been delivered at his employer's wharf, to be shipped to the order of C., no such wheat having in fact been delivered, and thereby willfully induced C. to pay the price to the pretended vendor:—Held, that the wharfinger was not liable, although it was proved that C.'s course of dealing was to pay for all wheat delivered for him at the wharf, on the production, by the vendor, of the wharfinger's receipt, and that the latter knew it. *Ib.*

The rule, that where a person does an act by command of another he is not responsible for consequences if it is done within the scope of his authority, only holds where the act is such that the superior would have been justified in doing himself. *Poulton v. London and South-Western Railway Company*, 8 B. & S. 616; 10 W. R. 309; 2 L. R., Q. B. 534; 36 L. J., Q. B. 294; 17 L. T., N. S. 11.

A master is liable for all the acts of his servant within the scope of his authority, whatever may be the extent to which the servant, acting as such, may abuse that authority. *Bayley v. Manchester, Sheffield and Lincoln Railway Company*, 28 L. T., N. S. 366; 8 L. R., C. P. 148; 42 L. J., C. P. 78 —Exch. Cham.; affirming the judgment of the Common Pleas, 7 L. R., C. P. 415; 41 L. J., C. P. 278.

—where the act is illegal.]—Where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding, and unquestionable there, the servant who does the act cannot be made responsible in the courts of England (of which he is a subject), for the consequence of such acts, merely by reason of a personal disability, imposed by English law upon him for contracting such engagement. *Dobres v. Napier*, 3 Scott, 201; 2 Bing. N. C. 781.

A master is answerable in trespass for damage occasioned by his servant's negligence in doing a lawful act in the course of his service; but not so if the act is in itself unlawful, and if not proved to have been authorized by the master. *Lyons v. Martin*, 8 A. & E. 512; 3 N. & P. 509.

As if a servant authorized merely to distract cattle, damage feasant, drives cattle from the highway into his master's close and there distrains them. *Ib.*

If A. employs another to do a lawful act, and he in doing it commits a public nuisance, A. is not responsible. *Peachey v. Rowland*, 18 C. B. 182; 17 Jur. 794; 23 L. J., C. P. 81.

Aliter, if the act to be done necessarily involves the committing of a public nuisance. *Ib.*

A master is answerable for the illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit. Thus, where, after the detection of smuggled tobacco concealed in a cellar, a servant in his master's absence procured a permit, by which he intended to protect the goods from seizure, the master is liable for the penalty attached to the offense of unduly using a permit. *Att. Gen. v. Siddon*, 1 C. & J. 220; 1 Tyr. 41.

Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act, yet if the act itself is wrongful the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. *Ellis v. Sheffield Gas Consumers' Company*, 2 El. & Bl. 767.

Where a business is conducted so as to be a public nuisance, the owner is liable to be indicted, although the nuisance is entirely occasioned by the conduct of his servants in disregarding his directions, and although he has no knowledge of the existence of the nuisance. *Reg. v. Stephens*, 1 L. R., Q. B. 702; 35 L. J., M. C. 251; 14 W. R. 859; 14 L. T., N. S. 593; 7 B. & S. 710.

An owner of a quarry on the margin of a navigable river, being very old and infirm, did not personally superintend it; he, however, gave directions to his men to dispose of the refuse in a certain way, and conduct the business in a proper way. These directions were disregarded, and the refuse was suffered to fall into the river, whereby its navigation was obstructed. Upon an indictment for the nuisance against him:—Held, that he was liable. *Id.*

The workmen employed on the works of a company, in the manufacture of certain foils and sheet metals, infringed, in the carrying out of the process upon they were employed, a patent for a method of combining lead and tin and a metal so produced:—Held, that the directors and managers, as well as the company, were personally liable for the acts of the workmen, even on the supposition that the workmen had been directed by them not to infringe the patent. *Betts v. De Vitre*, 16 W. R. 529; 37 L. J., Chanc. 325; 3 L. R., Ch. 420; 18 L. T., N. S. 165.

—for negligent or other wrongful acts in the management of horses, carriages, &c.]—A master is not liable in trespass for the willful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master; but he is liable to answer for any damage arising to another from the negligence or unskillfulness of his servant acting in his employ. *M'Manus v. Crickett*, 1 East, 106.

Trespass lies against a master for the act of his servant, where, while the servant is driving his master in a gig, the horse runs away and does damage. *Chandler v. Broughton*, 1 C. & M. 29; 3 Tyr. 220.

Where a servant wantonly, and not in the execution of his masters's orders, struck the plaintiff's horses, and thereby produced an accident, the master is not liable; but where he so struck them in the course of his employment, although injudiciously, the master is responsible. *Croft v. Alison*, 4 B. & A. 590.

If a servant, in driving his master's cart, on his master's business, makes a detour from the direct road for some purpose of his own, his master will be answerable for any injury occasioned by his negligent driving while so out of the road. *Joel v. Morison*, 6 C. & P. 501—Parke.

But if a servant takes his master's cart without leave, at a time when it is not wanted for the purpose of business, and drives it about solely for his own purposes, the master will not be answerable for any injury which he may do. *Id.*

In an action for damage done to the plaintiff's cabriolet, against which the defendant's cart was driven, the defendant will be liable, although it should appear that his servant was not driving at the time of the accident, but had intrusted the reins to a stranger who was riding with him, and who was not in the service of the defendant. *Doth's v. Mister*, 7 C. & P. 66—Abinger.

Where a master intrusts his servant with his carriage for a given purpose, and the servant drives it for another purpose of his own, in a direction different from that ordered by his master, and in doing so drives over a person, the master is liable for such negligence. *Sleath v. Wilson*, 9 C. & P. 607; *S. C.*, nom. *Heath v. Wilson*, 2 M. & Rob. 181. But see *Storey v. Ashlon*, 10 B. & S. 337, 339; 4 L. R., Q. B. 476; 38 L. J., Q. B. 223; 17 W. R. 727; and compare *Mitchell v. Crassweller*, 13 C. B. 237; 17 Jur., N. S. 716; 22 L. J., C. P. 100.

A master is responsible for injury resulting from the negligence of his servant while driving his cart or carriage, provided the servant is at the time engaged in the business of his master, even though the accident happened in a place where his master's business did not call him; but if the journey on which the servant starts is solely for his own purposes, and undertaken without the knowledge or consent of his master, the latter is not responsible. *Mitchell v. Crassweller*, 13 C. B. 237; 17 Jur., N. S. 716; 22 L. J., C. P. 100.

The plaintiff, a person of full age, contracted with the defendant to carry goods for her in his cart. The defendant sent his servant with the cart, and the plaintiff, by the permission of the servant, but without the defendant's authority, rode in the cart with her goods. On the way the cart broke down, and the plaintiff was thrown out and severely injured:—Held, that, as the defendant had not contracted to carry the plaintiff, and as she had ridden in the cart without his authority, he was not liable for the personal injury she had sustained. *Lygo v. Newbold*, 9 Exch. 302; 2 C. L. R. 449; 23 L. J., Exch. 108.

A corn factor was absent from his shop, and



During his absence his sister managed his business. She wanted to send out some corn to a customer, and for this purpose employed a person who occasionally worked for her brother, and who at the time of such employment was in a state of inebriety. This man, contrary to the practice of the corn factor's shop, took out the corn on a small warehouse truck, which he negligently left on the road, whereby a person driving along in a chaise was injured:—Held, that the corn factor was liable in an action at the suit of this person, on the ground that the employment of a tipsy man was an act of negligence, and that by such employment he set the whole thing in motion, and must therefore be answerable for the consequences. *Wanstall v. Pooley*, Q. B., M. T. 1841; 6 C. & F. 910, n.

A master is responsible for an injury occasioned by negligent driving of his servant, where he is acting at the time in his service, and in a manner impliedly sanctioned by him. *Patten v. Rea*, 2 C. B., N. S. 606; 3 Jur., N. S. 892; 26 L. J., C. P. 235.

A., the general manager of a defendant, proprietor of a horse repository, was possessed of a horse and a gig, which were kept for a time upon the defendant's premises free from charge, and were used by A. in the conduct of the defendant's business. In going (without the knowledge of the defendant) upon his business, with the horse and gig, A. drove against and killed the plaintiff's horse:—Held, that the defendant was responsible; and that it was immaterial that A. was also going on private business of his own. *Id.*

A master is liable for injury caused by the wanton and violent conduct of his servant in the performance of an act within the course of his employment. *Seymour v. Greenwood*, 7 H. & N. 355; 8 Jur., N. S. 214; 30 L. J., Exch. 327; 9 W. R. 785; 4 L. T., N. S. 833—Exch. Cham.

Therefore, where the guard of an omnibus, in removing therefrom a passenger whom he deemed to be drunk, forcibly dragged him out, and threw him upon the ground, whereby he was seriously injured:—Held, that the owner of the omnibus was liable. *Id.*

A driver of an omnibus while driving his master's omnibus, on one of its trips from A. to B., in regular course, at a point in the road, willfully and on purpose, and contrary to the express orders of his master, wrongfully and illegally endeavored to hinder and obstruct the passage along the road of another omnibus belonging to a rival proprietor, by drawing his omnibus across the road:—Held, this was such an act as the master was not responsible for; and therefore it would be a misdirection for a judge to tell a jury that the act of the driver, in drawing as he did across the road, to obstruct the other omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service; and that if he intended to do that which he thought best to suit the interest of his employer, and so to interfere with the trade and business of the other omnibus pro-

prietor, the employer was responsible; and that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment, and that the instructions given to the driver, not to obstruct another, or hinder or annoy the driver in his business, were immaterial. *General Omnibus Company v. Limpus*, 1 H. & C. 526; 9 Jur., N. S. 333; 11 W. R. 149; 32 L. J., Exch. 34; 7 L. T., N. S. 641—Exch. Cham.

A passenger was getting out of an omnibus before it stopped, when the conductor told her to wait. She continued to move towards the door, and he took her hand and supported her to the step, from which she fell to the ground:—Held, that this was not such negligence on the part of the servant as to render the master liable. *Lingard v. Kirkpatrick*, 15 L. T., N. S. 245—C. P.

A wine merchant sent his clerk with his horse and cart under the care of his carman to deliver wine and bring back empty bottles. On their return, when within a quarter of a mile from his master's stable, the carman, at the request of the clerk and for his business, drove the horse and cart in another direction, and when two miles from the stable injured a person by negligent driving:—Held, that the master was not liable, as the act of the servant was not done in the course of his employment, but on a new and an independent journey. *Story v. Ashton*, 10 B. & S. 337; 4 L. R., Q. B. 476; 38 L. J., A. B. 223; 17 W. R. 727.

The fact that a passenger in an omnibus is struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it appears that the blow was struck at the servant of another omnibus, with whom there had been a dispute, and who had jumped on the omnibus step to get its number, it is a question for the jury whether the blow was struck by the driver in private spite or in supposed furtherance of his employer's interests. *Ward v. General Omnibus Company*, 42 L. J., C. P. 265; 28 L. T., N. S. 850—Exch. Cham.; affirming the decision of the Common Pleas, 21 W. R. 358; 27 L. T., N. S. 761.

A stevedore employed to ship iron rails had a foreman whose duty it was (assisted by laborers) to carry the rails from the quay to the ship after the carman had brought them to the quay and unloaded them there. The carman not unloading the rails to the foreman's satisfaction, the latter got into the cart and threw out some of them so negligently that one fell upon and injured a person who was passing by:—Held, (per Grove and Denman, JJ., Brett, J., dissentiente), that there was evidence for a jury that the foreman was acting within the scope of his employment, so as to render the stevedore responsible for his acts. *Burns v. Poulson or Poulson*, 8 L. R., C. P. 563; 42 L. J., C. P. 302; 22 W. R. 20; 29 L. T., N. S. 339.

The carman of a coal merchant, for the purpose of delivering coals at the premises of

a customer, removed an iron plate in the footway which covered an opening communicating with the coal collar. The plaintiff was passing along the footway at the time. The carman gave her no warning that the plate was taken up, and in consequence of his negligence in not taking due precautions, without any want of due care on her part, she fell into the opening and sustained injuries:—Held, in an action against the coal merchant for negligence, that he was responsible, as the carman was acting as his servant in the delivery of the coals. *Whiteley v. Pepper*, 2 L. R., Q. B. Div. 276; 46 L. J., Q. B. Div. 486; 25 W. R. 607; 86 L. T., N. S. 588.

A carman, without his master's permission, and for a purpose of his own wholly unconnected with his master's business, took out his master's horse and cart, and on his way home negligently ran against a cab and damaged it. The course of the employment of the carman was, that, with the horse and cart, he took out beer to his master's customers, who was a brewer, and in returning to the brewery he called for empty casks wherever they would be likely to be collected, for which he received from his master a gratuity of 1d. each. At the time of the accident the carman had with him two casks which he had picked up on his return journey at a public house which his master supplied, and for which he afterwards received the customary 1d.:—Held, that the carman had not re-entered upon his ordinary duties at the time of the accident, and therefore the master was not liable. *Rayner v. Mitchell*, 2 L. R., C. P. Div. 357; 25 W. R. 638.

A person was run over and sustained injuries through furious driving on the part of a cab driver, and brought an action for such injuries against the proprietor of the cab. The arrangement between the proprietor and the driver was that the horse and cab were intrusted by the former to the latter for the day, to be used entirely at the driver's discretion during the day, for the purpose of plying for hire. The driver was to pay 10s. for the cab; all that he made above that sum was his perquisite for his labor, and any deficiency he had to make good afterwards. There was no particular time fixed for going out or returning with the cab. On the day when the accident occurred, the driver was on his way back with the cab to the stables of the proprietor, intending to return the cab. When he came to the end of the mews in which the stables were, he went on with the cab to a tobacconist's a little way off and purchased some snuff, and on his way back to the stables the accident happened:—Held, that the proprietor was liable for the acts of the driver while acting within the scope of the purposes for which the cab was intrusted to him, as a master for the acts of his servant, and that the driver was at the time of the accident so acting. *Venables v. Smith*, 2 L. R., Q. B. Div. 279; 25 W. R. 584; 46 L. J., Q. B. Div. 470; 36 L. T., N. S. 509—D. C. A.

A herd got leave from his master to go for

the day to a neighboring town to transact business of his own, and borrowed his master's horse and tax-cart for the purpose. He afterwards proposed, and the master assented, that he should bring home some meat from the town for the master. He drove the horse and tax-cart so negligently that he injured the plaintiff:—Held, in an action against the master for the negligence of the servant, that the court could not hold as a matter of law, upon the evidence, that the master was responsible for the negligence of the servant. *Cormick v. Digby*, 9 Ir. R., C. L. 557—Exch.

— in the management of railways. ]—Where the station master of a railway company arrested a passenger under the erroneous belief that he had not paid for the conveyance of a horse which he had with him:—Held, that the company was not responsible, and the injured party must be left to his remedy against the station-master. *Poulton v. London and South-Western Railway Company*, 8 B. & S. 616; 2 L. R., Q. B. 534; 36 L. J., Q. B. 294; 17 L. T., N. S. 11; 16 W. R. 309.

A quarrel having arisen on the premises of a railway company between a servant of the company and a number of persons, among whom was A., the company's servant gave A. into custody on a charge of assaulting him and obstructing him in the discharge of his duty. In an action by A. against the company for an assault and false imprisonment:—Held, that the company could not be made responsible for this act of their servant. *Lumsden v. London and South-Western Railway Company*, 16 L. T., N. S. 609—Bramwell.

A foreman porter in the service of a railway company, who, in the absence of the station-master, is in charge of a station, has no implied authority to give in charge a person whom he suspects to be stealing the company's property; and, if he gives in charge on such suspicion an innocent person, the company is not liable. *Edwards v. London and North-Western Railway Company*, 5 L. R., C. P. 445; 39 L. J., C. P. 241; 18 W. R. 834; 22 L. T., N. S. 656.

A constable, who was a servant also of the railway company, after the conclusion of a scuffle in a station-yard between some of the company's servants and other persons, wrongfully gave A. into custody on a charge of assaulting the servants of the company. By the regulations of the company their constables were authorized to take into custody any one they saw committing an assault upon another in any of the stations, and for the purpose of putting an end to any fight or affray; but they were directed to use this power with extreme caution, and not if the fight or affray was at an end before they interposed:—Held, that the company was not liable for the act of their servant, as the constable in giving A. into custody was not acting within the scope of his employment. *Walker v. South-Eastern Railway Company*, 5 L. R., C. P. 640; 39 L. J., C. P. 346; 18 W. R. 1032; 23 L. T., N. S. 14.

B. refused to leave a station-yard of the

company, and a struggle thereupon ensued between him and the servants of the company, during which he was wrongfully given in charge by a constable of the company, employed under the above rule:—Held, that there was evidence that the constable was acting within the scope of his employment. *Id.*

A clerk in the service of a railway company, whose duty it is to issue tickets to passengers, and to receive the money, and to keep it in a till under his charge, has no implied authority from the company to give into custody a person whom he suspects has attempted to rob the till, after the attempt has ceased; as such arrest could not be necessary for the protection of the company's property. And the company is therefore not liable for the act of the clerk. *Allen v. London and South-Western Railway Company*, 6 L. R., Q. B. 65; 40 L. J., Q. B. 55; 11 Cox C. C. 621; 23 L. T., N. S. 612; 19 W. R. 127.

But where the plaintiff came to the station of a railway company when a passenger train was shortly about to start, and having entered the compartment of the ticket-office where the clerk was then issuing tickets, he approached the ticket press and asked for a ticket, but did not get or pay for one, and a person outside the office called the plaintiff out as the train was about to leave the platform; and, as the plaintiff was leaving the ticket-office, the ticket-clerk, erroneously believing that he had seen a ticket in the plaintiff's hand, detained him, asked him for the ticket, and searched him, and subsequently charged the plaintiff, in the presence of the station-master, with having stolen a ticket, whereupon the plaintiff was also searched by the station-master; in an action by the plaintiff against the railway company for assault and false imprisonment:—Held, that there was evidence of their liability for the acts of the ticket-clerk and station-master. *Van Den Eynde v. Ulster Railway Company*, 5 Ir. R., C. L. 6—Q. B.; affirmed on appeal, 5 Ir. R., C. L. 328—Exch. Cham.

The stations of the defendants and of two other railway companies at Bristol adjoined, and were open to one another, and the passengers of each company were in the habit of passing directly from one to the other, the whole area being used as common ground by the passengers of all three companies. While the plaintiff was standing on the defendants' platform, on his way from the terminus of one of the other companies to the booking-office of the other company, waiting for his luggage, a porter of the defendants negligently drove a truck laden with luggage, and a portmanteau fell off and injured the plaintiff:—Held, that as the negligence complained of was an act of misfeasance by a servant of the defendants in the course of his employment, the maxim of respondeat superior applied; and that, under the circumstances, they were liable. *Tebbut v. Bristol and Exeter Railway Company*, 6 L. R., Q. B. 73; 19 W. R. 383; 40 L. J., Q. B. 78.

A passenger took a return ticket from the Mansion House to Notting Hill Gate. On reaching Edgware Road, a station short of Notting Hill Gate, he got out, but was informed that he must pay an additional fare of 2d. This he refused to do. He was thereupon given into custody by the inspector of the railway station upon the charge of refusing to give up his ticket, or pay his fare, and thereby defrauding the company. This charge was dismissed. The passenger having brought an action of trespass and false imprisonment:—Held, that, as the company was empowered under the Railways Clauses Act, 1845, 8 & 9 Vict. c. 20, s. 104, to arrest persons committing frauds under s. 103, and as the inspector was their representative at Edgware Road, it must be presumed, in the absence of evidence to the contrary, that the inspector had authority from the company to arrest persons supposed to be guilty of committing offenses against that section, and that the company was liable for his mistake. *Moore v. Metropolitan Railway Company*, 8 L. R., Q. B. 36; 42 L. J., Q. B. 23; 27 L. T., N. S. 579; 21 W. R. 145.

A passenger sustained injuries in consequence of being violently pulled out of a railway carriage, just after the train had started, by one of the porters, who acted under an erroneous impression that the passenger was not in the right train for the place to which he had booked. The rules of the railway company, a copy of which was given to each porter in their employ, assigned various specific duties to the porters; among others, that of not suffering passengers to get in or out of trains in motion, and concluded with a general direction that they were to do all in their power to promote the comfort of the passengers and the interests of the company. It was the duty of the porters to prevent passengers going by wrong trains, as far as they could do so, but it was not their duty to remove passengers from the wrong train or carriage:—Held, that there was evidence on which a jury might find that the act of the porter in pulling the passenger out of the carriage was an act done within the course of his employment as the servant of the company, and one for which the company was therefore responsible. *Bayley v. Manchester, Sheffield and Lincoln Railway Company*, 8 L. R., C. P. 148; 42 L. J., C. P. 78; 28 L. T., N. S. 366—Exch. Cham.; affirming the judgment of the Common Pleas, 7 L. R., C. P. 415; 41 L. J., C. P. 278.

**Effect of compensation by servant for injury.**—In an action for damages against the proprietors of an omnibus, in respect of injuries caused by negligence of their driver, they pleaded that he was awarded and had accepted a sum of money as compensation, by a magistrate having jurisdiction to award the same:—Held, a good defense to the action, notwithstanding such order was not made on the proprietors but on the driver. *Wright v. London General Omnibus Company*, 46 L. J.,

Q. B. Div. 429; 23 W. R. 647; 2 L. R., Q. B. Div. 271.

**Liability to penalty for offense.**—If a keeper of a place of public resort instructs his servant to manage it in such a way as to be a violation of 2 & 3 Vict. c. 47, s. 44, and the servant does so, the master is guilty of an offense within that act, and the servant is guilty as aiding and abetting him within 11 & 13 Vict. c. 43, s. 5. *Wilson v. Stewart*, 3 B. & S. 913; 9 Jur., N. S. 1130; 8 L. T., N. S. 277.

The Licensing Act, 1872, 35 & 36 Vict. c. 74, s. 16, enacts, that "if any licensed person . . . supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable," he shall be liable to a penalty. The servant of a licensed person having supplied to a constable in uniform and on duty a certain quantity of brandy, in the ordinary course of business:—Held, that the master was liable to the penalty imposed by the statute, personal knowledge on the part of the master not being necessary to constitute the offense. *Mullins v. Collins*, 29 L. T., N. S. 838; 23 W. R. 297; 9 L. R., Q. B. 293; 43 L. J., M. C. 67.

As to liability of carriers for negligence of their employees,—see CARRIER.

As to liability for negligence of independent contractors and their workmen,—see NEGLIGENCE.

#### (b) Liability of Servant.

**For money received.**—A party who, in the character of a servant to a debtor, receives money from his master to discharge the debt, is not liable to be sued by the creditor as for money received to his use. *Howell v. Batt*, 2 N. & M. 381; 5 B. & Ad. 504.

**For conversion.**—A servant is liable for an action of trover for a conversion for the benefit of his master. *Cranch v. White*, 1 Scott, 314; 1 Bing. N. C. 414; 1 Hodges, 61.

The defendant received from R. a bill of exchange, with notice that it was the plaintiff's property, and that it had been placed in the hands of R., for the purpose of his procuring it to be discounted for the plaintiff. R. being indebted to the defendant's mother, in whose employ the defendant was, the latter appropriated the bill in discharge of R.'s debt:—Held, that this was a conversion for which the defendant was liable in trover. *Ib.*

A servant may be charged in trover, although the act of conversion is done by him for the benefit of the master. *Stephens v. Elwell*, 4 M. & S. 259. And see *Perkins v. Smith*, 1 Wils. 323.

A servant or an agent who has received goods from his master or principal, may, on a demand made by the true owner, give a qual-

ified refusal to deliver them up, without being liable to an action of trover. *Lee v. Baga*, or *Robinson*, 18 C. B. 599; 2 Jur., N. S. 1093; 25 L. J., C. P. 249.

**For fraud.**—A servant who joins with and assists his master in the commission of a fraud is civilly responsible for the consequences, though his concurrence is unknown to the party injured, for all directly concerned in the commission of a fraud are principals. *Cullen v. Thomson*, 6 L. T., N. S. 870; 4 Macq. H. L. Cas. 441; 9 Jur., N. S. 85.

As to acts of servant for which master is not liable, as beyond the scope of the employment,—see this title, III., 5, b.

#### IV. OFFENSES AGAINST THE MASTER AND SERVANT ACTS; DISPUTES BETWEEN MASTERS AND SERVANTS; PROCEEDINGS BEFORE JUSTICES; ARBITRATIONS.

##### 1. Statutes; and their Application and Effect, in general.

**Statutes.**—[20 Geo. 2, c. 19, provides for the adjusting and recovery of wages of servants in husbandry, artificers, handicraftsmen, and labourers before justices.

By 31 Geo. 3, c. 11, this act is extended to all servants in husbandry, though hired for a less period than one year.

6 Geo. 3, c. 25, regulated apprentices and persons working under contracts, but section 4 of this statute is repealed by 4 Geo. 4, c. 34, s. 3. *Reg. v. Youle*, 6 H. & N. 753; 7 Jur., N. S. 551; 30 L. J., M. C. 234.

By 4 Geo. 4, c. 34, the powers of justices in determining complaints between masters and servants are enlarged; and by 10 Geo. 4, c. 52, its provisions are extended to silk manufacturers.

5 Geo. 4, c. 96, consolidates the laws relative to the arbitration of disputes between masters and workmen; amended by 7 Will. 4 & 1 Vict. c. 67, as to extending the time for making complaints, and giving jurisdiction to justices where the party complained against resides.

30 & 31 Vict. c. 141, amended the statute law relative to the determination of questions arising between master and servant under contracts of service; by s. 26, the act was in force for one year; and by subsequent statutes was continued, but is repealed by 38 & 39 Vict. c. 86 (The Conspiracy and Protection of Property Act, 1875), s. 17.

By 30 & 31 Vict. c. 105, councils of conciliation to adjust differences between masters and workmen may be established.

1 & 2 Will. 4, c. 37, "The Truck Act," prohibits the payment of wages in goods or otherwise than in current coin.

35 & 36 Vict. c. 46, extends the 5 Geo. 4, c. 96, relative to the arbitration of disputes between masters and workmen.

By 38 & 39 Vict. c. 90 (The Employers and Workmen Act, 1875), the jurisdiction of the

*county courts is enlarged in relation to disputes arising between employers and workmen; and justices have a civil jurisdiction conferred upon them in relation to the adjudication of their disputes.]*

**To what servants and contracts for service the statutes apply.**—The 20 Geo. 2, c. 10, extends to laborers of all descriptions, and not merely in the particular trades or businesses there enumerated; and consequently, includes wages earned by a laborer who contracted to dig and stein a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Louther v. Radnor*, 8 East, 113.

Where a person employed by an attorney to keep possession of goods seized under a *fi. fa.* made complaint to a magistrate that he could not obtain payment for his services, and the magistrate having summoned the attorney, and heard the complaint, proceeded under 20 Geo. 2, c. 10, and made an order upon the attorney for payment of a certain sum, which was afterwards levied on his goods:—Held, that the magistrate was liable to an action of trespass, for that the service performed was not of such a nature as to give him jurisdiction under the 20 Geo. 2, c. 10. *Bramwell v. Penneck*, 1 M. & R. 409; 7 B. & C. 536.

A magistrate has no authority, by 6 Geo. 3, c. 25, s. 4, to determine disputes between domestic servants and their masters, relative to their contracts of hiring. *Kitchen v. Shaw*, 1 N. & P. 791; 6 A. & E. 729; W., W. & D. 278.

A contract to weave certain goods at the house of the weaver is not a contract to serve, within 4 Geo. 4, c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver, for neglecting his work after commencing upon the same. *Hardy v. Ryle*, 4 M. & R. 205; 9 B. & C. 603.

The summary jurisdiction given to justices by the 4 Geo. 4, c. 34, s. 3, extends only to cases where the relation of master and servant exists; and, therefore, where A. had contracted with B. to build a wall for a certain price, within a certain time, and, having performed part of the work, refused to complete it:—Held, not to be within the statute. *Lancaster v. Greaves*, 9 B. & C. 628.

So a contract "to print certain pieces of woollen cotton goods," is not within 4 Geo. 4, c. 34, s. 3, and consequently a breach of such contract is not punishable under that statute. *Johnson, Ex parte*, 7 D. P. C. 702; 3 Jur. 481—B. C.

But a contract to serve H. & Co., calico printers, as a designer, for a term of years, is an employment within 4 Geo. 4, c. 34, s. 3. *Ormerod, Ex parte*, 1 D. & L. 825; 1 New Sess. Gas. 88; 8 Jur. 495; 13 L. J., M. C. 73—B. C.—Williams.

A journeyman tailor was employed to do any particular piece of work his master might set him upon. There was no contract to serve for any specific time, but he was to work ex-

clusively for the master upon his premises till he had finished any particular job which he had undertaken. He was convicted by a justice for neglecting to go on with the making of a waistcoat which he had in hand:—Held, that such employment created the relation of master and servant, and the justice had jurisdiction to convict. *Gordon, Ex parte*, 1 Jur., N. S. 683; 25 L. J., M. C. 12—B. C.—Wightman.

Upon a rule calling upon justices to issue their warrant of distress to enforce an order made by two justices for the payment of wages to H., it appeared that she was hired to serve at a farm for a year as a dairy-maid, and to assist in the harvesting of the hay and corn, if required, and, according to the affidavit of the master, as a servant of all work necessary to be done in housekeeping, and to cook for the servants and laborers, and make their beds, and also to attend upon him and his family on their occasional visits to the farm, their residence being two miles off:—Held, that there was evidence from which the justices might find that H. was a servant in husbandry, within 20 Geo. 2, c. 19; and therefore the court made the rule absolute. *Hughes, Ex parte*, 2 C. L. R. 1542; 18 Jur. 447; 23 L. J., M. C. 138—Q. B.

A. contracted with B. to keep the general accounts belonging to his farm, to weigh out food for cattle, and set the men to work, to lend a hand to anything if wanted, and especially at all times to carry out the orders of B. He was convicted, for refusing to obey the order of B. to go through the whole of the cattle stock under his charge:—Held, that he was not a servant in husbandry within 4 Geo. 4, c. 34, s. 3. *Davies v. Berwick*, 7 Jur., N. S. 410; 3 El. & El. 549; 30 L. J., M. C. 84; 9 W. R. 334; 3 L. T., N. S. 697.

An agreement in writing was entered into by an infant to serve a master, and no one else, for twelve months. The infant entered into the service. By the terms of the agreement the master was authorized to stop the wages of the infant at any time during which the master's steam-engine should, for any reason, stop working; but the master was not compelled to provide employment for the infant during such time:—Held, that the agreement was iniquitable and void, and the court quashed a conviction of the infant for absenting himself without leave. *Reg. v. Lord*, 12 Q. B. 757; 3 New Sess. Cas. 246; 12 Jur. 1001; 17 L. J., M. C. 181.

By agreement in writing, A. agreed to serve B. and C., potters, as a biscuit-oven placer, at daily wages for twelve months. By another agreement of the same date, R. agreed to serve B. and C. for the same period as a biscuit-oven fireman, to be paid by piece-work, he paying A. wages out of what he earned:—Held, that the relation of master and servant subsisted between B. and C. and A., notwithstanding his wages were paid by R., and consequently that he was properly convicted for absenting himself from B. and



C.'s service. *Willett v. Boote*, 6 H. & N. 26; 30 L. J., M. C. 6; 8 L. T., N. S. 270.

An iron-ship builder contracted in writing with six skilled handicraftsmen to plate a vessel, they agreeing exclusively to serve him, subject to the rules and regulations of the yard, and to execute the whole of the skilled and unskilled labor requisite to complete the entire hull of the vessel, of the best workmanship, and to the entire satisfaction of their employer (they employing and paying such skilled and unskilled assistants as might be requisite to complete the vessel with all dispatch), and to be paid 5*l.* per ton for the work so done by them:—Held, that the contracting parties were handicraftsmen or artificers within 4 Geo. 4, c. 84, s. 3. *Lawrence v. Todd*, 14 C. B., N. S. 554; 32 L. J., M. C. 238; 11 W. R. 335; 8 L. T., N. S. 505; 10 Jur., N. S. 179.

So, a person working manually at weekly wages and a commission, and superintending other workmen, is an artificer. *Whiteley v. Armitage*, 13 W. R. 144—Q. B.

By an agreement between W. and B., on behalf of himself and his partners, constituting a coal company, W., in consideration of wages to be paid to him fortnightly by the company, contracted to serve them faithfully and exclusively as their servant as a collier, and not to quit the service of the company without twenty-eight days' notice; and in consideration of such faithful service, and of the proper performance of the stipulations therein mentioned, the company agreed that W. should not be discharged without twenty-eight days' notice in writing. An information was afterwards laid, under 4 Geo. 4, c. 84, s. 3, by F., "agent to B. and his partners," alleging the contract to be with "B. and his partners."—Held, first, that the contract, although the amount of wages was not thereby expressly and definitely fixed, was not void for want of mutuality, but was to be understood, by necessary implication, as binding upon the employers to find work and pay wages, after a reasonable rate, fortnightly. *Whittle v. Frankland*, 2 B. & S. 49; 8 Jur., N. S. 382; 31 L. J., M. C. 81; 5 L. T., N. S. 639.

Held, secondly, that the variance, if any, between the information, which proceeded in the name of "B. and his partners," and the agreement, in which the employers were designated as "the R., M. and H. Coal Company," was not calculated to mislead or deceive W., and was, therefore, within the operation of the proviso in section 1 of 11 & 12 Vict. c. 43. *Id.*

When a contract for service in husbandry was not in writing, and had not been entered upon, no proceedings could be taken to enforce it under the Master and Servant Act, 1867, s. 3. *Banks v. Crossland*, 32 L. T., N. S. 220; 23 W. R. 414; 44 L. J., M. C. 8; 10 L. R., Q. B. 97.

When such parol contract is not to be performed within a year from the making thereof, s. 4 of the Statute of Frauds also prevents its being enforced by any means. *Id.*

The proprietors of a mill had a weaver in their employ who was paid by the piece. Rules were posted so that the workpeople passed them on going to their work, and one required fourteen days' notice before termination of employment. The weaver left his work without notice, but it was not proved that his attention had been called to the rules or that he had seen them or assented to them, or was able to read. The justices held that there was not sufficient evidence of a contract to justify a conviction of the respondent under the Master and Servant Act, 1867, s. 2, and they refused to admit evidence of custom:—Held, that the rules as they were posted, or a well-known custom in the district, might be sufficient to establish a contract, if found as a fact to exist. *Carus v. Eastwood*, 33 L. T., N. S. 855—Q. B.

**Effect of arbitration.**—When a trade is regulated by committees of the masters and workmen respectively, which committees make rules from time to time, and by one of such rules, in case of disputes between a master and his men, an arbitration committee, presided over by a barrister, is to decide, and a particular dispute has been so decided, such decision is not to be considered as imported into all future engagements between masters and men, nor is it binding on persons not parties to that particular reference. *Levey v. Hill*, 3 H. & N. 702; 4 Jur., N. S. 580; 27 L. J., Exch. 259—Exch. Chanc.

## 2. Non-Payment of Wages by Master.

**Jurisdiction and powers of justice to compel payment.**—In order to give justices jurisdiction to hear a complaint as to the non-payment of wages, under 20 Geo. 2, c. 19, s. 1, it is only necessary that the relation of master and servant should exist between the parties, and the contract of service need not be for any specific time. *Taylor v. Carr*, 2 B. & S. 335; 31 L. J., M. C. 111.

The provisions of 5 Geo. 4, c. 18, applied only to cases of penalties and forfeitures, and therefore magistrates had no power, under that statute, to commit a party to prison for the non-payment of a sum of money adjudged by them, under 20 Geo. 2, c. 19; 31 Geo. 2, c. 11; and 4 Geo. 4, c. 84, to be due as wages. *Wiles v. Cooper*, 6 N. & M. 270; 3 A. & E. 524; 1 H. & W. 500. But now, by virtue of the repeal of 5 Geo. 4, c. 18, by 11 & 12 Vict. c. 43, s. 36, they have such power.

In an information before magistrates, under 20 Geo. 2, c. 19; 31 Geo. 2, c. 11; and 4 Geo. 4, c. 84, for non-payment of wages, it should appear that the relation of master and servant existed in one of the occupations therein specified between the debtor and the informant. *Id.*

The 42 Geo. 3, c. 90, s. 61, enabled a magistrate to make an order for payment of servants' wages in certain cases, and directed "that in case of refusal or nonpayment of any sum so ordered, for twenty-one days after

such determination, he may issue his warrant of distress;" but it gave an appeal to the sessions:—Held, that twenty-one days having elapsed between the making of such order before the appeal, and also twenty-one days after such appeal dismissed, before the warrant of distress issued, the magistrate was warranted in issuing such order of distress without proof of any demand subsequent to the appeal.

*Wootton v. Harvey*, 6 East, 75; *S. C.*, nom. *Wood v. Harvey*, 2 Smith, 238.

A workman dismissed without notice contrary to the contract of service, could recover compensation before two justices under the Master and Servant Act, 1867. *Shaw v. Alderson*, 32 L. T., N. S. 724; 23 W. R. 730; 44 L. J., M. C. 160—Q. B.

**Deductions and abatement.]**—A master summoned by a servant, an artificer, under 20 Geo. 2, c. 19, s. 1, for wages, is entitled to a deduction in respect of bad workmanship; and the justices, upon satisfactory evidence, should order the payment of so much as may seem just and reasonable. *Sharp v. Hainsworth*, 8 B. & S. 139; 9 Jur., N. S. 353; 7 L. T., N. S. 320; 32 L. J., M. C. 33; 11 W. R. 36.

Under 4 Geo. 4, c. 34, s. 3, a justice may by his conviction order wages already due and unpaid to be abated. *Reg. v. Biggins*, 5 L. T., N. S. 605—Q. B.

**Appeals.]**—There is no appeal to the sessions against an order made under 4 Geo. 4, c. 34, s. 3, for payment of wages, the sum to be levied by distress in case of non-payment for nineteen days, although the justices, on making the order, may have acted without jurisdiction. *Reg. v. Bedwell*, 4 El. & Bl. 213; 3 C. L. R. 88; 1 Jur., N. S. 306; 24 L. J., M. C. 17.

As to right to wages, generally, and actions to recover wages,—see this title, II., 2.

### 3. *Absence, Misconduct, and Offenses by Servants.*

**Jurisdiction of justices and liability of servant in cases of misconduct, generally.]**—A magistrate has jurisdiction under 4 Geo. 4, c. 34, to discharge, unless it shall appear to him that the servant "shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid." *Lilly v. Elwin*, 11 Q. B. 742; 12 Jur. 623; 17 L. J., Q. B. 132.

The 4 Geo. 4, c. 34, s. 1, does not authorize magistrates to punish misconduct on the part of a servant which amounts to a felony. *Jacklin, Ex parte*, 2 D. & L. 103; 1 New Sess. Cas. 280; 13 L. J., M. C. 189; *S. C.*, nom. *Reg. v. Fytche*, 8 Jur. 576—B. C.—Coleridge.

D. was employed by B. under a contract, by the terms of which he was to keep the general accounts belonging to a farm of B., to weigh out food for cattle, to set the men to work, to lend a hand to anything if wanted, and in all things to carry out his orders. He entered upon the employment, and in the

course of it was ordered by B. to go through the whole of the cattle stock under his charge on the farm, and to give particulars of all the animals which had died under his care, and all bullings and calvings which had taken place. Having refused to obey the order, he was summoned before justices, and convicted under 4 Geo. 4, c. 34, s. 3, for such refusal. On appeal against this conviction:—Held, that it was bad; first, because he was not a servant in husbandry; and secondly, because, assuming that he was such a servant, he had not been guilty of any misconduct or misdemeanor in the execution of his contract to serve in that capacity. *Davies v. Berwick*, 3 El. & El. 549; 7 Jur., N. S. 410; 20 L. J., M. C. 84; 9 W. R. 334; 3 L. T., N. S. 697.

**—in cases of servants absenting themselves or neglecting work.]**—To render an artificer liable for absenting himself from service, it is necessary not only that he should absent himself without a lawful excuse, but that he should have a guilty knowledge that he has no lawful excuse. *Rider v. Wood*, 2 El. & El. 338; 5 Jur., N. S. 1354; 29 L. J., M. C. 1; 1 L. T., N. S. 30; 8 W. R. 23.

On the 5th of July, 1858, A., an artificer, made a written contract with P., signed by A. and P., to serve P. for five years from that date, and then entered into the service. On the 15th of October, 1858, A., so being in P.'s service, made a written contract with H., signed by them both, to serve H. for five years from this latter date. On the next day A. refused to enter into H.'s service, giving as a reason that P. insisted on his remaining in his (P.'s) service:—Held, that A. could not be convicted for not entering into H.'s service, if he had a lawful excuse for not entering into it; and that the fact that he could not do so without committing the criminal offense of absenting himself from P.'s service was sufficient to constitute such an excuse. *Ashmore v. Horton*, 2 El. & El. 360; 29 L. J., M. C. 13; 6 Jur., N. S. 15; 1 L. T., N. S. 58.

A coal miner had been convicted by a justice, under 30 & 31 Vict. c. 141, of neglecting to fulfill a contract of service with his employers, and absenting himself without just cause or lawful excuse. The contract was to give and take fourteen days' notice, and the employers had received notice of that length from one of their workmen that the whole of the men employed by them would leave unless two non-union men were discharged. No evidence was given of any authority from the miner to his fellow-workman to give the notice; and when the period elapsed the non-union men were not discharged. The miner and some others left work, and the remainder continued in the employ:—Held, that the conviction was right. *Smart v. Passol*, 30 L. T., N. S. 632—Q. B.

The absenting himself from a weekly employment without notice and without assigning cause by a workman, and a complaint thereon to justices, shows a dispute arising

out of, or incidental to, their relation as employer and workman, so as to give justices jurisdiction under the Employers and Workmen Act, s. 4, notwithstanding that the workman had not expressly had notice that a week's notice was necessary before leaving the service, and that he said nothing to dispute that fact. *Clemson v. Hubbard*, 45 L. J., M. C. 69; 1 L. R., Exch. Div. 179; 83 L. T., N. S. 814; 24 W. R. 312—D. C. A.

—after conviction for like offense.]—A servant having been convicted, under 4 Geo. 4, c. 34, s. 3, for absenting himself without leave or lawful excuse from his service, and imprisoned, and still refusing to return after his imprisonment to the service, the term of which is incomplete, may be again convicted; and it is immaterial that he intended in the first instance to break the contract once for all, or bonâ fide believed that in point of law the first imprisonment put an end to the contract. *Unwin v. Clarke*, 1 L. R., Q. B. 417; 12 Jur., N. S. 429; 85 L. J., M. C. 193; 14 W. R. 688; 14 L. T., N. S. 856.

A potter was convicted and sentenced to imprisonment for leaving his service before the time of contract was expired. After the imprisonment had expired, but before the original time of contract had expired, he, not having returned to the service, was again convicted for absenting himself:—Held, that the second conviction was good, as the contract, notwithstanding the first conviction and imprisonment, was not dissolved. *Baker, Ex parte*, 7 El. & Bl. 697; 8 Jur., N. S. 514; 26 L. J., M. C. 193; 8 L. R., Exch. Div. 219; 8 Jur., N. S. 937; 26 L. J., M. C. 155.

By a memorandum in writing, Y. agreed to serve M. as a cutler for three years, and M. agreed to employ him and pay him for his work according to a schedule of prices. Having quitted his service during the term, he was convicted and imprisoned for twenty-one days, for unlawfully absenting himself from his service. After his discharge from prison, he did not return to the service of M., but went and worked elsewhere. On a second information laid against him for unlawfully absenting himself from the service, it was proved to the satisfaction of the justices that on the first occasion he absented himself on account of a difference with his master as to the scale of prices; that when, after his discharge from prison, he refused to return, he was advised by his attorney that he was not bound to do so; and the justices stated that they thought it very probable that he bonâ fide believed what his attorney told him. The justices convicted him under the 6 Geo. 3, c. 25, for unlawfully absenting himself, and sentenced him to one month's imprisonment:—Held, that the conviction could not be sustained; first, because the servant in refusing to return appeared to have been acting bonâ fide in the exercise of a supposed right; secondly, because the provisions of the 6 Geo. 3, c. 25, s. 4, relating to this matter, are repealed or superseded by the 4 Geo. 4, c.

34; and thirdly, because the servant having been once convicted for a departure, with intent to leave his service altogether, could not be convicted a second time under the 6 Geo. 3, c. 25, s. 4. *Reg. v. Fould*, 6 H. & N. 753; 30 L. J., M. C. 234; 9 W. R. 637; 4 L. T., N. S. 290.

A fire-iron forger, in 1871, agreed to serve five years. On the 1st of April, 1873, he was summoned under the Master and Servant Act, 1867, 30 & 31 Vict. c. 141, for absenting himself from his employer's service, and was, on the 18th of May, ordered to pay 11l. 8s. to his employers as compensation for the breach of contract, which sum was paid. Not having returned to his employment, he was again summoned, and, on the 7th of July, ordered to fulfill his contract and to give security for its fulfillment, and in default to be imprisoned for a term not exceeding three months. He did not comply with the order, and underwent three months' imprisonment. On his liberation he continued to absent himself, and was again summoned for absenting himself from his employers' service, and ordered, on the 18th of November, to pay 11l. 14s. to his employers as compensation:—Held, that the orders did not annul the contract of service, and were no bar to the subsequent summons and order of the 18th of November; and that that order was rightly made. *Cutler v. Turner*, 9 L. R., Q. B. 503; 43 L. J., M. C. 124; 30 L. T., N. S. 706; 22 W. R. 840.

—in cases of servants purloining or embezzling manufacturing materials.]—The offense created by 17 Geo. 3, c. 56, s. 10, consists in the accused party not giving, when brought before the justices, a satisfactory explanation of how he came by the goods suspected to have been purloined or embezzled. *Boothroyd, In re*, 2 New Sess. Cas. 251; 15 M. & W. 1; 10 Jur. 117; 15 L. J., M. C. 57.

If yarn, of a description liable to be condemned, is found in the house of a party, magistrates have jurisdiction to condemn it under 17 Geo. 3, c. 56, and to convict the party, although the yarn was not found on the execution of a search warrant previously granted. *Davis v. Nest*, 6 C. & P. 107—Tindal.

By 17 Geo. 3, c. 56, s. 10, it shall be lawful for any two justices, upon complaint made to them upon oath that there is cause to suspect that purloined or embezzled materials, used in certain manufactures, are concealed in any dwelling-house, outhouse, yard, garden or other place or places, to issue a search warrant for the search, in the daytime, of every such dwelling-house, &c.; and if any such materials, suspected to be purloined or embezzled, are found therein, to cause the same, and the person in whose house, outhouse, yard, garden or other place they are found, to be brought before two justices, and if the person shall not give an account to their satisfaction of how he came by the same, he shall be adjudged guilty of a misdemeanor:—Held, that a warehouse occupied for

business purposes only, and not within the curtilage of or connected with any dwelling-house, was a place within the meaning of the above section. *Reg. v. Edmundson*, 2 El. & El. 77; 5 Jur., N. S. 1951; 28 L. J., M. C. 212; 8 Cox C. C. 212.

#### 4. Convictions; Commitments; Punishment.

**Conviction and commitment of servant for absence, neglect of work, or other misconduct in employment.**—A commitment under 4 Geo. 4, c. 34, s. 2, which states that the defendant, a miner, had contracted to serve A., but omits the words "in the employment of a miner," is bad. *Reg. v. Jones or Lewis*, 1 New Sess. Cas. 3; 1 D. & L. 822; 8 Jur. 470; 13 L. J., M. C. 46—B. C.—Williams.

So a commitment, stating that complaint had been made against E., servant to G., for misconduct in his said service, is insufficient, for not stating the nature of the service. *Copstick, In re*, 1 New Sess. Cas. 181; 13 L. J., M. C. 161.

A warrant of committal stated, that A. contracted to serve H. & Co., calico printers, "as a designer," and that, while he was in such service, and in the execution of the said contract, he was guilty of, &c.:—Held, that it was not necessary to state under which of the various classes of employment enumerated in the 4 Geo. 4, c. 34, s. 3, that of a designer came, and that it was sufficient, if the court should be of opinion that a designer was a service or employment within that section. *Ormerod, Ex parte*, 1 D. & L. 825; 1 New Sess. Cas. 38; 8 Jur. 495; 13 L. J., M. C. 73—B. C.—Williams.

An order of a justice for discharging a servant from her master's service under 5 Eliz. c. 4, was void, and not merely voidable, because it did not appear on the order itself, that "she was a servant in husbandry." *Rez v. Hullcott*, 6 T. R. 583.

A party was committed by a magistrate, under 4 Geo. 4, c. 34, s. 3, by a warrant of commitment, which was in the following form:—"To the constable of M., Surrey, &c. Whereas, information and complaint hath been made unto me, one, &c., upon the oaths of J. H. and S. M., both of M., in the said county of S., calico printers, that W. J., of M. aforesaid, in the county aforesaid, calico printer, did, on Wednesday, the 8th of May inst., contract with the said S. M. to print certain pieces of woolen cotton goods, and that the said W. J. had adopted such contract, and entered into the service of the said S. M. under such contract, and that the said W. J. hath, in his said service, been guilty of divers misdemeanors, miscarriages, and ill behavior towards the said S. M., and particularly with having, on the 9th of May inst., refused to perform such contract, and left his said work unfinished, and the service of the said S. M., without his license or consent. And whereas, in pursuance of the statute in that case made and provided, I have duly examined the proofs and allegations of both the parties,

touching the matter of the complaint, and, upon due consideration had thereof, have adjudged and determined, and do hereby adjudge and determine, the said complaint to be true." It then commanded the constable to convey the party to the house of correction, and deliver him to the keeper thereof, who was ordered to detain him in custody:—Held, that this was a commitment in execution, and that it was bad, because it did not show, either that the contract was entered into, or the work refused to be done, or the party found, within the jurisdiction of the magistrate. *Johnson v. Reid*, 6 M. & W. 124.

A warrant of commitment of a servant for leaving his master's employment is bad, if it does not aver either that the contract was in writing, or that the service had been entered upon. *Askeu, Ex parte*, 2 L. M. & P. 429; 15 Jur. 705; 20 L. J., M. C. 241—B. C.—Wightman.

The return to a habeas corpus stated, that S. T. was detained under a warrant of commitment and conviction by a justice, which, after reciting a complaint by R. T., agent of J. D., that S. T. had contracted with J. D. to serve J. D. in the capacity of a miner, and had entered into such service and did, before the term of his contract was completed, absent himself from his service, and did thereby neglect to fulfill the same, contrary to the form of the statute in such case made and provided, set forth the contract of service, and evidence of S. T. having left the service without the consent of J. D., and convicted S. T. of the offense charged in the information and complaint:—Held, that no offense was laid in the information, though it followed the words of the 4 Geo. 4, c. 34, s. 3, inasmuch as it did not appear that the absence of S. T. was without lawful excuse; and the prisoner was discharged. *Reg. v. Turner*, 2 New Sess. Cas. 403; 9 Q. B. 80; 10 Jur. 522; 15 L. J., M. C. 140.

The return to a habeas corpus stated, that the prisoner was committed for three months by warrant of a justice set forth in the return, reciting a conviction by the justice, on which the warrant purported to proceed, for an offense under the 4 Geo. 4, c. 34, s. 3. The recited conviction was, on the face of it, bad. The return then stated, that, a week after such commitment, the prisoner being still in custody, the same justice delivered to the jailer another warrant of commitment, reciting and grounded upon a conviction of the same date as the first, by the same justice, setting forth the same offense, and imposing the same punishment. In this conviction no material defect appeared:—Held, that the prisoner was not entitled to be discharged, the return showing a good warrant, under which he was in custody. *Reg. v. Richards*, 5 Q. B. 926; D. & M. 777; 8 Jur. 752; 18 L. J., M. C. 147.

In a commitment in execution, under the 4 Geo. 4, c. 34, s. 3, which is intended by the statute to operate as a conviction, the warrant must show that the magistrate has done all

that is necessary to make the conviction lawful. *Reg. v. Tordeoff*, D. & M. 698; 5 Q. B. 938; 1 New Sess. Cas. 171; 8 Jur. 772.

A warrant of commitment under 4 Geo. 4, c. 84, ss. 1, 3, should state that the examination was on oath, and taken in the presence of the defendant. *Gray, Ex parte*, 1 New Sess. Cas. 354; 2 D. & L. 589; 8 Jur. 1049; 14 L. J., M. C. 26—B. C. S. P., *Reg. v. Jones*, 1 New Sess. Cas. 3; 1 D. & L. 842; 8 Jur. 470; 18 L. J., M. C. 46—B. C.

A commitment of a servant under 4 Geo. 4, c. 84, s. 3, for absenting himself, need not set forth the evidence on which the conviction proceeded; but it must show on the face of it that the servant has been convicted of an offense within the meaning of the act. It is therefore not sufficient that it shows that the servant absented himself without assigning any sufficient reason. *Gemwood, In re*, 2 El. & Bl. 952; 2 C. L. R. 209; 23 L. J., M. C. 35; 17 Jur. 1168.

A return to a habeas corpus set forth a warrant, which recited that the prisoner had been on the same day convicted before a justice of an offense against the 4 Geo. 4, c. 84, s. 3, and that the justice had adjudged that he should be committed for two months, and commanded the constable to take and the jailer to receive him:—Held, that the conviction and warrant of commitment might be in separate instruments; that this instrument was a warrant of commitment, and therefore it was no objection that it did not set forth the evidence before the justice, nor state that it was taken in the presence of the prisoner or upon oath. *Bailey, In re*, 3 El. & Bl. 607; 2 C. L. R. 1645; 18 Jur. 930; 23 L. J., M. C. 161.

Held, also, that it might be shown by affidavits that there was no evidence before the justice of such a contract to serve as would give him jurisdiction: but that if there was any evidence to justify the finding of the justice, the court could not interfere. *Ib.*

A conviction did not expressly state that the servant had entered the service, but it found that he did "misconduct himself in his said service":—Held, that this was a sufficient finding of his having entered into the service. *Baker, Ex parte*, 7 El. & Bl. 697; 8 Jur., N. S. 514; 26 L. J., M. C. 193. S. P. and S. C., 2 H. & N. 219; 3 Jur., N. S. 987; 26 L. J., M. C. 155.

The conviction stated that it appeared to the magistrate, as well on the examination on oath of M., in presence of the party charged, "as otherwise," that the party had absented himself:—Held, that it was not to be inferred from this that the justice had proceeded upon evidence not given in the presence of the party. *Ib.*

The conviction stated that the party misconducted himself, &c., "by neglecting and absenting himself from his master's service":—Held, that this was not a finding of two statutable offenses, but only of the absenting. *Ib.*

A habeas corpus having issued, directed to

the keeper of a house of correction in the borough of Kingston-upon-Hull, to bring up S., a prisoner, detained in his custody, he made a return, setting out a warrant of commitment by a magistrate of the borough, stating that S. did unlawfully aid and abet T., a handicraftsman, who had contracted in writing to serve H., a shipbuilder, in neglecting and refusing to commence his service with H., according to his contract. The return then stated that while S. was in the keeper's custody, the same magistrate delivered to him another warrant of commitment, which stated that S. was duly convicted, "for that T., a handicraftsman, did, at the parish of Holy Trinity, in the borough, contract with H., a shipbuilder, to serve him in the capacity of a shipwright, for a period not then expired, the contract being in writing and signed by the contracting parties; and that T. did not then and there, or at any day since then, enter into his service, according to his contract, and that he had not the consent of H. nor any lawful excuse for such his default in not entering into his service; and that S., before the committing of the offense by T., unlawfully did aid, abet, counsel and procure T. the said offense in manner and form aforesaid to commit; that is to say, S. did then and there aid, abet, counsel and procure T. so as aforesaid not to enter his service according to the said contract;" and it was thereby adjudged that S., for his offense, should be imprisoned in the house of correction in the borough, &c. The first warrant of commitment was bad on the face of it:—Held, first, that the defect in the first warrant was cured by the second, it appearing by the return that the second was substituted by the same magistrate as an amendment of the first. *Smith, In re*, 3 H. & N. 227; 27 L. J., M. C. 186.

Held, secondly, that the second warrant sufficiently stated that S. aided T., "knowing that he had not the consent of H., or any lawful excuse for not entering into his service." *Ib.*

Held, thirdly, that the warrant was not bad, because it stated that S. "did aid, abet, counsel and procure," without stating of which offense he was convicted. *Ib.*

Held, fourthly, that an affidavit could not be received for the purpose of showing that T. did not, in fact, contract within the borough, as stated in the warrant. *Ib.*

In an action for false imprisonment, it appeared that the plaintiff had been committed to prison by warrant of a justice, under 4 Geo. 4, c. 84, s. 3. The warrant alleged that the plaintiff, a collier, had been guilty of divers misdemeanors, particularly that he had absented himself from the service of his masters before the term of his contract with them was completed, contrary to the form of the statute:—Held, that no conviction was necessary under the statute; and that the warrant, whether it was an order or in the nature of a conviction, was the only instrument contemplated by the legislature, and the



gality of the imprisonment depended upon the sufficiency of that instrument alone. *Indeay v. Leigh*, 11 Q. B. 455; 8 New Sess. Cas. 99; 12 Jur. 286; 17 L. J., M. C. 50—*sch. Cham.*

**Held**, also, that whether the warrant was to be construed with less strictness, as being in the nature of an order, or with greater strictness, as being in the nature of a conviction, it was bad, as it did not bring the case within the statute, by averring either that the contract was in writing or else that the service had been entered upon. *Id.*

Where the Statute of Laborers gives a magistrate jurisdiction to examine upon oath any servant, and to make order for payment of wages to such servant, and a magistrate, in his adjudication on this act, avers a complaint, made on oath, and an examination on oath, it is not competent, in replevin for taking the plaintiff's goods, for the plaintiff to plead in bar of a recognizance made under a warrant of distress and sale founded on that adjudication, that the servant did not duly make oath before the magistrate that the sum claimed was justly due to him for wages; nor can he plead that the sum claimed was not due. *Wilson v. Weller*, 1 B. & B. 57; 8 Moore, 294.

An information by a master under 80 & 81 Vict. c. 141, claimed a fulfillment of the contract, but not payment of damages in the alternative:—**Held**, that it was not invalid to sustain an order for fulfilment. *Crans v. Powell*, 4 L. R., C. P. 123; 88 L. J., C. P. 43; 20 L. T., N. S. 703; 17 W. R. 161.

The justices on the information ordered that the servant should fulfill the contract, and they adjudged that if, upon a copy of a minute of the order being served on him, he should neglect or refuse to comply with the same, he should, for such his disobedience, be imprisoned for one calendar month:—**Held**, that if the justices had not jurisdiction to imprison the servant, except on a fresh summons after he had disobeyed the order, the latter part of the order might be rejected as surplusage, and the order itself was still good. *Id.*

— for purloining or embezzling manufacturing materials.]—A conviction under 17 Geo. 3, c. 56, s. 10, stated, that materials used in woolen manufactures, suspected to have been purloined, had been found in the house of A., and that he had given no satisfactory account thereof to the convicting justices:—**Held**, that it was not necessary that the conviction should state that they were found concealed in the house, nor that they were found under a search-warrant. *Reg. v. Wilcock or Wilcocks*, 7 Q. B. 317; 1 New Sess. Cas. 651; 9 Jur. 729; 14 L. J., M. C. 104.

The 17 Geo. 3, c. 56, so far as regards the distribution of the penalties thereby imposed, is repealed by 58 Geo. 3, c. 57. *Id.*

Where the information, under 17 Geo. 3, c. 56, s. 10, has been laid before two justices, and the conviction has taken place before

two other justices, this fact must appear on the face of the conviction (unnecessary since 11 & 12 Vict. c. 43, s. 36). *Id.*

A conviction under 17 Geo. 3, c. 56, stating that A. was convicted before the magistrates upon the oath of a credible witness, of having in his possession, in his dwelling-house, certain materials used in the woolen manufacture, suspected to be embezzled and purloined, he not producing the party from whom he bought the same, or giving a satisfactory account, and then going on to adjudicate, is good. *Davis v. Nest*, 6 C. & P. 167—*Tindal*.

Upon a conviction under 17 Geo. 3, c. 56, s. 10, the offense created by which consists in the accused party not giving, when brought before the justices, a satisfactory explanation of how he came by the goods suspected to have been purloined or embezzled:—**Held**, that it was no objection to the conviction, first, that it purported to be founded on the information of A., and the oaths of him and other credible witnesses, whose names were set out; and, secondly, that the warrant on which the premises of the defendant had been searched for the suspected materials was granted on an affidavit of A., in which he only stated that he had cause to suspect that there were purloined or embezzled materials on the premises of the defendant, and did not show the offense to have been committed within the jurisdiction of the justices. *Id.*

A conviction under 17 Geo. 3, c. 56, s. 10, and 58 Geo. 3, c. 51, for having in possession articles suspected to be purloined or embezzled, was not in the form given by the schedule to the latter statute, and purported to be made on the information of the informer and the oaths of him and certain other credible witnesses, whose names were set out, and concluded by awarding the penalty to be paid as the law directs:—**Held**, first, that it was not necessary that the conviction should state—1, the value of the materials; 2, to whom they belonged; 3, that the defendant knew them to be purloined or embezzled; 4, that the informer or witnesses were sworn in the presence of the accused; 5, that the accused, when before the magistrates, had not applied for time to produce the parties from whom he received the suspected materials. *Boothroyd, In re*, 2 New Sess. Cas. 251; 15 M. & W. 1; 10 Jur. 117; 15 L. J., M. C. 57.

**Appealing against convictions.**]—By 17 Geo. 3, c. 56, s. 20, an appeal is given to the sessions against certain convictions, the party giving notice in writing to the justices convicting, and entering into a recognizance to try the appeal, and those justices are required to give notice to the party of his right to appeal; if those justices do inform him of such right, without saying anything about the notice, and he enters into the recognizance, the sessions are bound to receive the appeal, though he did not give the notice in writing. *Rex v. Leeds (Justices)*, 4 T. R. 583.

Or if the justices at the time of such conviction make known to the party convicted

his right to appeal, and he declines appealing, they need not go on to inform him of the necessary steps to be taken in order to appeal. *Rez v. W. R. Yorkshire (Justices)*, 3 M. & S. 498.

Under 17 Geo. 3, c. 56, ss. 1, 2, 20, 22, two justices may convict and sentence to imprisonment; and the party convicted may appeal to the sessions, giving notice to the justices at the time of conviction, and at the same time entering into a recognizance with sufficient sureties to try the appeal and abide the judgment of the sessions; but if he do not at such time enter into such recognizance, the convicting justices are to commit him till the sessions, unless such recognizance be sooner entered into, and are to transmit the conviction to the sessions, and the sessions, on proof of notice of appeal, and on receiving the conviction, are to hear the appeal; and if the conviction be affirmed, the party is to suffer the punishment originally adjudged, the time of imprisonment, if inflicted, being computed from the time of affirmance, unless the party has been imprisoned under the original conviction, in which case the time for which he has been so confined is to be included in the order of confirmation. *Reg. v. Twyford*, 5 A. & E. 430; 6 N. & M. 836.

**Punishment.**—Under 20 Geo. 2, c. 19, s. 2, if a justice of the peace, upon a complaint made to him of misconduct, sentences the offender to be committed to the house of correction for a time not exceeding one calendar month, he must, if he intends to proceed upon that statute, also sentence him there to be corrected and held to hard labor; but the statute gives the justice an option to punish the offender in that manner, or otherwise, by abating part of his wages, or by discharging him from his employment. And the meaning of the terms "there to be corrected" is to be understood of a correction by whipping. But this latter punishment cannot be inflicted upon the like offender under 6 Geo. 3, c. 25, which enables the justice to commit the offenders to the house of correction for any time not exceeding three months, nor less than one month; nor can the punishments inflicted by the two acts be blended. *Rez v. Hoosason*, 14 East, 605.

Upon a complaint against a servant for absenting himself from his service, the conviction adjudged that he should be imprisoned in the house of correction, there to remain and be held to hard labor for one month. The commitment required the keeper to receive him into custody, there to remain and be corrected, and held to hard labor, for one month (following the words of 20 Geo. 2, c. 19, s. 2):—Held, that the "correction" therein mentioned must be understood to mean something beyond the hard labor, and therefore that the commitment was bad, as varying in this respect from the conviction, and authorizing a punishment not warranted by the statute. *Wood v. Fenwick*, 10 M. & W. 195.

#### V. COMBINATIONS AMONG MASTERS OR WORKMEN; TRADES UNIONS.

**Validity of combinations at common law.**—Every man has a right to work for the best price he can get; but if others choose to work for less than the usual prices, the law will not permit that violence should be committed towards them, or towards those by whom they are employed, or those with whom they are connected. *Rez v. Batt*, 6 C. & P. 329—Gurney.

The condition of a bond recited that the obligors were manufacturers in Wigas and the neighborhood, and that combinations of workmen, preventing free labor by fear of social persecution, injuriously interfered with the management of their manufactories, and that these combinations were sustained by funds extorted from workmen employed by the manufacturers, and that measures were necessary to protect as well the manufacturers in the free management of their capital as the workmen in the free disposal of their labor; wherefore the manufacturers had agreed, in regard to the amount of wages, the periods of engagement, the hours of work and the general management of their establishments, to act for twelve calendar months in conformity with the lawful resolutions of a majority of the manufacturers present at a meeting, and declared that the bond should be void if this agreement was performed:—Held, that the bond was illegal at common law, and could not be enforced, as being contrary to public policy and in restraint of trade. *Hilton v. Eckersley*, 6 El. & Bl. 47; 3 Jur., N. S. 597; 25 L. J., Q. B. 190—Erich Cham.

**Statutory prohibitions of combinations, intimidation, &c.**—[6 Geo. 4, c. 129, repeals 5 Geo. 4, c. 95, and enacts provisions for regulating combinations among workmen, and for fixing the wages of labor.

23 Vict. c. 34, reciting that different decisions have been given in the construction of the 6 Geo. 4, c. 129, enacts that no workman or other person, whether actually in employment or not, shall by reason merely of his entering into an agreement with any workman or workmen, or other person or persons, for the purpose of fixing or endeavoring to fix the rate of wages or remuneration at which they or any of them shall work, or by reason merely of his endeavoring peaceably, and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages, or the altered hours of labor so fixed or agreed upon or to be agreed upon, shall be deemed or taken to be guilty of molestation or obstruction within the meaning of the act, and shall not therefore be subject or liable to any prosecution or indictment for conspiracy: provided always, that nothing herein contained shall authorize any workman to break or depart from any contract, or authorize any attempt to induce any workman to break or depart from any contract.

By 34 & 35 Vict. c. 32, s. 1, every person

no shall do any one or more of the following acts; that is to say,

(1.) Use violence to any person or any property;

(2.) Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace;

(3.) Molest or obstruct any person in manner defined by this section with a view to coerce such person,—

(1.) Being a master, to dismiss or to cease to employ any workman; or being a workman, to quit any employment or to return work before it is finished;

(2.) Being a master, not to offer, or being a workman, not to accept, any employment or work;

(3.) Being a master or workman, to belong or not to belong to any temporary or permanent association or combination;

(4.) Being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination;

(5.) Being a master, to alter the mode of carrying on his business, or the number or description of any persons employed by him; shall be liable to imprisonment, with or without hard labor, for a term not exceeding three months.

A person shall, for the purposes of this act, be deemed to molest or obstruct another person in any of the following cases; that is to say,

(1.) If he persistently follow such person about from place to place;

(2.) If he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof;

(3.) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road.

Nothing in this section shall prevent any person from being liable under any other act or otherwise, to any other or higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence.

Provided, that no person shall be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing, as hereinbefore mentioned.

88 & 89 Vict. c. 86 (The Conspiracy and Protection of Property Act, 1875), amends the law as to conspiracy in trade disputes, breaches of contract by persons employed in supply of gas or water, and of contracts involving injury to persons or property.]

A threat, by a workman to his employer, made in pursuance of a combination (which is illegal) between that workman and fellow-workmen to carry it out that all the workmen so combining will immediately leave work, unless the employer discharges other workmen who are then in the same service, renders

such workman liable to conviction for the offence under 6 Geo. 4, c. 129, s. 8. *Walsby v. Anley*, 3 El. & El. 516; 7 Jur., N. S. 405; 30 L. J., M. C. 121; 9 W. R. 271; 3 L. T., N. S. 666.

L., a workman, and member of a workman's society, being in the employ of a master who employed men not qualified by the rules thereof, O., the president, said he would use his influence to have him turned out of the society. L. continuing to work for his master, a meeting was called, to which he was summoned, the object of which was to discover whether he would leave his employ or be turned out of the society. G., another of the members, made a report of the proceedings of a previous deputation to the master of L. upon the subject, and O. then asked L. "Whether he intended to remain an honorable member of the club and leave the shop (his work), or continue it, be despised by the club, and have his name sent all over the country in the report, and be put to all sorts of unpleasantness?"—Held, that this was evidence on which O. might be convicted of unlawfully, by threats and intimidation, endeavoring to force L. to depart from his hiring, within the 6 Geo. 4, c. 129, s. 8, but was not sufficient as against G. *O'Neil v. Longman*, 4 B. & S. 376; 9 Cox C. C. 300; 11 W. R. 947; 8 L. T., N. S. 637—*Wightman and Blackburn*.

O. and G. were convicted upon an information for endeavoring by threats and intimidation to force K. to make an alteration in his mode of conducting his business, contrary to the 6 Geo. 4, c. 129, s. 8. The evidence was as stated in the preceding case:—Held, first (per Cockburn, C. J., *Wightman and Mellor*, JJ.), that there was no evidence against O. *O'Neil v. Kruger*, 4 B. & S. 389; 33 L. J., M. C. 259; 13 W. R. 47; 8 L. T., N. S. 657.

Held, secondly (per Cockburn, C. J., and *Mellor, J., Wightman, J.*, dissentiente), that the object of G. was to discuss with K. the terms of arranging the dispute between him and the club-men in his employ rather than to intimidate him, and therefore there was not sufficient evidence against G. *Id.*

A resolution was passed by a society of bricklayers, that no society bricklayer would work for B. until such time as he parted with some of his apprentices. The men in B.'s employment were accordingly withdrawn. In reply to a letter from B., requiring to be informed why the men were taken away, the resolution was communicated to him in a letter from the secretary. The secretary and the president of the meeting at which the letter was written having been convicted under 6 Geo. 4, c. 129, s. 8, of using threats to compel B. to limit the number of his apprentices:—Held, that in the absence of any evidence to show that the letter communicating the resolution, though apparently an explanation, was, in fact, meant as a threat, the conviction could not be sustained. *Wood v. Bouron*, 2 L. R., Q. B. 21; 36 L. J., M. C.

5; 15 W. R. 58; 15 L. T., N. S. 207; 7 B. & S. 931.

A master builder had in his employ several carpenters who were members of a carpenters' union, and also J., who was not a member. The secretary to a branch lodge served the master with the following notice in the middle of a week: "I am requested by the committee of carpenters to give the men in your employ notice to come out on strike against J., unless he becomes a member of the society. This notice will be carried out after the end of this week, unless settled in accordance with the society's laws:"—Held, that the secretary was rightly convicted, under 6 Geo. 4, c. 129, s. 8, of having by threats endeavored to force the master builder to limit the description of his workmen. *Skinner v. Kitch*, 2 L. R., Q. B. 398; 16 L. T., N. S. 413; 10 Cox C. C. 498; 15 W. R. 830; 36 L. J., M. C. 116.

The defendants were members of a trades union of tailors. The workmen having, at the instigation of the union, struck for wages, and the masters having employed work-people, men and women, not being members of the union, the defendants, who were members of the managing committee of the union, caused pickets to be stationed about the doors of such employers to note workpeople who went in and out, for the purpose of deterring them from continuing in such employ and inducing them to join the union. Proof was given of the use of insulting expressions and gestures used by the pickets to the non-union work-people:—Held, to be an intimidation, molestation, and obstruction, within 6 Geo. 4, c. 129, s. 8, and 23 Vict. c. 84, s. 1. *Reg. v. Druitt*, 16 L. T., N. S. 855; 10 Cox C. C. 598—Bramwell.

The defendants, who were officers of a trades union, gave notice to workmen, by means of placards and advertisements, that they were not to hire themselves to the plaintiffs, pending a dispute between the union and the plaintiffs. A bill in equity prayed an injunction to restrain the issuing the placards and advertisements, alleging that by means thereof the defendants had, in fact, intimidated and prevented workmen from hiring themselves to the plaintiffs, and that the plaintiffs were thereby prevented from continuing their business, and the value of their property was seriously injured and materially diminished:—Held, that the acts of the defendants, as alleged by the bill, amounted to a crime, and that a court of equity would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction or deterioration of property. *Springhead Spinning Company v. Riley*, 6 L. R., Eq. 551; 37 L. J., Chanc. 889; 16 W. R. 1138; 19 L. T., N. S. 64.

**Form and validity of convictions.**—The 6 Geo. 4, c. 129, s. 8, makes it an offense to endeavor, by threats, to force any workman hired for any work to leave his hiring; and the 2 & 3 Vict. c. 7, provides that a conviction in the words of any statute declaring an

offense shall be sufficient. A conviction by a metropolitan police magistrate stated that the defendant did by threats endeavor to force W. J. to leave his hiring:—Held, that the conviction was sufficient; that the nature of the threats need not be shown, nor the threats set out, the essence of the offense being the endeavor to force a workman to depart from his employ, and that the threats were matter of evidence only. *Perham, Ex parte*, 5 H. & N. 30; 29 L. J., M. C. 33; 5 Jur., N. S. 1231. S. P. and S. C., 29 L. J., M. C. 31; 2 El. & El. 383; 5 Jur., N. S. 1212.

Held, also, for the same reason, that neither the conviction nor the information need allege that the threats were to any particular person. *Id.*

Three laborers having been convicted by justices of an offense, under 34 & 35 Vict. c. 83, appealed to the quarter sessions under a 3, which enacts that any party aggrieved by a conviction made by a court of summary jurisdiction may appeal, subject to certain conditions: (2.) The appellant shall, within seven days after the cause of appeal arose, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and the ground of it. (5.) The court of appeal may make such order as to costs to be paid by either party as the court thinks just. The appellants gave due notice to the prosecutor and to the convicting justices, and the justices, as well as the prosecutor, were named respondents in the appeal; but the justices did not appear. The quarter sessions quashed the conviction, and ordered the respondents, or some or one of them, to pay the appellants' costs. The appellants having brought up the conviction by certiorari, under 12 & 13 Vict. c. 45, s. 18, in order to enforce the payment of costs, a rule was obtained to quash so much of the order as ordered the justices to pay costs:—Held, that the quarter sessions had no power to award costs against the convicting justices; and the court made the rule absolute with costs. *Reg. v. Goodall*, 9 L. R., Q. B. 557; 43 L. J., M. C. 119.

**Trades unions.**—[By 32 & 33 Vict. c. 61, The Trades Unions Funds Protection Act, s. 1, an association of persons having rules, agreements or practices among themselves as to the terms on which they or any of them will or will not consent to employ or to be employed shall not, by reason only that any of such rules, agreements or practices may operate in restraint of trade, or that such association is partly for objects other than the objects mentioned in the Friendly Societies Acts, be deemed, for the purposes of s. 24 of the 18 & 19 Vict. c. 63, Friendly Societies Act, 1855, for the punishment of frauds and impositions, to be a society established for a purpose which is illegal, or not to be a friendly society within s. 24.

But by s. 2, the act is not to be in force after the last day of August, 1870.

33 & 34 Vict. c. 103, continues the Trades Unions Funds Protection Act to 31st August 1871.

**84 & 85 Vict. c. 81, amends the law of Trade Unions and by 89 & 40 Vict. c. 22, that act is *gain amended.***

The home secretary made a regulation providing that upon an application for the registration of a trade union which was already in operation, the registrar, if he had reason to believe that the applicants had not been duly authorized by such trade union to make the same, might, for the purpose of ascertaining the fact, require from the applicants such evidence as might seem to him necessary. An application was made to the registrar, dated December 28th, requiring him to register the Amalgamated Society of Carpenters and Joiners, signed by persons who stated that they were authorized to make it by a resolution passed by the executive council of the society. A second application was made, dated December 30th, by different persons, to register a society under the same title, the applicants stating that they were authorized to make it by a vote of the whole of the members of the society. The registrar required evidence from both sets of applicants in support of their applications, and being satisfied from the evidence that differences had arisen which had led to the division of the society into two sections, which were represented by the respective applicants, he refused to register the society upon either application:—Held, that, apart from any question as to the validity of the regulations made by the home secretary, the registrar had properly refused the applications, as he was not bound upon an application for registration to inquire into differences which existed within the society, and to alter the position of one party by granting registration upon the application of the other. *Reg. v. Registrar of Friendly Societies*, 41 L. J., Q. B. 366; 7 L. R., Q. B. 741; 27 L. T., N. S. 229.

As to registration of friendly societies, generally,—see FRIENDLY AND LOAN SOCIETIES.

## Matrimonial Matters.

See HUSBAND AND WIFE.

## Measure.

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## Medicine and Medical Practitioner.

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### I. SALE OF MEDICINES, POISONS, &c.; CHEMISTS AND DRUGGISTS.

*Statutes before the Pharmacy Act, 1868.*

—[15 & 16 Vict. c. 56, amended by 31 & 32 Vict. c. 211, regulated the qualifications of pharmaceutical chemists; and 14 & 15 Vict. c. 18, the sale of arsenic.]

*The Pharmacy Act, 1868; and amendments.*—[By 31 & 32 Vict. c. 121, "The Pharmacy Act, 1868," s. 1. after 31st December, 1868, it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title of "chemist and druggist," or chemist or druggist, or pharmacist or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of the act, and be registered under the act, and conform to such regulations as to the keeping, dispensing, and selling of such poisons as may from time to time be prescribed by the Pharmaceutical Society with the consent of the Privy Council.

By s. 13, the registrar of the Pharmaceutical Society shall in the month of January in every year cause to be printed, published, and sold, a correct register of the names of all pharmaceutical chemists, and a correct register of all persons registered as chemists and druggists, and in such registers respectively the names shall be in alphabetical order according to the surnames, with the respective residences, of all persons appearing on the register of pharmaceutical chemists, and on the register of chemists and druggists on the 31st of December last preceding, and such printed registers shall be called "The Registers of Pharmaceutical Chemists, and Chemists and Druggists," and a printed copy of such registers for the time, purporting to be so printed and published as aforesaid, or any certificate under the hand of the said registrar, and countersigned by the president or two members of the Council of the Pharmaceutical Society, shall be evidence in all courts, and before all justices of the peace and others, that the persons therein specified are registered according to the Pharmacy Act, 15 & 16 Vict. c. 56, or of this act, as the case may be, and the absence of the name of any person.



*from such printed register shall be evidence, until the contrary shall be made to appear, that such person is not registered according to the provisions of the Pharmacy Act, 1852, or of this act.*

32 & 33 Vict. c. 117, amends the Pharmacy Act, 1868, as to the sale of poisons by duly qualified medical practitioners and veterinary surgeons.]

**Registration of chemists.**—Under 15 & 16 Vict. c. 56, persons who have become members of the Pharmaceutical Society since the passing of the act, according to its by-laws and charter, are entitled to be put upon the register of pharmaceutical chemists which is to be kept according to the act, although they have been admitted as members of the society without being examined according to the provisions of the act. *Reg. v. Pharmaceutical Society (Registrar)*, 1 Jur., N. S. 198; 24 L. J., Q. B. 177—Exch. Cham.

**License for sale of patent medicines.**—[By 38 Vict. c. 23, s. 8, in lieu of the duties of excise now (1875) payable by law upon or in respect of the licenses to be taken out yearly in any part of Great Britain by the owners, proprietors, makers, and compounders of, and persons uttering, vending, or exposing to sale or keeping ready for sale, any medicine liable to stamp duty, there shall be paid for each such license the duty of 5s.]

**Sale of quack medicines under false representations.**—An injunction to prevent a chemist from selling a quack medicine under a false and colorable representation that it was a medicine of the plaintiff, an eminent physician, was refused. *Clark v. Freeman*, 41 Beav. 112; 12 Jur. 149; 17 L. J., Chanc. 142.

**Sale of poisons.**—A duly registered chemist was convicted, under 31 & 32 Vict. c. 121 (Pharmacy Act, 1868), s. 17, for selling poison to a person unknown to him. It was proved that Y., who was unknown to the chemist, came into his shop and produced a prescription written in the abbreviated form usual among chemists. At the foot of it were the initials R. M. L., and the words Mrs. Newton, Aug. 11, 1869. There was a legally qualified medical practitioner having the initials R. M. L. The chemist's assistant dispensed the prescription by putting a small quantity of prussic acid into a bottle and filling up the bottle with rose water, according to the meaning of the prescription. The chemist made an entry in his prescription book, Newton, Mrs. (copying the prescription), Aug. 11, R. M. L. He also indexed the entry, by inserting the name "Newton," and the page, in the index contained in the book. The bottle was labeled with the name and address of the chemist, but not with the word "poison." The prescription was one which might be ordered for a lotion. No evidence was given as to whether there was such a person as Mrs. Newton or not. The chemist was also convicted in respect of the same sale, for selling poison in

a bottle not labeled with the word "poison":—Held, first, that, assuming that he was believed that he was dispensing a prescription given by a medical man to Mrs. Newton, he could not be convicted for selling poison to a person unknown to him, but may be taken to have dispensed a medicine according to the requirements of the proviso to s. 17. *Berry v. Henderson*, 39 L. J., M. C. 77; 5 L. R., Q. B. 296; 22 L. T., N. S. 331.

Held, secondly, that he could not be twice convicted under the same section in respect of the same sale. *Id.*

**Warehousing upon drawback of tinctures or medicinal spirits.**—[By 38 Vict. c. 23, s. 10, subject to any regulations which may be from time to time made by the Commissioners of Customs and the Commissioners of Inland Revenue respectively, tinctures or medicinal spirits may be warehoused upon drawback by a licensed rectifier or compounder of spirits, in any customs or excise warehouse, under the like provisions under which British liquors may be so warehoused by virtue of the Customs and Excise Warehousing Act, 1869, s. 13.]

**Duty on mineral waters.**—The defendant sold a mineral water in the form of a powder, composed of carbonate of soda, carbonic acid gas and chlorate of potash, which he advertised as beneficial for a variety of disorders:—Held, that the composition came within the head of "Artificial Mineral Waters" in the schedule of 52 Geo. 3, c. 150, as an article recommended as a medicine, the tax on which head was repealed by 3 & 4 Will. 4, c. 97, s. 20, and was not at any time taxable under the "tail" of the schedule of the former act. *Ad. Gen. v. Lamplough*, 20 W. R. 823—C. A.; reversing the judgment of the Exchequer Division, 25 W. R. 753; 87 L. T., N. S. 247.

## II. APOTHECARIES.

### 1. Qualification; Statutory Regulation; Certificates.

**Statutes.**—[By 55 Geo. 3, c. 194, regulations are made relative to the education, examination, admission, and practice of apothecaries.

By s. 20, if any person (except such as were then actually practicing) shall, after the 1st of August, 1815, act or practice as an apothecary, in any part of England or Wales, without having obtained a certificate from the master, warden, and society of apothecaries, he shall, for every such offense, forfeit and pay 20l.; and if any person (except such as were then acting, and excepting persons who have actually served an apprenticeship) shall, after the 1st of August, 1815, act as an assistant to any apothecary, to compound and dispense medicines, without having obtained such certificate, he shall forfeit 5l. for every offense.

37 & 38 Vict. c. 34, amends the 55 Geo. 3, c. 194, for regulating the practice of apothecaries in England and Wales.]

**What apothecaries actually practicing at passage of act.**—The 55 Geo. 3, c. 104, which was passed on the 12th July, 1815, does not extend to persons who practiced as apothecaries previously to the 1st August in that year. A person who practiced as an apothecary previously to, but not on the 1st August, without a certificate, was however held to be liable to the penalties of that act. *Apothecaries' Company v. Roby*, 1 D. & R. 564; 5 B. & A. 949.

In an action by an apothecary, to prove practicing as such previous to August, 1815, he ought to show instances of compounding and making up prescriptions; merely attending local complaints is not enough. *Thompson v. Lewis*, M. & M. 253; 3 C. & P. 483—Tenterden.

Where a person was sued for a penalty, and insisted that he was within the exemption, as having actually practiced as an apothecary prior to the passing of the act:—Held, that in summing up to the jury, the judge acted properly in referring them to s. 5, which described the duty of an apothecary to be to make up prescriptions of physicians; and it appearing that the defendant had never done so prior to the passing of the act, through incapacity and ignorance, that it was strong evidence to be left to the jury, and that they were warranted in finding that he had never practiced as an apothecary, although he had occasionally administered medicines to different patients prior to that period. *Apothecaries' Company v. Warlurton*, 3 B. & A. 40.

**Necessity of apprenticeship and certificate, generally.**—In an action for a libel upon the plaintiff, who had served upwards of three years as house-apothecary at a public infirmary, before the passing of the above act:—Held, that such service was sufficient to qualify him to act as an apothecary, and superseded the necessity of an apprenticeship, or the production of a certificate, in conformity with the regulations of that statute. *Wogan v. Somerville*, 1 Moore, 102; 7 Taunt. 401.

To an action on a bond the defendant pleaded, that the bond was given in pursuance of a corrupt agreement, that he should serve the obligee as an apprentice to the business of a surgeon, apothecary, and man-midwife for two years, and that the agreement should be ante-dated, to make it appear that he had served five years, in order that, by such corrupt contrivance, he might be admitted to his examination for the business of an apothecary at the end of two years, instead of five, as required by the statute. A verdict having been found for the defendant, the court held that the bond was void, and refused to enter judgment non obstante veredicto, which was moved for on the ground that it appeared to be the object of the parties to enable the defendant to practice as a surgeon also, and that a five years' apprenticeship was not required for the business of a surgeon, and that it was not open to the defendant to object to the legality of his own

bond. *Prole v. Wiggins*, 8 Bing. N. C. 280; 3 Scott, 607; 2 Hodges, 204.

A diploma of M.D. from the university of St. Andrew's, in Scotland, is no defense to an action for penalties, for practicing as an apothecary without having obtained a certificate from the Apothecaries' Company. *Apothecaries' Company v. Collins*, 5 C. & P. 519; 1 N. & M. 401; 4 B. & Ad. 604.

**Proof of certificate; and effect in evidence.**

—[By 14 & 15 Vict. c. 90, s. 8, every certificate of the qualification of an apothecary, which shall purport to be under the common seal of the Apothecaries' Company, shall be received in evidence without proof of the seal or of the authenticity of the certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the certificate duly qualified to practice as an apothecary in any part of England or Wales.]

In an action for medicines supplied as an apothecary, he, after proof of the delivery of the medicines, put in evidence a license from the Apothecaries' Company (the seal to which was proved to be genuine), to practice as such, granted to a person bearing his christian name and surname:—Held, that it was unnecessary for him in the first instance, to give additional evidence of his identity with the person named in the license. *Simpson v. Diamore*, 9 M. & W. 47; 1 D., N. S. 357; 5 Jur. 1012.

Before the above enactment, in an action for an apothecary's bill, it was necessary to prove that the seal affixed to a certificate to practice as an apothecary was the common seal of the Apothecaries' Company. *Chadwick v. Bunning*, 2 C. & P. 106; R. & M. 300—Abbott.

An apothecary is entitled to recover for business done in London, if he has a general certificate from the Apothecaries' Company of his fitness to practice, although he paid but 6l. 6s. on his obtaining it. *Id.*

In order to prove that a person has passed his examination at Apothecaries' Hall, it is sufficient to produce the certificate of examination (which is given to every person who has been approved of by the examiners), and prove the signature of one of the examiners to such certificate. *Walsley v. Abbott*, 5 D. & R. 62; 3 B. & C. 218; 1 C. & P. 309.

**Surgeons in army or navy.**—Action for work done as an apothecary. Plea, that the plaintiff was not an apothecary prior to the 1st of August, 1815; nor had he, at any time, obtained a certificate to practice as an apothecary from the master, wardens, and society of the art and mystery of apothecaries. Replication, that before the work was done, and before the 1st of August, 1826, the plaintiff held a warrant as assistant-surgeon in the navy, and that the work was done after the passing of the 6 Geo. 4, c. 138:—Held, that the replication was good. *Stevenson v. Oliver*, 8 M. & W. 234; 5 Jur. 1064.

Held, also, that the certificate required by 55 Geo. 3, c. 104, was a certificate from the court of examiners, and not from the master,

wardens, and society of the art and mystery of apothecaries, and that the plea was good. *Id.*

In an action to recover charges claimed by an apothecary, he relied on the 6 Geo. 4, c. 133, s. 4, which enacts, that no person who held a commission or warrant as surgeon or assistant-surgeon, in his Majesty's army, should be obliged to prove that he was in practice as an apothecary on the 1st August, 1815, otherwise than as holding such commission or warrant:—Held, that the evidence of the paymaster of the regiment, that he paid the plaintiff his salary as assistant-surgeon during a period of several years, and that he should not have done so without the production of his warrant, was sufficient to entitle him to the right conferred by the statute. *Milbank v. Bryant*, 3 G. & D. 81; 6 Jur. 931; 12 L. J., Q. B. 81.

What constitutes practicing, within the statute; and recovery of penalties.]—Practicing as an apothecary is the mixing up and preparing medicines prescribed by a physician or by any other person, or by the apothecary himself. *Woodward v. Ball*, 6 C. & P. 577—Williams.

The acting as a surgeon or an accoucheur is not practicing as an apothecary, nor would the party supplying medicine to a friend be so. But if the party sought his living by practicing as an apothecary, that is sufficient, as it is not essential that he should have gained his whole livelihood by his practice. *Id.*

Where an apothecary's assistant attended patients as an apothecary:—Held, that he could not be considered as practicing as such, although the patients paid him for the medicines administered to them. *Brown v. Robinson*, 1 C. & P. 264—Abbott.

A. bound himself apprentice to an apothecary, who resided eight miles from H. The apothecary then took a house at H., in which A. resided, and attended several patients there, the apothecary coming over occasionally, and being consulted by the defendant about the patients:—Held, that this was a practicing by A. as an apothecary, within 55 Geo. 3, c. 194, s. 20. *Apothecaries' Company v. Greenwood*, 2 B. & Ad. 709.

An unqualified person dispensing medicine of his own advice is within the penalties of 55 Geo. 3, c. 194. *Apothecaries' Company v. Allen*, 1 N. & M. 413; 4 B. & Ad. 625.

A chemist and druggist practicing as an apothecary, in attending the sick, and giving them medicines, is liable to penalties. *Apothecaries' Company v. Greenough*, 1 G. & D. 378; 1 Q. B. 790.

By a plaint in a county court, a defendant was summoned for a debt of 20*l.*, for illegally practicing as an apothecary. The particulars stated that the action was brought to recover 20*l.*, for that the defendant, on divers days, acted as an apothecary, without a certificate, at four places named, by attending and supplying medicine to four persons mentioned, whereby he had forfeited 20*l.* By 55 Geo. 3,

c. 194, s. 20, any person who shall practice as an apothecary without a certificate shall forfeit for every such offense 20*l.*:—Held, that whether the facts stated in the particulars amounted to four offenses or one offense only, the sum recoverable was limited by the summons and particulars to 20*l.*, and therefore the county court had jurisdiction. *Apothecaries' Company v. Burt*, 5 Exch. 363; 1 L. M. & P. 405; 19 L. J., Exch. 334.

In an action for a penalty for practicing as an apothecary, without having obtained a certificate from the Apothecaries' Company, it is not necessary, on the part of the company, to prove that the party has not obtained his certificate, the onus being laid on him to show that he has. It must, however, be averred in the declaration that he has not. *Apothecaries' Company v. Bentley*, 1 C. & P. 538; R. & M. 159—Abbott.

Customers went to the shop of a chemist and asked him what was good for their ailments, and not being a certificated apothecary, he was accustomed to suggest medicine, make it up, and sell it to them:—Held, that in so doing he was acting and practicing as an apothecary, and was liable to a penalty under 55 Geo. 3, c. 194, s. 20. *Apothecaries' Company v. Nottingham*, 34 L. T., N. S. 76—Bramwell.

As to liability of apothecary practicing as a physician, or under direction of a physician, —see this title, III., 1.

## 2. Recovery of Charges.

By apothecaries, in general.]—[By 55 Geo. 3, c. 194, s. 21, no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 5th August, 1815, or that he has obtained a certificate to practice as an apothecary from the master, wardens and society of apothecaries.]

An apothecary who furnishes medicines, not being in a capacity to recover, cannot recover even for the vials in which the medicines were contained. *Steel v. Henley*, 1 C. & P. 574—Best.

In an action by a payee on a promissory note, expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker:"—Held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary, and, if that was proved, that he could not recover without bringing himself within 55 Geo. 3, c. 194, s. 21. *Blogg v. Prickers*, R. & M. 125—Best.

A surgeon and apothecary may, besides his charge for medicine, recover such charges for attendances as the jury considers fair and reasonable. *Hendley v. Henson*, 4 C. & P. 110—Tenterden.

Where an arbitrator awarded to an apothecary in London charges for attendances, the court refused to refer back the award to him

reconsideration. *Gensham v. Germain*, 11 *Loore*, 1.

There is no rule of law to preclude an apothecary from recovering both for medicines and attendance, where the united charges do not exceed a reasonable remuneration; and it is a question for the jury what is reasonable. *Morgan v. Hallen*, 3 N. & P. 498; 8 A. & E. 489; 1 W., W. & H. 870; 2 Jur. 591.

The fact of an apothecary having, in a former bill, left a blank for the price of his attendances, is evidence upon which a jury may say whether or not there was a contract to make no charge for attendance. *Id.*

If a surgeon, in a bill to his patient, leaves a blank for his charge for attendances, and the patient pays a sum on account, the former is bound by the bill, and cannot recover more than the sum paid into court by the latter. *Tuson v. Batting*, 3 Esp. 192—Kenyon.

A person who professes to cure certain disorders within a specific time, and induces another person to employ him by false and fraudulent professions of his skill, cannot recover either for his medicines or attendance. *Huys v. Phelps*, 2 Stark. 480—Abbott.

In an action for an apothecary's bill, consisting of a great number of items, where the jury gives a verdict for the whole sum due, the court will not grant a new trial because every item was not proved, if evidence was given as to some of them. *Wheeler v. Sims*, 6 Jur. 151—B. C.

It is a good defense to an action by an apothecary, that he treated the patient ignorantly or improperly. *Kannen v. M'Mullen*, Peake, 59—Kenyon.

Aliter, if the medicines were administered under the direction of a physician. *Id.*

In an action to recover the amount of a chemist's bill, it being suggested that the items are properly within the scope of an apothecary's profession, the proper question for the jury is, under 55 Geo. 3, c. 194, ss. 14, 28, whether he has acted as an apothecary, and not whether he has charged as a chemist or an apothecary. *Richmond v. Coles*, 1 D., N. S. 560; 6 Jur. 238—B. C.—Patteson.

In an action by an apothecary for charges incurred in London, he produced at the trial a certificate of qualification entitling him to practice in the country, but he had not paid the extra fee of 4*l.* 4*s.* to the Apothecaries' Company, which was necessary by 55 Geo. 3, c. 194, s. 10, to entitle him to practice in London:—Held, that he was not prevented from recovering by s. 21. *Young v. Geiger*, 6 C. B. 541; 6 D. & L. 337; 12 Jur. 983; 18 L. J., C. P. 40.

The right of an apothecary to charge for attendances is not matter of law, but of contract, either express or to be implied from the usage of the place. *Smith v. Chambers*, 2 Ph. 221; 11 Jur. 859.

Action for goods sold and delivered, work done, and materials provided, and on an account stated: the particulars of demand consisted of items "for medicines and attend-

ances." At the trial, the plaintiffs' assistant proved that they were surgeons, and that he had visited and dispensed medicines to the defendant, and that on one occasion he had bled the defendant:—Held, that *prima facie* the charges were charges in a medical case, and that the plaintiffs were therefore bound to prove that they were certificated as apothecaries or that they had been in practice previously to the 1st August, 1815. *Proud v. Mayall*, 3 D. & L. 531—B. C.—Patteson.

Under the Medical Act, 1858, 21 & 23 Vict. c. 90, ss. 31 and 32, and the Apothecaries Act, 55 Geo. 3, c. 104, s. 21, in order to recover for medicines and attendance as an apothecary, it is necessary that the practitioner should have been qualified and registered at the time of the services rendered; and it is not sufficient that he produce at the trial a certificate of registration obtained after action brought. *Leman v. Houseley*, 10 L. R., Q. B. 66; 44 L. J., Q. B. 22; 23 W. R. 235; 81 L. T., N. S. 833.

**By surgeons.**—A person having a certificate as a surgeon from the College of Surgeons cannot charge for attending a patient in a fever, unless he has also a certificate from the Apothecaries' Company. *Allison v. Haydon*, 4 Bing. 619; 1 M. & P. 588; 3 C. & P. 246.

But a surgeon may charge for medicine administered in a surgical case, when the medicine is subservient and subordinate to the discharge of his duty as a surgeon. *Id.*

When a surgeon attended patients in cases requiring surgical aid, and also dispensed medicines to them, not being certificated as an apothecary under 55 Geo. 3, c. 194:—Held, that he might recover for his surgical advice. *Simpson v. Ralfe*, 4 Tyr. 325.

Under the Apothecaries Act, 55 Geo. 3, c. 194, s. 21, which is not repealed by the Medical Act, 1858, 21 & 23 Vict. c. 90, ss. 31, 32, a member of the College of Surgeons, registered as a surgeon only under the latter act and having no other qualification, cannot recover for medicines administered by him in a case not requiring surgical treatment. *Leman v. Fletcher*, 42 L. J., Q. B. 214; 8 L. R., Q. B. 319; 21 W. R. 788; 28 L. T., N. S. 499.

**Pleading want of qualification.**—It is not necessary to plead as a defense to an action on an apothecary's bill, that he has not a certificate to practice from the society of apothecaries, as that is part of the plaintiff's case. *Morgan v. Ruddock*, 4 D. P. C. 811; 1 H. & W. 505.

In an action brought by a party for work and labor as an apothecary, and for medicines, he must either prove his certificate, or that he was in practice as an apothecary before the 5th of August, 1815, pursuant to 55 Geo. 3, c. 194, s. 21, although the defendant has only pleaded *nunquam indelbitatus*. *Sharpe v. Wagstaffe*, 8 M. & W. 521; 6 D. P. C. 566; 1 H. & H. 164. S. P., *Shearwood v. Hay*, 5 A. & E. 883; 6 N. & M. 831; 2 H. & W. 249.

So, although he has pleaded as to part that

he never was indebted, and as to the residue a tender. *Id.* 8. P., *Wudsworth v. Collins*, 8 C. & K. 58—Talfourd.

As to proof of certificate, and its effect in evidence,—see this title, II., 1.

### III. MEDICAL PRACTITIONERS.

#### 1. Qualification; Registration; Colleges and Diplomas.

**Statutes.**—[3 & 4 Will. 4, c. 75, regulates schools of anatomy.

21 & 22 Vict. c. 90 (the Medical Act), regulates the qualifications of practitioners in medicine and surgery.

This act is amended by 23 Vict. c. 21, 23 Vict. c. 7, and by 23 & 24 Vict. c. 66, as to the grant of new charters to the Royal Colleges of Physicians in England, Scotland and Ireland.

By 21 & 22 Vict. c. 90, Medical Act, s. 48, it shall be lawful for her Majesty, by charter, to grant to the royal college of surgeons of England power to institute and hold examinations for the purpose of testing the fitness of persons to practice as dentists, who may be desirous of being so examined, and to grant certificates of such fitness.

By 22 & 23 Vict. c. 86, s. 2, the stamp duty of 15*l.*, payable in respect of a license to practice as a physician in Great Britain or Ireland, is repealed.

25 & 26 Vict. c. 91, s. 1, incorporates the General Council of Medical Education and Registration of the United Kingdom.

By s. 2, the right of printing, publishing, and selling the *British Pharmacopœia* is vested in such council.

27 & 28 Vict. c. 60, enables the crown to grant a lease for 999 years of the College of Physicians in Pall Mall.

By 31 & 32 Vict. c. 29, s. 3, every colonial legislature shall have full power, from time to time, to make laws for the purpose of enforcing the registration within its jurisdiction of persons who have been registered under "The Medical Act," anything in that act to the contrary notwithstanding.

By 33 & 34 Vict. c. 94, superannuation allowances may be made to medical officers of unions, districts and parishes in England and Wales.

36 & 37 Vict. c. 55, amends the Medical Acts so far as relates to the University of London.

38 Vict. c. 18, amends the Medical Acts so far as relates to the Royal College of Surgeons in England.

By 39 & 40 Vict. c. 40, the Medical Practitioners Act, 1876, s. 3, all persons who have obtained from any university of the United Kingdom, legally authorized to confer the same, the degree of bachelor in surgery, shall be permitted and are hereby empowered to register the same as a qualification under the Medical Act, anything in the act to the contrary notwithstanding.

By 39 & 40 Vict. c. 41, s. 1, the powers of everybody entitled under the Medical Act to

grant qualifications for registration shall extend to the granting of any qualification for registration granted by such body to all persons without distinction of sex: provided always, that nothing herein contained shall render compulsory the exercise of such powers, and that no person who but for this act would not have been entitled to be registered shall, by reason of such registration, be entitled to take any part in the government, management or proceedings of the universities or corporations mentioned in the Medical Act.]

**College of Physicians.**—The 14 & 15 Hen. 8, c. 5, appointing and regulating the College of Physicians, is a public act. *Physicians' College v. Harrison*, M. & M. 191; 4 M. & R. 404.

A doctor, who is not a member, has no right to inspect the books of the College of Physicians. *West v. Physicians' College*, 1 Wils. 240; 5 Mod. 395.

A doctor of physic, who has been licensed by the college to practice physic in London and within seven miles, cannot claim, as a matter of right, to be examined by the college, in order to his being admitted a fellow of the college. *Rez v. Physicians' College*, 7 T. R. 282.

A mandamus will not lie to the College of Physicians, commanding them to examine a doctor of physic, who has been licensed, in order to his being admitted a fellow of the college. *Id.*

A person created a doctor of medicine by: Scotch university could not practice as a physician in England, unless licensed by the College of Physicians, before the Medical Act. *Collins v. Carnegie*, 3 N. & M. 703; 1 A. & E. 695.

Candidates to be admitted of the college are to be examined by the comitia minora, then proposed to the comitia majora, and elected by them, before they can claim to be admitted. *Rez v. Askew*, 4 Burr. 2186.

Under 21 & 22 Vict. c. 90, the Royal College of Physicians has power to grant licenses without restricting their licentiates from compounding and supplying for gain the medicines which they prescribe, and for such licentiates so to compound and supply medicines is not an invasion of the privileges of the Apothecaries' Company. If such practice by licentiates of the college would have been an invasion of the privileges of the Apothecaries' Company, the proper remedy would have been by proceedings at law against the offender, and not by information and bill in equity against the college. *Att. Gen. v. Royal College of Physicians*, 1 Johns. & H. 561; 7 Jur., N. S. 511; 30 L. J., Chanc. 757; 9 W. R. 590; 4 L. T., N. S. 356.

**General council of medical education and registration.**—Under 21 & 22 Vict. c. 90, s. 29, the General Council of Medical Education and Registration are sole judges of whether a registered medical practitioner has been guilty of infamous conduct in a professional respect; and the council having, after due



**inquiry**, so adjudged, and ordered the name of the medical practitioner to be removed from the register accordingly, the court cannot interfere. *La Merit, Ex parte*, 4 B. & S. 582; 13 L. J., Q. B. 69; 12 W. R. 201; 9 L. T., N. S. 410.

**Under the existing charter of the University of London**, the right to elect its member of the general medical council, under 21 & 22 Vict. c. 90, is vested in its senate, consisting of the chancellor, vice-chancellor, and fellows for the time being; not in the whole body incorporated as the university by the charter, namely, the chancellor, vice-chancellor, fellows and graduates. *Reg. v. Storrar*, 2 El. & El. 133; 5 Jur., N. S. 1304; 28 L. J., Q. B. 326; 7 W. R. 612.

**By 21 & 22 Vict. c. 90, s. 36**, any entry which shall be proved to the satisfaction of the general or branch council to have been fraudulently or incorrectly made, may be erased from the register by order in writing of the council:—Held, that the council might make such an order, where the registration had been made under the dispensing power given to them by s. 46, as well as where it had been made by the registrar under s. 15. *Reg. v. General Council of Medical Education and Registration*, 7 Jur., N. S. 798; 30 L. J., Q. B. 201; 9 W. R. 413; 3 L. T., N. S. 692; 3 El. & El. 525.

**When the registrar of the branch medical council inserts in, and afterwards, by order of such branch council, and without notice to the party registered, strikes out of the registry the description of a qualification which the evidence produced to the registrar by the claimant did not show that he had obtained**, the court will not by mandamus compel the registrar to reinsert such description. *Reg. v. Steele*, 13 Ir. C. L. R. 398—Q. R.

**Surgeons.**—Before the Medical Act, the separated companies of surgeons and barbers were under the same regulations as before their separation. *Sharpe v. Law*, 4 Burr. 2133.

**Understanding the Latin tongue was a previous qualification necessary to being even apprenticed to a London surgeon.** *Res v. Surgeons' Company*, 2 Burr. 892.

**Diplomas.**—The mere production in court of a diploma of a doctor of physic, under the seal of one of the universities, is not in itself evidence to show that the party named in the diploma is entitled to that degree. *Moises v. Thornton*, 8 T. R. 803; 3 Esp. 4.

**But when a person, previously a stranger to a place, went to a town which was the seat of a university, and was told that a certain building was the college, that a certain person whom he saw in it was the librarian, and this person showed him a seal in his custody, which he stated to be the seal of the university, and produced a book which he stated to be the Book of Acts (statute book) of the university, and such person compared such seal with the seal upon a diploma, the genuineness of which was in question, and made a**

**copy (which was duly examined) from the Book of Acts, of an entry of an act conferring the degree of M. D.:—Held**, that the diploma was authenticated, and the act conferring the degree properly proved. *Collins v. Carnegie*, 3 N. & M. 703; 1 A. & E. 695.

**Diplomas conferring degrees and honors and certificates from medical institutions and practitioners did not pass to the provisional assignee by the vesting order of the Insolvent Debtor's Court under 1 & 2 Vict. c. 110, s. 37.** *Kernot v. Catlin*, 2 El. & Bl. 790.

**Proof of registration.**—Semble, that a book, purporting to be a copy of the Medical Register, pursuant to 20 & 21 Vict. c. 90, and professing to be "published and sold at the office of the general council of medical education and registration," is admissible under s. 27. *Pedgrift v. Chevallier*, 8 C. B., N. S. 246.

**Forgery of diploma.**—A person was convicted on an indictment at common law for forging and uttering a diploma of the College of Surgeons. The jury found that he forged the document with the general intent to induce the belief that it was genuine, and that he was a member of the college, and that he showed it to persons with intent to induce such belief in them; but that he had no intent in forging, or in uttering, to commit any particular fraud or specific wrong to any individual whatever:—Held, that the conviction was not sustainable, on the ground that no particular person was defrauded. *Reg. v. Hodgson, Dears. & B. C. C. 3*; 2 Jur., N. S. 453; 25 L. J., M. C. 78.

**Unregistered practitioners; false assumption of medical degree.**—A. and B. (the latter being a duly-qualified medical practitioner) jointly occupied a house, on one door of which was a plate with the name of Mr. A. engraved thereon. On another plate, on the same door, under the former, but inclosed in the same frame, was the name of Mr. B., with the addition of the words "surgeon, accoucher, &c." On another door was written the word "surgery," and on a lamp over the door "surgeon, accoucher." The name of A. was not in the Medical Register. Upon a complaint under the 21 & 22 Vict. c. 90, s. 40, the justices, assuming from the facts that A. falsely pretended to be a surgeon, convicted him in the penalty of 10*l*. The court, on appeal, quashed the conviction, on the ground that there was no evidence to warrant it. *Pedgrift v. Chevallier*, 8 C. B., N. S. 246; 6 Jur., N. S. 1341; 29 L. J., M. C. 225; 8 W. R. 500.

**K., who was legally qualified as a surgeon and apothecary, and registered as such under the 21 & 22 Vict. c. 90, was, before the time of passing of that act, possessed of a German medical diploma, and called himself Dr. K.; he continued to use that description after the passing of the act, though not registered as doctor of medicine:—Held**, no evidence that he had willfully and falsely pretended to be, or taken or used the name and title

of, a doctor of medicine, so as to render him liable to a penalty under s. 40. *Ellis v. Kelly*, 6 H. & N. 222; 30 L. J., M. C. 35; 6 Jur., N. S. 1113; 9 W. R. 56; 3 L. T., N. S. 381.

To warrant a conviction for acting as or pretending to be a surgeon, there must be unequivocal evidence that the party has so acted or pretended, it is not enough that he is so called by persons whom he has attended professionally, in the absence of evidence to show that he has done so on his own account and for his own profit. *Pedgrift v. Chevallier*, 8 C. B., N. S. 240.

An apothecary being freeman of London attended a patient, and made up and administered proper medicines to him, but without having a license from the faculty, or the direction of a physician, or demanding or taking any fee for his advice:—Held, that this did not amount to a practicing of physic within 14 & 15 Hen. 8, c. 5. *Ross v. Physicians' College*, 5 Bro. P. C. 553.

A druggist had attended a patient in the capacity of a medical man, and sent in to him a bill for such attendances, headed, "Mr. P. to Thomas Andrews, M.D.," setting out a variety of charges for attendance and medicine. He subsequently wrote a letter, signed "Thomas Andrews, M.D.," threatening legal proceedings unless the bill were paid, and he gave a receipt for the bill when paid, signing it in the same way. There was a colored lamp over his shop door, on three sides of which the words and letters "Thomas Andrews, M.D.," were painted. He had obtained by the payment of a sum of money a diploma of doctor of medicine from the University of Philadelphia in the United States, but he had never been in America, or studied or passed any examination for such degree, and he was not registered under the Medical Act, 21 & 22 Vict. c. 90. On appeal from a conviction by justices under s. 40 of that act, for having unlawfully, willfully, and falsely taken and used the name, title, description and addition of M.D., and thereby implying that he was then registered under the Medical Act, whereas he was not so registered:—Held, that the conviction was right, and must be affirmed. *Andrews v. Styrap*, 26 L. T., N. S. 704—Exch.

H. kept a shop, where he dispensed medicines and gave advice; he had a diploma in the window, in which he was described as "John Hamilton, doctor of medicine of the Metropolitan Medical College of New York," and he so held himself out to the world; and the magistrate reported that it was not satisfactorily proved that he was not entitled so to describe himself. He was not registered, and held no qualifications which would entitle him to be registered under the Medical Act. The magistrate having dismissed a complaint brought against him under the Medical Act, 21 & 22 Vict. c. 90, s. 40:—Held, that the decision of the magistrate was right, as the only evidence of any false pretense was, that the person pretended to be what he really

was; and also that it was a question of fact for the magistrate's decision rather than one of law for the court. *Carpenter v. Hinde*, 37 L. T., N. S. 157—Exch. Div.

## 2. Recovery of Charges.

### (a) By Physicians.

**Fees, before The Medical Act (21 & 22 Vict. c. 90).]**—Before the Medical Act a physician could not maintain an action for his fees. *Chorley v. Balcott*, 4 T. R. 317.

If a medical practitioner wrote prescriptions, and passed himself off as a physician, although he had no diploma, and no right to assume that character, he could not maintain an action for fees as a surgeon. *Lipson v. Holmes*, 2 Camp. 441—Ellenborough.

A physician might recover on an express contract to remunerate him for his attendance. *Veitch v. Russell*, 3 G. & D. 198; 3 Q. B. 223; Car. & M. 363; 7 Jur. 60; 12 L. J., Q. B. 513.

But, as the ordinary understanding was, that such attendance was given without legal title to remuneration, subsequent promises to pay were, in general, to be referred to the usual honorary claim of the physician, and would not amount to proof of an express contract, unless it was clear that the attendance was not given on the ordinary understanding. *Id.*

When no special agreement had been made to remunerate a physician, he could not recover expenses out of pocket, in traveling to attend his patient, for such expenses were incidental to the attendance, and to be considered as money paid to the physician's own use in the ordinary exercise of his profession. *Id.*

A contract to pay a physician could not be implied from the mere fact of his attendance on a patient, but a promise at the end of his attendance to pay him a fixed sum, or a reasonable compensation, would raise such a contract as would support an action. *Id.*

A physician could not sue for his fees for any thing he had done as a physician, either in attending or in prescribing medicine for a patient; but if he acted as a surgeon, or in any other capacity than that of a physician, he might maintain an action for a compensation for what he had done, provided he could show that it was not done by him as a physician; and the fact, that he was not paid fees at the times when he was consulted, went to show that he was not acting as a physician. *Little v. Oldacre*, Car. & M. 370—Denman.

A physician attended a testator for many years, without having obtained any remuneration. He stated, "that the testator had promised to pay him for his services, or leave him an equivalent." He did neither:—Held, that he had no claim against the estate, and a payment made to him by the executor was disallowed. *Shalleross v. Wright*, 12 Beav. 559; 14 Jur. 1037; 19 L. J., Chanc. 443.

B. practiced as a physician and a surgeon.

case occurring in which the advice of a physician was considered necessary, as well as the act of a surgeon, he was called in. It appeared that he had performed for his patient some services which usually are in the province of a surgeon. He sent his bill to the executors of his patient:—Held, that if the jury considered that he had done any such as surgeon, they should find a verdict against him to the amount of the value of that service. *Battersby v. Lawrence*, Car. & M. 120. —Maule.

**Charges by practitioners registered under the Medical Act.**—[By 21 & 22 Vict. c. 90 (Medical Act), s. 31, every person registered under that act shall be entitled according to his qualification or qualifications to practice medicine or surgery, or medicine and surgery, as the case may be, in any part of her Majesty's dominions, and to demand and recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the use of any medicines or other medical or surgical appliances rendered or supplied by him to his patients:

Provided always, that it shall be lawful for any college of physicians to pass a by-law to the effect that no one of their fellows or members shall be entitled to sue in manner aforesaid in any court of law, and thereupon such by-law may be pleaded in bar to any action for the purposes aforesaid, commenced by any fellow or member of such college.

By s. 32, no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation or for any medicine, which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this act.]

A physician, registered under 21 & 22 Vict. c. 90, who attends a patient professionally, and is not prohibited from suing by any by-law of the College of Physicians, can recover his fees without an express contract. *Gibbon v. Budd*, 2 H. & C. 92; 9 Jur., N. S. 525; 32 L. J., Exch. 182; 8 L. T., N. S. 321.

The presumption is not as formerly, that he attends the patient for an honorarium, but for fees, the right to which can be enforced by action. *Id.*

The enactment has not a retrospective operation. *Wright v. Greenroyd*, 1 B. & S. 758; 8 Jur., N. S. 98; 31 L. J., Q. B. 4; 8 Jur., N. S. 98; 5 L. T., N. S. 847. S. P., *Thistleton v. Frever*, 31 L. J., Exch. 230.

A medical practitioner is entitled to maintain an action for attendances and medicines, though not registered at the time of such attendances; it is enough if he appears to be duly registered at the time of the trial. *Turner v. Reynall*, 14 C. B., N. S. 328; 9 Jur., N. S. 1077; 33 L. J., C. P. 104; 11 W. R. 700; 8 L. T., N. S. 281.

Where a business is carried on by two partners, one of whom is registered as a surgeon and an apothecary, and the other as a surgeon only; this is no answer to a joint claim for

attendances given and medicines supplied in both capacities. *Id.*

The 21 & 22 Vict. c. 90, s. 32, is not confined to cases in which the patient is sued. *Alvasey De la Rosa v. Prieto*, 10 C. B., N. S. 578; 10 Jur., N. S. 831; 33 L. J., C. P. 262; 12 W. R. 1029; 10 L. T., N. S. 757.

Though an unregistered assistant may sue a registered practitioner for salary, an unregistered practitioner cannot sue a registered practitioner for medicines supplied to or attendance upon the patients of the latter at his request. *Id.*

Where medicine is supplied or attendance given by an unregistered practitioner to a patient, under a guaranty for payment given by a third person, the statute will afford a defense either to the principal debtor, or to the surety; for the patient does not the less require protection because the paymaster is a third person. *Id.*

A medical officer of a Peruvian vessel of war lying in the Thames, engaged an unregistered practitioner to attend the crew and troops (partly on board the vessel, and partly on shore) during his temporary absence. In an action against the Peruvian officer for the services thus rendered:—Held, that the above section precluded the unregistered practitioner from recovering; for, by whatever law the contract was to be interpreted, the remedy must be governed by the *lex fori*. *Id.*

#### (b) By Surgeons, Dentists, and Others.

**Surgeons.**—A surgeon may administer medicines in the cure of a surgical case without being subject to the penalties of 55 Geo. 3, c. 104; but he has no right to do so in a case of internal diseases not requiring surgical treatment, such as fever or consumption. *Apothecaries' Company v. Lotinga*, 2 M. & Rob. 495—Cresswell.

A. had several of his children residing in a house distant from his own in the charge of a servant:—Held, that if an accident happened to one of the children, A. was liable to pay for its cure, although he did not know the surgeon who was called in, and although the accident might have arisen from the carelessness of the servant. *Cooper v. Phillips*, 4 C. & P. 581—Tenterden.

A surgeon for several years bestowed medical attendance upon a lady, but, expecting that she would amply compensate him by a legacy, sent in no bill. She died and left him nothing; whereupon he sued her executors, claiming 500*l.* The jury awarded him 250*l.*—The court refused to disturb the verdict. *Baxter v. Gray*, 4 Scott, N. R. 374; 4 M. & G. 771.

In such a case, to disentitle the party to sue, there must be something more than the mere expectation of a legacy. *Id.*

Action, for work and labor as a surgeon, and for medicines. Plea, his bankruptcy before the debt accrued, and that his assignees claimed the debt from the defend-

ant before action. Replication, that the work was the personal labor of the bankrupt, and necessary for the present support of the bankrupt and his family; that the materials were purchased with the proceeds of his personal labor, and increased in value thereby, and were necessary for the performance of the work. On the trial it appeared that the plaintiff was a surgeon and an apothecary, and in substance carrying on a trade as such with medicines obtained on credit:—Held, that the assignees were entitled to the proceeds of a trade thus carried on, and that the replication was not proved. *Elliot v. Clayton*, 16 Q. B. 581; 15 Jur. 203; 20 L. J., Q. B. 217.

To an action for work and operations performed as a surgeon, a plea that he had not been examined or approved, or admitted to exercise or occupy himself as a physician or a surgeon, as required by the statute, is bad for not showing that the work and operations were done in a place within the operation of the 3 Hen. 8, c. 11, which imposed a penalty on persons practicing as physicians or surgeons in London, or within seven miles thereof, or in any diocese within the realm, without being examined. *D'Allez or D'Allez v. Jones*, 2 Jur., N. S. 979; 26 L. J., Exch. 79.

As to surgeons practicing as apothecaries,—see this title, II.

**Dentists.**—A. ordered of B. a set of artificial teeth, which were by the terms of the contract to be fitted to her mouth; before they were so fitted she died:—Held, a contract for the sale of goods within the Statute of Frauds, 29 Car. 2, c. 3, s. 17; and that B. could not sue her executor for work and labor done and materials provided. *Lee v. Griffin*, 1 B. & S. 272; 7 Jur., N. S. 1302; 30 L. J., Q. B. 252; 9 W. R. 702; 4 L. T., N. S. 546.

**Veterinary surgeons.**—If there is a general usage applicable to a particular trade or profession, persons employing one in such trade or profession will be taken to have dealt with him according to that usage, but a usage for a veterinary surgeon to charge for his attendance, when there was not much medicine required, is too uncertain. *Sewell v. Corp*, 1 C. & P. 392—Best.

A count for work, labor, and materials, will enable a plaintiff to recover for attendances as a farrier, and for medicines administered. *Clark v. Mumford*, 3 Camp. 37—Ellenborough.

### 3. Liability for Want of Skill or Negligence.

**Grounds of liability.**—An action lies against a surgeon for gross negligence and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient. *Sears v. Prentiss*, 8 East, 48.

So, for want of skill in disuniting the callus of the leg after it was set. *Slater v. Baker*, 2 Wils. 359.

A surgeon is responsible for an injury done to a patient, through the want of proper skill in his apprentice, but, in an action against him, the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. And if a person goes into a surgeon's shop and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation; if there are no external indications of its being improper, such person is justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result. *Hancke v. Hooper*, 7 C. & P. 81—Tindal.

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill; he does not, if he is an attorney, undertake at all events to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and, in an action against him by a patient, the question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant or not. *Lamphier v. Phipps*, 8 C. & P. 475—Tindal.

A surgeon having been employed by a railway company to examine a passenger who had sustained an injury in a collision on their line, and he having, so far as he could see or judge, on his own statement of his injuries, told him that they were so slight that he accepted a small sum in compensation:—Held, even assuming that his injuries were greater, there was no ground of action. *Pimm v. Roper*, 2 F. & F. 783—Bramwell.

To render a medical man liable for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. *Rick v. Pierpont*, 3 F. & F. 35—Erle.

A person not qualified, as being a regular medical practitioner, but assuming to be or to practice as such, and undertaking to treat another for a disease, is liable for injury caused by ignorant and improper treatment, by which the patient is rendered worse instead of better, and is injured by the use of improper medicines. *Ruddock v. Lowe*, 4 F. & F. 519—Crompton.

In an action against a chemist and druggist upon an alleged retainer (as a surgeon and an apothecary) to treat the plaintiff for a certain disorder (for which mercurial treatment was improper), the breach being negligent treatment (by mercury):—Held, that if the do-

plaintiff assumed to act as a surgeon or an apothecary, he was liable as such; but that these words were immaterial and might be rejected, the substance of the declaration being, that he undertook to treat the plaintiff for his disorder, and did so negligently or ignorantly; and that mercurial treatment, in a case for which it was wholly unfit, was such negligence or ignorance as would sustain the action. *Jones v. Fay*, 4 F. & F. 525—Pigott.

In an action by a person who had been a patient at a hospital, for maltreatment there by two of the surgeons, it appeared that the alleged maltreatment was in the administration of a hot bath which they had ordered, but which it was no part of their ordinary duty personally to direct and superintend, and at the actual administration of which they were not present:—Held, that he was not entitled to expect more than the usual and ordinary degree of care and attention at the hands of the surgeons, and that if they were not personally cognizant of the alleged ill-usage, they were not liable. *Perionowsky v. Freeman*, 4 F. & F. 977—Cockburn.

As to when want of skill or negligence is a defense to an action for charges or fees, —see this title, II., 2; III., 2.

**Who may sue.**—In an action against a surgeon for unskillfulness and misconduct, issue being taken on the fact of the employment of the defendant by the plaintiff, the mere circumstance of the defendant's attendance is evidence in support of the issue, though the plaintiff is an infant, and the defendant is sent for and paid by the plaintiff's father. *Gladwell v. Steggall*, 5 Bing., N. O. 733; 8 Scott, 60; 3 Jur. 535.

It is not a ground of demurrer to a declaration in an action by a man and his wife against a surgeon for an injury to the wife by reason of his improper and unskillful treatment, that it is not stated that he was retained and employed as a surgeon for reward to be to him paid, by whom he was so retained, or by whom he was to be paid. *Peppin v. Shepherd*, 11 Price, 400.

It is sufficient to aver that he was retained as a surgeon, and entered upon the cure. *Ib.*

Where it was agreed between A. and B. that B. should take A.'s mare to graze, and have her blistered:—Held, that A. could maintain an action against a chemist for selling ointment to B., which, upon being applied, injured the mare. *Phillips v. Wood*, 1 N. & M. 434.

## Members.

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## Merger.

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- VII. BY JUDGMENT. See JUDGMENT.
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### I. OF DEBTS AND OTHER LIABILITIES.

**Simple contract debts by specialties.**—A mortgage security executed by two (and the wife of the third) of three persons indebted to the mortgagee in a simple contract debt, does not operate as a merger of the claim on the simple contract in the specialty. *Sharpe v. Gibbs*, 18 C. B., N. S. 527; 12 W. R. 711.

To operate a merger of a simple contract debt in a specialty, the specialty must be co-extensive with the simple contract debt, and between the same parties. *Boaler v. Mayor*, 19 C. B., N. S. 76; 34 L. J., C. P. 230; 13 W. R. 775; 13 L. T., N. S. 457.

As to merger of simple contract by bond, —see also BOND; by covenant, —see also COVENANT.

As to merger by judgment, —see JUDGMENT.

### II. OF ESTATES AND OTHER RIGHTS AND INTERESTS.

**In lands, generally.**—A term of years and a freehold may subsist in the same person without merger if held in different rights. *Jones v. Davies*, 5 H. & N. 706; 29 L. J., Exch. 374; 8 W. R. 628; affirmed on appeal, 7 H. & N. 507; 8 Jur., N. S. 592; 31 L. J., Exch. 116; 10 W. R. 464; 6 L. T., N. S. 442—Exch. Cham.

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights without having acquired the freehold by his own act, and consequently there is no merger. *Ib.*

A testatrix seized in fee devised her real estate to E. for life, and after death to her children or child living at her death, and the issue of any child then dead, in fee, and in case of there being no child, then to H. in fee; and all the residue and remainder of her estate not be-



fore disposed of she devised to E. in fee. E., by lease and re-lease, conveyed all her estate to J. in fee, and died, never having been married:—Held, that the reversion passed by the residuary devise to E., and that, by the conveyance to J., E.'s life estate and reversion were both vested in him, and by the merger thus occasioned the contingent remainder to H. was destroyed. *Egerton v. Massey*, 3 C. B., N. S. 388; 8 Jur., N. S. 1325; 27 L. J., C. P. 10.

A. and B. were owners in fee, as tenants in common, of freehold property. On the death of B. a building lease of a portion of the property was granted by A. and the devisees of B., to a person who afterwards assigned all his interest under that lease to A. alone. On the death of A., his devisees, and the devisees of B., granted a building lease of another portion of the freehold property to a person who assigned his interest under the lease to A.'s trustees alone. The legal estate in all the property was outstanding in a mortgagee, who, subsequently to these transactions, reconveyed the mortgaged premises to the trustees of A. and B.:—Held, that there was no merger of the leasehold interests in the reversion in fee of it, and the leases were consequently still existing. *Brandon v. Brandon*, 31 L. J., Chanc. 47; 9 W. R. 825; 5 L. T., N. S. 829—V. C. K.

A., seized in fee of twelve twenty-fourth parts of a manor held by several as tenants in common, purchased lands holden of the manor, which were thereupon surrendered to a trustee for him, and afterwards to himself, in fee, and he was admitted tenant of the entirety by the act of all the lords:—Held, that twelve twenty-fourth parts of his copyhold interest in the lands merged in his freehold estate therein as lord of the manor. *Cattley v. Arnoll*, 4 Kay & J. 595.

An owner in fee bought up an existing building lease of the property, and had it assigned to a trustee, in trust for him, "his executors, administrators and assigns."—Held, that the presumption was, that the lease had not, in equity, merged in the inheritance, but that it passed as part of his personal estate. *Gunter v. Gunter*, 23 Beav. 571; 8 Jur., N. S. 1013.

As to merger of reversions,—see LANDLORD AND TENANT.

**Annuities and charges on land.]**—A. devised to B., a married woman, a reversionary interest in an estate, and bequeathed to her for life and for her separate use, an annuity charged on the same estate, and to commence immediately. A. also bequeathed other annuities similarly charged. At the death of the testatrix, the prior limitation having failed, B. became tenant for life in possession. She afterwards became discoverte, and the property having become insufficient to pay all the annuities:—Held, that a merger of her annuity in her life interest, by operation of law, would not be presumed. *Byam v. Sutton*, 19 Beav. 550.

A tenant in tail in remainder expectant

upon a preceding estate in tail, purchased a mortgage on the estate, and took an assignment to himself of the mortgage debt and of the term by which it was secured. He subsequently became entitled to the estate as tenant in tail in possession, and as such continued for six years in receipt of the rents, after which he died without barring the entail, or doing any other act indicative of an intention as to whether the charge should merge:—Held, that the charge was kept alive for the benefit of his personal representative. *Horton v. Smith*, 4 Kay & J. 624; 27 L. J., Chanc. 773.

When an owner of an estate has also a charge upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say, that without some special act, no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate; but where the intermediate estate is created by the act of the owner himself, this reasoning has no application. *Johnson v. Webster*, 4 De G., M. & G. 474; 1 Jur., N. S. 145; 24 L. J., Chanc. 301.

A man covenanted to pay a woman an annuity for her life, payable half-yearly, for her separate use, and free from anticipation. The covenantor afterwards married the annuitant, and died leaving her surviving:—Held, that the annuity was not extinguished, but only suspended, by the marriage, and that the widow was entitled to recover arrears accruing subsequently to the death of her husband. *Fitzgerald v. Fitzgerald*, 2 L. R., P. C. C. 83.

**Provisions of The Judicature Act, 1873.]**—[By 36 & 37 Vict. c. 66 (Judicature Act, 1873), s. 25, sub-s. 4, there shall not, after the commencement of the act, be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.]

## Mersey Conservancy.

See SHIPPING.

## Mesne Profits.

See EJECTMENT.

## Metage.

See CUSTOM AND PRESCRIPTION.

## Metal Dealers.

See 24 & 25 Vict. c. 51.

## Metropolis.

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### I. MANAGEMENT AND REGULATION, GENERALLY.

**Statutes.**—[16 & 17 Vict. c. 128, amended by 19 & 20 Vict. c. 112, is *The Metropolitan Smoke Nuisance Abatement Act*.

18 & 19 Vict. c. 120, is *the act for the better Local Management of the Metropolis*, amended by 19 & 20 Vict. c. 112, 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102.

By 26 & 27 Vict. c. 75, *the embankment of the Thames on south side is authorised*.

26 & 27 Vict. c. 78, *amends the acts relating to the turnpike roads in the neighborhood of the metropolis, north of the Thames*.

27 Vict. c. 68, and 28 Vict. c. 10, *extend the powers of the 21 & 22 Vict. c. 104, relating to the main drainage of the metropolis*.

28 Vict. c. 84, *makes the Metropolitan Houseless Poor Act, 27 & 28 Vict. c. 116, perpetual*.

28 & 29 Vict. c. 90, *is the act for the establishment of a fire brigade in the metropolis*.

29 & 30 Vict. c. 123, *provides for the improvement, protection, and management of commons near the metropolis*.

29 & 30 Vict. c. 81, *provides for superannuation allowances to officers of vestries and district boards within the area of the Metropolitan Local Management Act*.

30 & 31 Vict. c. 134, amended by 31 Vict. c. 5, s. 1, *regulates the street traffic of the metropolis*.

By 31 Vict. c. 5, s. 2, *no regulation by the police as to the carriage of lamps by cabs in pursuance of s. 17 of 30 & 31 Vict. c. 134, is to be made except with the approval of the secretary of state*.

32 & 33 Vict. c. 107, *amends the Metropolitan Commons Act, 1866, 29 & 30 Vict. c. 122*.

33 & 33 Vict. c. 63, *amends the Metropolitan Poor Act, 1867, 30 & 31 Vict. c. 6*.

32 & 33 Vict. c. 115, *amends the law relating to hackney and stage carriages within the metropolitan police district*.

32 & 33 Vict. c. 67, *provides for the uniformity of assessment of ratable property in the metropolis*.

33 & 34 Vict. c. 18, *provides for the equal distribution over the metropolis of further portions for the relief of the poor; and 34 Vict. c. 15, further amends the Metropolitan Poor Act, 1867*.

34 & 35 Vict. c. 113, *amends the Metropolitan Water Act, 1852*.

38 & 39 Vict. c. 83, *amends the Metropolitan Management Acts, as to making abatement on assessment of parts of metropolis containing property exempt from sewers' rate*.

40 & 41 Vict. c. 35, *affords facilities for the enjoyment by the public of open spaces in the metropolis*.]

For statutes relating to the powers of boards of works, vestries, &c.,—see this title, II.—IV.; buildings,—see this title, V.; other regulations,—see this title, VII.

### II. METROPOLITAN BOARD OF WORKS.

**Statutes.**—[18 & 19 Vict. c. 120, *is the act for the better Local Management of the Metropolis; and is amended by 19 & 20 Vict. c. 112, 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102*.

26 Vict. c. 13, *vests the care and management of grounds or gardens dedicated to the use of inhabitants in the metropolis, in the Metropolitan Board of Works*.

31 & 32 Vict. c. 43, *amends and extends 27 & 28 Vict. c. 61, as to the powers of the Metropolitan Board of Works in relation to loans under that act for the Thames embankment and metropolis improvements*.

32 & 33 Vict. c. 102, *regulates the borrowing of money by the Metropolitan Board of Works*.

33 & 34 Vict. c. 24, *provides for borrowing money by the Metropolitan Board of Works*.

34 & 35 Vict. c. 47, *amends the acts regulating the borrowing powers of the Metropolitan Board of Works*.

36 & 37 Vict. c. 40, *empowers the Metropolitan Board of Works to acquire and appropriate certain land reclaimed from the Thames, in pursuance of "The Thames Embankment Act, 1862"*.

38 & 39 Vict. c. 65; 39 & 40 Vict. c. 55, and 40 & 41 Vict. c. 52 (*The Metropolitan Board of Works (Money) Act, 1877*), *further amend the acts relating to the raising of money by the Metropolitan Board of Works*.]

#### Powers in respect of roads and streets.]—

By 25 & 26 Vict. c. 102, s. 98, *no existing road, passage, or way, being of a less width than forty feet, shall be hereafter formed or laid out for building as a street for the purposes of carriage traffic, unless such road, passage, or way be widened to the full width of forty feet; the measurement to be taken*

half on either side from the center or crown of the railway to the external wall or front of the house, or to the fence or boundary of the forecourt, if any:—Held, that this provision did not apply where the buildings abutted in the rear upon an old lane of less width than forty feet. *Metropolitan Board of Works v. Cox*, 19 C. B., N. S. 445.

In 1864, several plots of land abutting on one side of a lane were sold for building purposes; the lane was an ancient carriage way, and had buildings at intervals, on both sides, erected before 1862; the lane varied in width from forty one foot to twenty-eight feet, which was the width opposite the plots, and on the other side of the road was a permanent inclosure belonging to a church, and other buildings erected before 1862. In July, 1865, A. bought the plots, houses having been built on two of them, the front walls of the houses being twenty-seven feet from the old wooden boundary fence of the lane. On the 26th of September, 1865, A. began to remove this fence, which had been left untouched, and to substitute a permanent wall and railing, and the work was completed on the 14th of October. On the 6th of October the Board of Works was informed of what A. was doing, and in March, 1866, they laid an information against him to recover penalties for contravening the 25 & 26 Vict. c. 102, ss. 98, 107. At the hearing the magistrate found that A., by taking down the old fence and erecting the permanent fence, did begin to form and lay out the road for building as a street on the 26th of September, and completed such forming on the 14th of October; that the road was not required, by s. 98, to be widened to forty feet from the opposite fence, but only to the width of twenty feet from the center of the roadway to the boundary fence of A.'s ground; and he convicted A. in certain penalties:—Held, that the conviction was right. *Taylor v. Metropolitan Board of Works*, 2 L. R., Q. B. 213; 15 W. R. 765; 36 L. J., M. C. 53.

By a local improvement act, no street was to be made of less width than twenty-four feet; and by s. 30, it should not be lawful to build within the borough any houses with their fronts facing each other which should be separated from each other by a space of less than forty-four feet wide:—Held, that this section applied to prohibit the erection in a street in the borough of two houses at the same time, with their fronts facing each other, within the prescribed distance, and not to affect the erection of buildings not in a street. *Reg. v. Sid'siotham*, Bell C. C. 71; 28 L. J., M. C. 189; 7 W. R. 450.

An owner of land, lying between roads A. and B., built houses along road A. with back gardens running down to road B., and he then took down the old fence of road B. and placed an oak fence with gates three feet back on his land:—Held, that he could not be compelled, under 25 & 26 Vict. c. 102, s. 98, to put back his fence to twenty feet from the center of road B. *Metropolitan Board of*

*Works v. Clever*, 37 L. J., M. C. 123; 3 L. R., C. P. 531; 16 W. R. 1016; 18 L. T., N. S. 723.

The provisions of the Highway Acts and the Metropolitan Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. *St. Mary, Newington (Ventry) v. Jacobs*, 7 L. R., Q. B. 47; 25 L. T., N. S. 800.

**Naming streets and numbering houses.**—The Metropolitan Board of Works had authority, under 18 & 19 Vict. c. 120, s. 141, to name the streets and number the houses within the city of London, that enactment superseding in that respect a former and inconsistent local act, 11 & 12 Vict. c. 168, the *Sewer Act*. *Daw v. Metropolitan Board of Works*, 12 C. B., N. S. 161; 8 Jur., N. S. 1040; 31 L. J., C. P. 223; 6 L. T., N. S. 853. See now 25 & 26 Vict. c. 102, s. 87.

**Interfering with bed of river.**—The Metropolitan Board of Works has no power under 18 & 19 Vict. c. 120, s. 135, to erect my works on the bed or soil of the Thames, without first obtaining the consent of the Admiralty, pursuant to 21 & 22 Vict. c. 104, and of the conservators of the river; and consequently the board is liable to an action by an owner of a vessel which sustains damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by the board. *Brownlow v. Metropolitan Board of Works*, 13 C. B., N. S. 763; 8 Jur., N. S. 891; 31 L. J., C. P. 140; 10 W. R. 384; 6 L. T., N. S. 187; affirmed on appeal, 16 C. B., N. S. 546; 33 L. J., C. P. 233; 12 W. R. 871.—*Exch. Cham.*

**Metropolitan commons.**—The Metropolitan Board of Works purchased a metropolitan common. They agreed that if within a stipulated time the common should not be devoted to the public, having no part of it sold or let on building or other lease, that a party who had been beneficially entitled to part of the common should re-purchase his share. The board prepared a scheme for the Inclosure Commissioners, which provided for the sale or letting of a part of the common, which scheme was promulgated by the commissioners. The court restrained the Board of Works from promoting such scheme. *Telford v. Metropolitan Board of Works*, 41 L. J., Chanc. 589—V. C. B.

**Sewerage and drainage.**—The powers conferred on the Metropolitan Board of Works by 18 & 19 Vict. c. 120, s. 135, are uncontrolled by the 150th to 153d sections; and the board is empowered under the former section to make such sewers as they shall think fit, on compensating the owners of property for the damage occasioned thereby, without being required, under the latter sections, to buy the land under which they carry their works, or easements therein, from the owner. *Hughes v. Metropolitan Board of Works*, 7 Jur., N. S. 986; 9 W. R. 517; 4 L. T., N. S. 318.—R.

**The Metropolitan Board of Works is not authorized by 18 & 19 Vict. c. 120, s. 135, to turn into a navigable river or stream the sewage of an entire district (which has not previously been drained into such river or stream), so as to create a nuisance. *Att. Gen. v. Metropolitan Board of Works*, 11 W. R. 820; 9 L. T., N. S. 139; 1 H. & M. 298.**

**The metropolitan board may execute any works comprised within the terms of 18 & 19 Vict. c. 120, s. 135, making compensation for damage, without first acquiring the land under ss. 150-153, and The Lands Clauses Act, 8 & 9 Vict. c. 18, notwithstanding that the works may be of such a character as to involve an actual taking of land, and may be within the powers of ss. 150 and 153. *North London Railway Company v. Metropolitan Board of Works*, 1 Johnson, 405; 5 Jur., N. S. 1121; 28 L. J., Chanc. 909.**

**Apportionment and recovery of expenses of paving streets, sewers, and other works.]**

—By 18 & 19 Vict. c. 120, s. 170, the Metropolitan Board of Works is directed, in apportioning the expenses of the board among the different parts of the metropolis, to have regard to the annual value of the property in the several parts of the metropolis, and in the case of the expenditure on works of drainage, to the benefit derived from such expenditure by the several parts of the metropolis affected thereby. By s. 181, the money necessary to discharge the liabilities of the metropolitan commissioners of sewers is to be raised in like manner as the expenses of the board. The metropolitan commissioners of sewers had, while acting under 11 & 12 Vict. c. 112, borrowed 200,000*l.*, out of which they had expended 67,000*l.* on drainage works for the benefit of the Surrey and Kent sewerage district, which, formed by them, comprised nineteen parishes and parts of parishes. On the passing of the 18 & 19 Vict. c. 120, the metropolitan board had to provide for the payment of the liabilities of the metropolitan commissioners of sewers, and acting under ss. 179 and 181, they apportioned the 67,000*l.* amongst the parishes in the Surrey and Kent sewerage district, according to the ratable value of the property in those parishes, and not according to the proportion of the sum expended in them, or to the benefit derived by them from the expenditure, and made a rate accordingly upon each parish:—Held, that the rate so made was valid. *Pew v. Metropolitan Board of Works*, 6 B. & S. 235; 11 Jur., N. S. 346; 34 L. J., M. C. 97; 13 W. R. 580; 12 L. T., N. S. 140.

In assessing property to the sewer rate under 18 & 19 Vict. c. 120, the law of sewers must in general prevail, that if property is situate within the area benefited by the sewers, it must contribute without any reference to the amount of benefit derived; and if the property does not fall within the classes mentioned in s. 163, or within any exemption

or reduction mentioned in s. 164, it must be assessed at its full value as ascertained by the poor rate for the time being. *Reg. v. Heald*, 3 B. & S. 419; 32 L. J., M. C. 115; 11 W. R. 339; 7 L. T., N. S. 708.

Therefore, the mains and pipes of a gas company, laid in the ground for the purpose of supplying gas to customers, must be assessed at their full value, and are not entitled to any deduction on the ground of deriving less benefit from the sewers than house property. *Id.*

A commutation tithe rent-charge is liable to the general rate and lighting rate levied under 18 & 19 Vict. c. 120, s. 161, but not to the sewers rate, being within the exemption of s. 164, when the practice, before the 18 & 19 Vict. c. 112, was to exempt the tithes of the parish from the sewers rate. *Reg. v. Goodchild*, 27 L. J., M. C. 151; 4 Jur., N. S. 1050; El., Bl. & El. 1.

By 18 & 19 Vict. c. 120, s. 181, the Metropolitan Board of Works has power, in default of the overseers, to appoint a person to make a rate over parishes beyond the metropolis, but within the limits of the 11 & 12 Vict. c. 112, for the purpose of paying off debts due under 11 & 12 Vict. c. 112. *Reg. v. Glossop*, 33 L. J., M. C. 92; 11 W. R. 345—B. C.—Mellor.

In the absence of any estimate or basis of a county rate in the city of London, the Metropolitan Board of Works, under 21 & 22 Vict. c. 104, s. 10, may make the parochial assessment the basis or estimate of a rate for raising the necessary sums for the purposes of the main drainage rate. *London Commissioners of Sewers v. Metropolitan Local Board*, 10 L. T., N. S. 351—Q. B.

As to powers of district boards of works in respect of drainage and sewerage,—see this title, IV.

As to sewers, generally, and in the metropolis before the above statutes,—see **SEWERS**.

**Making compensation for works or injuries.]** The mere temporary obstruction of access to premises, though it may cause some inconvenience and loss of business to the occupier, is not a damage in respect of which he is entitled to claim compensation under 18 & 19 Vict. c. 120, ss. 185, 225. *Herring v. Metropolitan Board of Works*, 19 C. B., N. S. 510.

By 11 & 12 Vict. c. 112, s. 38, power is given to the commissioners of sewers to construct sewers, and to make compensation for damage done thereby, and compensation was to be made out of rates to be levied under the act. By 18 & 19 Vict. c. 120, s. 143, the Metropolitan Board of Works was appointed to take the place of the commissioners of sewers, and no action against the commissioners was to abate, but to continue against the metropolitan board. By s. 148, the property of the commissioners is vested in the board, and money recoverable from the former is made recoverable from the latter, and all liabilities which, under 11 & 12 Vict. c. 112, were charged on

or payable out of any rates levied thereunder, are continued in full force, and charged on the district as before. In an action against the metropolitan board for damage done by the commissioners of sewers in the construction of works several years before action:—Held, that the Metropolitan Board of Works was liable. *Pettward v. Metropolitan Board of Works*, 10 C. B., N. S. 489; 11 Jur., N. S. 932; 34 L. J., C. P. 301; 12 L. T., N. S. 764.

In a field, situate upon a bed of gravel, there had existed from time immemorial a pond, formed in the gravel surface, underlying which was a natural basin of clay. The pond was the result of the percolation of water from the adjoining high lands into the gravel, whence, being confined by the substratum of clay, it rose to the surface, and formed the source of a rivulet supplying the owner's house, gardens, &c. The Metropolitan Board of Works, in pursuance of their powers under 11 & 12 Vict. c. 112, and in order to drain a district within the limits of their commission, constructed a sewer along the highway at a short distance from the pond, cutting through the beds of clay and gravel, and thereby draining and diverting the percolating water, so as to leave the pond and rivulet permanently dry:—Held, that the case was to be treated as though the pond had never been in existence, and that the owner was not, therefore, entitled to compensation for the abstraction of the water. *Reg. v. Metropolitan Board of Works*, 9 Jur., N. S. 1008; 33 L. J., Q. B. 105; 11 W. R. 492; 3 B. & S. 710.

A proceeding for settling by arbitration the amount of compensation payable by the Metropolitan Board of Works in respect of land and buildings damaged by the sewage works of such board, under the powers of their act, is not a proceeding against the board within 25 & 26 Vict. c. 102, s. 106, which limits the time for issuing process or instituting any proceeding against such board for anything done under the powers of the board under their acts. *Delaney v. Metropolitan Board of Works*, 36 L. J., C. P. 227; 16 L. T., N. S. 386; affirmed on appeal, 17 L. T., N. S. 262; 16 W. R. 137; 37 L. J., C. P. 59; 3 L. R., C. P. 111—Exch. Cham.

The mere construction of a sewer by the Metropolitan Board of Works does not give the owners of the adjacent lands a right to compensation under the Sewers Act, 11 & 12 Vict. c. 112, ss. 69 and 70. *Metropolitan Board of Works v. Metropolitan Railway Company*, 16 W. R. 1117; 19 L. T., N. S. 10; 3 L. R., C. P. 612; 37 L. J., C. P. 281.

Where the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw-dock, as public rights, and not as rights attached to the premises, and was obstructed in the enjoyment of these rights by the works of the embankment:—Held, that he could not claim compensation under the Lands Clauses Act, 1845, s. 63. *Reg. v. Metropolitan Board of Works*, 4 L. R., Q. B. 358; 38 L. J., Q. B. 201; 17 W. R. 1094.

**Action against officers of board.]**—By 25 & 26 Vict. c. 102, s. 106, no writ or process shall be sued out against or served upon . . . the Metropolitan Board of Works, or any vestry or district board, or their clerk, or any clerks, surveyor, contractor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done, under the powers of such board or vestry under the metropolitan acts, until one month after notice:—Held, that the section intended only some act done by virtue of the powers vested in the board or vestry and under their authority, and that, therefore, a person who had received notice from a district board to drain into a sewer, and in doing so committed a trespass, was not entitled to notice of action. *Dout v. Slater*, 10 B. & S. 400; 38 L. J., Q. B. 159.

**Making compensation for loss of office.]**—The services of a clerk of the works to paving commissioners were discontinued, and he ceased to act as their clerk. The powers of the commissioners having been determined in 1856 by 18 & 19 Vict. c. 120, he applied for compensation for the loss of his office to the district board of works, who rejected his application, on the ground that he was not an officer of the commissioners at the time of the act coming into force. He appealed to the Metropolitan Board of Works, who made an order awarding compensation for the loss of emoluments, as such officer, arising from the passing of the act:—Held, that the question whether he was an officer or not was necessarily within the jurisdiction of the Metropolitan Board of Works as a court of appeal. *Reg. v. Metropolitan Board of Works*, 4 Jur., N. S. 25; 27 L. J., Q. B. 5; 8 El. & Bl. 520.

**Stock investments.]**—The Metropolitan Board of Works  $3\frac{1}{2}$  per cent. consolidated stock is charged on land, and therefore a bequest of such stock, or of money to be invested in such stock, to a charity, is void under the Statute of Mortmain, 9 Geo. 2, c. 36. *Cluff v. Cluff*, 24 W. R. 632; 2 L. R., Ch. Div. 223—V. C. H.

The costs of an interim investment in consols and of the petition for that purpose are "expenses of all purchases from time to time" within s. 89 of the General Metropolitan Paving Act, 1817, 57 Geo. 3, c. 29. *Merceron, In re*, 26 W. R. 187—R.

For analogous decisions as to the powers, duties and liabilities of metropolitan vestries and district boards of works,—see this title, III.—IV.

### III. METROPOLITAN VESTRIES.

**Powers and duties, and how exercised in general matters.]**—Where the right of electing the minister of a parish had been by deed vested in trustees for the parishioners:—Held, that it was not transferred to the vestry, or otherwise affected, by 18 & 19 Vict. c. 120, or



y 19 & 20 Vict. c. 112. *Carter v. Cropley*, 1 De G., M. & G. 680; 8 Jur., N. S. 171; 26 L. J., Chanc. 240.

Under a deed for the foundation of a charity, the right of electing almspeople was vested "in the minister, churchwardens, overseers of the poor, and such of the parishioners as should pay taxations to the poor, and should not keep inmates or poor lodgers."—Held, that this was not "a duty, power, or privilege relating to the management and relief of the poor, or the administration of any money or other property applicable to the relief of the poor," within 19 & 20 Vict. c. 112, s. 3, and that the right of electing almspeople was not transferred to the new vestry appointed under that act. *Att. Gen. v. Drapers' Company*, 27 L. J., Chanc. 542; 4 Drew. 299.

When a decree of the Court of Chancery and a scheme framed thereunder gave the parishioners and inhabitants of a metropolitan parish in vestry assembled the power to elect new trustees of a charity:—Held, to be exercisable by a vestry appointed under 18 & 19 Vict. c. 120, and 19 & 20 Vict. c. 112. *Hayle, In re*, 8 Jur., N. S. 810; 81 L. J., Chanc. 612; 10 W. R. 577; 7 L. T., N. S. 18.

A parish was previously to 18 & 19 Vict. c. 120, and 19 & 20 Vict. c. 112, governed by local acts by which it was provided that the vestrymen should appoint governors and directors of the poor, who should make out the poor-rates for the parish:—Held, that since the passing of these acts, the old vestry had no longer the power of appointing the governors and directors, but that the power of doing so was vested in the new vestry by virtue of 18 & 19 Vict. c. 120, s. 11, or 19 & 20 Vict. c. 112, s. 3. *Reg. v. Rendle*, 1 B. & S. 54; 7 Jur., N. S. 1072; 30 L. J., M. C. 135; 9 W. R. 666.

**Voting.**—By 18 & 19 Vict. c. 120, s. 28, the duties of vestries are to be performed by the majority present. By a by-law made pursuant to s. 202, it was provided that all questions shall be determined by a show of hands, or by a division, if demanded, with the names recorded:—Held, that the division or poll might take place after a show of hands. *Tear v. Freebody*, 4 C. B., N. S. 228.

Inspectors of votes for the election of vestrymen have authority to inquire into the qualification of candidates, and are not to return as elected any person, who, although he may have a majority of votes, was not qualified at the time of the election. *Ross, Ex parte*, 3 Jur., N. S. 1302; 26 L. J., Q. B. 313; 7 El. & Bl. 954.

An action does not lie against a churchwarden presiding, under 18 & 19 Vict. c. 120, at the election of vestrymen and auditors, for refusing the vote of a party entitled to vote for vestrymen and auditors, or for refusing to allow as a candidate a party entitled to be candidate, unless malice is alleged and proved. *Tozer v. Child*, 7 El. & Bl. 377; 3 Jur., N. S. 774; 26 L. J., Q. B. 151—Exch. Cham.

By 18 & 19 Vict. c. 120, s. 21, if any person knowingly personate and falsely assume to vote in the name of any parishioner entitled to vote in any election under this act, or forge or in any way falsify any name or writing in any paper purporting to contain the vote or votes of any parishioner voting in any such election, or by any contrivance attempt to obstruct or prevent the purposes of such election, the person so offending shall, upon conviction, be liable, &c.:—Held, that an intentional obstructing of the voting by actual violence, is an offense within the act. *Buckmaster v. Reynolds*, 13 C. B., N. S. 63.

**Powers and duties as to roads, streets and lighting, sewers, &c.**—An unfinished road (in a parish mentioned in Schedule A of 18 & 19 Vict. c. 120), containing inhabited houses along part of it, communicated at one end only with another road containing houses placed singly at long intervals. The soil of such unfinished road was private property, and the road itself had not been dedicated to the public. The vestry of the parish refused to light the road under s. 130:—Held, that the vestry was not bound to treat the road as a street under ss. 130, 250. *Reg. v. St. Mary, Islington (Vestry)*, El., Bl. & El. 743.

A metropolitan police magistrate, on a summons for an order under 18 & 19 Vict. c. 120, ss. 105, 226, upon the proprietor of houses in D., alleged to be a new street within the metropolis, for his share of the expenses for paving it, after hearing the parties and their evidence, dismissed the summons on the ground that D. was not a new street within the meaning of the enactment, because it was an old highway. A rule calling on him to hear and adjudicate on the complaint was obtained, with a view of obtaining the decision of the court, that D. might be a new street under 18 & 19 Vict. c. 120, s. 105, though it was an old highway:—Held, by Lord Campbell, C. J., Wightman and Crompton, J.J., that the court could not inquire whether the magistrate came to a right conclusion or not, but only whether he had adjudicated; and, they being of opinion that he had done so, the rule was discharged without any expression of opinion as to whether he was right or wrong in his construction of the act. Erle, J., dissentiente, and holding that, as the magistrate could not safely proceed unless D. was a new street, his decision, that it was not, was such as to give the court jurisdiction to determine whether he was right or wrong in that decision. *Reg. v. Dayman*, 7 El. & Bl. 672; 3 Jur., N. S. 744; 26 L. J., M. C. 128.

A magistrate having upon the construction of the 5th rule of s. 26 of 18 & 19 Vict. c. 122, decided that a certain place, being a row of houses forming part of a line of thoroughfare, was a street, the court declined to interfere with his decision. *Newman v. Baker*, 8 C. B., N. S. 200.

A company built Vauxhall Bridge under a local act, by which the company was empow-

ered to make a road leading to the bridge in Lambeth and Surrey, and required to put up lamp posts and lamps on the road and bridge, and to keep the road and bridge lighted, under pain of being indicted if in default; half the bridge was to be deemed to be in Lambeth, and Surrey, but not to be deemed a county bridge so as to subject the county or parish to the repairs of the bridge or road. By a subsequent act, commissioners were empowered to cause the road to the middle of Vauxhall Bridge to be kept properly lighted, and it was lawful for them to keep lighted such streets as they might think proper; and the "present lamps and posts in the streets within their jurisdiction, and which shall or may hereafter be erected or fixed," were vested in the commissioners:—Held, that the obligation to light the road and half the bridge and the property in the lamps were transferred from the company to the commissioners, and from them to the vestry of Lambeth, by 18 & 19 Vict. c. 120, ss. 90, 130 and 250. *Reg. v. Lambeth (Vestry)*, 31 L. J., Q. B. 252; 6 L. T., N. S. 644; 9 Jur., N. S. 48; 3 B. & S. 1.

A tramway is not a pavement of a street, and consequently not within the powers conferred on vestries by 18 & 19 Vict. c. 120, s. 98. *Reg. v. Train*, 2 B. & S. 640; 9 Cox C. C. 180; 8 Jur., N. S. 1151; 31 L. J., M. C. 169; 10 W. R. 539; 3 F. & F. 22.

A. occupied a house standing in a contiguous line of houses, in a district within 18 & 19 Vict. c. 120. Immediately in front of these houses was a paved public footway, fifteen feet wide, then a space thirty feet wide, then a public carriage-way, fifty feet wide, then an intermediate space fifty-eight feet wide, then a paved public footway ten or twelve feet wide, immediately in front of another continuous line of houses, facing the first mentioned line. The intermediate spaces between the footways and the carriage-road had always been made use of by the owners of the houses opposite, in such manner as suited their respective occupations; in some instances they had erected permanent structures, and A., whose house was a public-house, had, before the act came into operation, placed in the part opposite to his house a permanent horse-trough, and the carts of his customers stood on that space while the drivers and horses were resting; he had, also, put there movable seats, and in summer a movable shed, and had fixed sockets which were let into the ground. The footway was always left clear. A. paid the owner of the soil for permission to use the intermediate space. The public passed over the intermediate space as of right, subject to the above described user of it by the owners of the houses. Persons wishing to get from the footway to the carriage road did so without objection, picking their way where the space was not obstructed. The vestry elected under the act having removed A.'s shed and seats, as obstructions within s. 120:—Held, that the act did not justify them, first, because the

intermediate space was not part of a street within the meaning of the act; and, secondly, because the shed and seats were not projections or obstruction against, or in front of, any house, within the meaning of the act. *Le Neve v. Mile End New Town (Vestry)*, 9 El. & Bl. 1054; 4 Jur., N. S. 660; 27 L. J., Q. B. 208.

By 25 & 26 Vict. c. 102, s. 98, no existing roadway of a width less than forty feet shall be laid out for building as a street for carriage traffic unless such road be widened to the width of forty feet, taken half on either side of the center of the roadway. An owner of land had in 1866 erected some houses thereon, the gardens in the rear of which abutted upon an ancient lane, and some of the owners of land adjoining this lane had in 1867 begun to form it into a street for carriage traffic. He however, himself, had done no act towards forming or laying out the lane as a street for the purposes of carriage traffic, otherwise than by the removal in 1866 of an old bank and thorn-fence, and the substitution of an oak-fence three feet within his own land, nor had he any intention of doing any such act, or of putting up any building fronting towards the lane:—Held, that he had not committed any offense against the statute, and was not bound to set back his oak-fence so as to leave a space of twenty feet between it and the center of the lane. *Metropolitan Board of Works v. Clever*, 3 L. R., C. P. 531; 37 L. J. 126.

By 18 & 19 Vict. c. 120, s. 69, the vestry of every parish mentioned in schedule A. shall make such sewers as may be necessary for effectually draining their parish, provided that no new sewer shall be made without the previous approval of the Metropolitan Board of Works. A mandamus to a vestry of a parish, commanding them to make such sewers as might be necessary for draining a particular part of the parish, and to take all necessary steps in that behalf, is defective, first, because it does not show a duty to make the sewers; and, secondly, because it ordered the vestry to make them without showing that the approval of the Metropolitan Board had been obtained. *Reg. v. St. Luke's (Vestry), Chelsea*, 1 B. & S. 903; 8 Jur., N. S. 308; 31 L. J., Q. B. 50; 10 W. R. 293; 5 L. T., N. S. 744.

The vestry of a parish, contained in schedule A. of 18 & 19 Vict. c. 120, passed a resolution that certain premises, not being drained by sufficient drains communicating with a sewer, notice be given to the owners to drain by separate drains into a new sewer, and to discontinue the old sewer. The owners made default, whereupon the vestry executed the work, and summoned the owners to pay the expense:—Held, that the drains were required by reason of the new sewer, and that the drains were constructed under s. 69, and not under s. 73, and that the owners of the houses were not liable. *Marylebone (Vestry) v. Ford*, 19 C. B., N. S. 424; 11 Jur., N. S. 907; 34 L. J., C. P. 214; 13 W. R. 1064; 13 L. T., N. S. 673.

Under 18 & 19 Vict. c. 120, s. 81, the

stry or district board of a parish is empowered, in the case of an insufficient privy, to erect its conversion into a water-closet. *Luke, Middlesex (Vestry) v. Lewis*, 1 B. & C. 865; 8 Jur., N. S. 432; 31 L. J., M. C. 33; 3 W. R. 120; 5 L. T., N. S. 603.

A vestry, acting under the powers of 18 & 19 Vict. c. 120, s. 88, resolved to erect a urinal in a situation where the vestry deemed such accommodation was required by the public, but where B. and other occupiers of houses considered that it would be a private nuisance; and the court granted an injunction, on the grounds that the act conferred no power to enable the vestry to erect that which would be a nuisance to any one; that the vestry had no power to suppress nuisances; and that the act conferred no arbitrary power, which appeared to have been exercised, on the metropolitan vestries. *Biddulph v. St. George's, Hanover Square (Vestry)*, 3 De G., J. & S. 493; 9 Jur., N. S. 484; 83 L. J., Chanc. 411; 11 W. R. 524; 8 L. T., N. S. 44—V. C. S.

But, on appeal, the court, being satisfied upon the evidence that the urinal intended would not of necessity be a public nuisance, and also that it was neither certain nor probable that the vestry was exceeding nor would exceed its powers, and that the vestry was not influenced by any improper motive, dissolved the injunction. *S. C.*, 9 Jur., N. S. 953; 33 L. J., Chanc. 411; 11 W. R. 739; 8 L. T., N. S. 558—L. J.

**Apportionment and recovery of expenses of paving streets, and other works.**—An action will not lie against the owner or occupier of a house for the recovery of his proportion of the expenses of paving a street under 18 & 19 Vict. c. 120, but recourse must be had to the remedy pointed out by s. 225, viz., by a proceeding before two justices. *St. Pancras (Vestry) v. Batterbury*, 2 C. B., N. S. 477; 3 Jur., N. S. 1106; 26 L. J., C. P. 243.

A., the owner in fee of land, entered into an agreement with B., by which he was to have possession of such land and to build thereon a certain number of houses, and to inclose and lay out a portion of the land as an ornamental pleasure ground, for the exclusive use of the inhabitants of such houses. A lease was to be granted by A. of each house when finished, and with the lease of the last house was to be granted a lease of the inclosed pleasure ground; and until all the leases were granted, B. was to pay A. a yearly rent in respect of the whole land, but the agreement was not to operate as a demise nor to give B. any estate or interest in the premises until the leases were executed. B. inclosed and laid out the pleasure ground, and built some of the houses, of which, and of which only, leases were granted to him; but not having completed all the houses.—Held, that A. remained the owner of the land which had been inclosed as such pleasure ground within the meaning of 18 & 19 Vict. c. 120, s. 250, and, therefore, as such owner, was liable under

25 & 26 Vict. c. 102, s. 77, to contribute to the expense incurred by the vestry in paving a new street abutting on the pleasure ground. *Holland v. Kensington (Vestry)*, 3 L. R., C. P. 565; 36 L. J., M. C. 105; 15 W. R. 1045; 17 L. T., N. S. 73.

A. let to B. for twenty-one years, determinable at the end of five, seven or fourteen years, at his option, a house in the parish of Paddington, yielding and paying the specified rent, "clear of all deductions in respect of land-tax, sewers-rate, and all other taxes, rates and deductions whatsoever;" and B. covenanted that he would "pay and discharge all taxes, rates, duties and assessments whatsoever which during the continuance of this present demise shall be taxed, assessed or imposed on the tenant or landlord of the premises hereby demised in respect thereof, whether parliamentary, parochial or otherwise (except property or income tax)." The house was in a new street within the meaning of the Metropolitan Management Acts, and the vestry of Paddington paved this street and obliged the landlord to pay his proportion of the expenses, by virtue of 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, ss. 77, 96:—Held, that the landlord was entitled to recover this money so paid from his tenant. *Thompson v. Lamouth*, 37 L. J., C. P. 74; 3 L. R., C. P. 149; 16 W. R. 312; 17 L. T., N. S. 507.

The vestry of a metropolitan parish, having incurred expenses for paving, gave the occupier of a house liable to contribute thereto, notice, under 25 & 26 Vict. c. 102, s. 86, to pay his rent to them and not to his landlord. The tenant gave notice thereof to his landlord, who nevertheless distrained. The tenant thereupon paid his rent (which was less than the paving expenses apportioned to the house) to the vestry, and the landlord then merely levied the expenses of the distress and withdrew:—Held, that his right of distress was only taken away on actual payment by the tenant to the vestry, that the distress was therefore justifiable in the first instance, and that the expenses thereof might be levied. *Ryan v. Thompson*, 37 L. J., C. P. 134; 3 L. R., C. P. 144; 16 W. R. 314; 17 L. T., N. S. 506.

A church surrounded by a strip of land opposite a row of houses abutting upon a new street, the site of the church having been conveyed to the commissioners for building churches, is not liable to be assessed to the expenses of paving the new street, as it is not a house within 18 & 19 Vict. c. 120, s. 105, nor land within 25 & 26 Vict. c. 102, s. 77, nor are the commissioners owners within either statute. *Angell v. Paddington (Vestry)*, 9 B. & S. 496; 37 L. J., M. C. 171; 3 L. R., Q. B. 714; 16 W. R. 1167.

The Harrow road is an ancient road, and had been formerly under the management of turnpike trustees and commissioners until 1864, when the vestry of the parish took charge of it for the first time. The part of the Harrow road eastward of Elgin road had been built over for many years. In 1866, a person built

a row of houses called Frankfort terrace, on the side of the Harrow road on the part westward of Elgin road. No sewer existed on that part of the road, but sewers rates had been levied and paid in respect of the land adjoining for more than five years prior to 1856. When Frankfort terrace was built, the parish constructed a sewer in that part of the road, and, upon its completion, the vestry apportioned the whole of the expense of it upon the owners of the adjoining land, under the Metropolis Local Management Amendment Act, 25 & 26 Vict. c. 102, s. 52:—Held, that the vestry was right, and that the road built upon was a new street within that section; and that the owners of the adjoining land were liable to be assessed for their respective portions of the whole expense. *Sawyer v. Paddington Vestry*, 40 L. J., M. C. 8; 23 L. T., N. S. 662; 19 W. R. 96—Q. B.

Held, also, that the word "street" in s. 53 did not apply to a new street within s. 52. *Ib.*

The Metropolis Local Management Amendment Act, 1862, ss. 77 and 96, makes certain paving expenses recoverable by the vestry by action from the present or future owner of premises, or from any person who then or thereafter occupies the premises. The vestry had recovered a judgment against a former owner of premises in respect of such expenses, which remained unsatisfied:—Held, that such judgment was no bar to a subsequent action for the same expenses against the occupier who occupied the premises as tenant to a succeeding owner. *Bermondsey Vestry v. Ramsey*, 40 L. J., C. P. 206; 6 L. R., C. P. 247; 24 L. T., N. S. 429; 19 W. R. 774.

A railway which ran in a cutting, and was adjoining to a new street which the vestry was about to pave, and was separated from it by a wall, through which there was no communication between the street and the railway, bounded the street within the meaning of the 25 & 26 Vict. c. 102, s. 77:—Held, that the company was liable to contribute to the expense of paving the street; and the vestry having charged the company in the same proportion as the owners of house property, that the court had no power to control the discretion vested in them by the act. *London and North-Western Railway Company v. St. Pancras (Vestry)*, 17 L. T., N. S. 654—C. P.

By certain local acts power was given to trustees to purchase land to make a road, paying the owners a rent; land was so acquired from the plaintiffs' predecessors, and a rent paid for it till 1863; in that year, by the Metropolis Roads Act, 1863, so much of the road as was within any of certain parishes was to be maintained by that parish, "and all quit-rents and other outgoing payments in respect thereof" to be paid as part of the expenses of maintaining the same. Part of the land acquired from the plaintiffs' ancestors was in a parish:—Held, that an action lay for the rent, but that only a proportionate part of the rent could be recovered from the parish.

*Sanson v. St. Leonard (Vestry), Shoreditch*, 38 L. J., C. P. 286; 4 L. R. 654.

Vacant land possessed by a railway company close to one of the piers of a railway bridge, and used for the purposes of repairing the bridge, and land which is partly vacant and partly a buttress or a support to the embankment of the railway, are land within 25 & 26 Vict. c. 102, s. 77. *Higgins v. Harding*, 8 L. R., Q. B. 7; 43 L. J., M. C. 31; 27 L. T., N. S. 483; 21 W. R. 191.

A railway in the metropolitan district was carried across a new street by an arch. On one side of the street the railway was carried forward on arches, and on that side was a strip of land, ten feet wide, left open for the purpose of repairing the arches; this abutted for ten feet on the street. On the other side, the railway was carried forward on an embankment, and the sloping part or buttress of the embankment abutted on the street about thirty-six feet, and at the foot of the embankment was an open space also about thirty-six feet wide, also abutting on the street, which was left for the purpose of allowing of slips in the embankment. The vestry of the parish, having determined to pave the street, sought to make the railway company contribute, under 25 & 26 Vict. c. 102, s. 77, as an owner of land abutting on the street:—Held, that the above pieces of land, including the slope of the embankment, were land within that section. *Ib.*

A bridge for every kind of traffic may be a street within 18 & 19 Vict. c. 120, s. 105, although it goes over a railway, and although before its erection a right of crossing existed for foot passengers only. *North London Railway Company v. St. Mary (Vestry), Islington*, 21 W. R. 226; 27 L. T., N. S. 672—Q. B.

A railway company agreed by articles dated 12th June, 1868, with a water company, to build a bridge to be devoted to the use of the public, in which bridge the water company might lay its pipes. The bridge was built and used by the public for eighteen months. By an indenture of 28th December, 1871, the railway company covenanted with the water company to retain the possession of the bridge (subject to the user thereof by the public) under its control. The vestry of the district paved the road of which the district formed part:—Held, that the dedication of the bridge to the use of the public might be inferred; that the roadway over it was a new street within the 18 & 19 Vict. c. 120, and that the railway company was liable to contribute to the paving of the road. *Ib.*

In front of a house situate in a London square was an area and a cellar. The cellar was formed of brick walls, one forming the outer wall of the area, and another running parallel to such outer wall. The covering to the cellar was formed of large flagstones, the ends of which rested on the walls. From 1830, when the houses were built and the flagstones were laid down, the flagstones were used by the public as a footway, and became by reason of the traffic worn down, cracked

and dangerous. The vestry called upon the owner to repair the cellar and its covering. He refused to do so, whereupon the vestry did the work, and proceeded against him to recover the expenses:—Held, that the vestry was bound to keep the flagstones in repair, and could not recover from the owner any part of the expenses of doing so. *Hamilton v. St. George, Hanover Square (Vestry)*, 43 L. J., M. C. 41; 9 L. R., Q. B. 43; 29 L. T., N. S. 429; 22 W. R. 86.

In the Metropolitan Management Act, 1862, 25 & 26 Vict. c. 102, s. 112, the expression "new street" is not confined to streets dedicated to the public. *St. Mary, Islington (Vestry) v. Barrett*, 9 L. R., Q. B. 278; 43 L. J., M. C. 85; 22 W. R. 402; 30 L. T., N. S. 11.

Houses were on both sides of a road, the foot-paths of which on each side had been paved by the vestry of the parish, and were used by the public. The carriage way had never been dedicated to the public; the vestry paved the carriage way, and sought to recover the expense from the owner of the houses under 18 & 19 Vict. c. 120, s. 105, on the ground that the carriage way was a new street:—Held, that although the carriage way had not been dedicated to the public, it was a new street within 25 & 26 Vict. c. 102, s. 112; and that the owner was liable to pay the expense of paving it under 18 & 19 Vict. c. 120, s. 105. *Id.*

In 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the expressions "forming" and "bounding or abutting on" a street are not confined to houses immediately fronting a street. *London School Board v. St. Mary, Islington (Vestry)*, 1 L. R., Q. B. Div. 65; 45 L. J., M. C. 1; 24 W. R. 137; 33 L. T., N. S. 504.

The vestry of a metropolitan parish, having paved a new street, under 18 & 19 Vict. c. 120, s. 105, assessed the London School Board, in respect of a school-house, as being owners of one of the houses forming the street. The school-house did not immediately front the street, but stood back from it some seventy or eighty feet, in a large yard, the whole area being about 29,500 square feet. There was a row of eleven small houses with gardens at the back of them between this area and the street; but the only access to the school was by a private passage which ran along one side of the last house and garden into the school yard, with gates opening from the street in question; the width of the passage being twenty feet and the length about sixty-four feet:—Held, that the school-house, though not actually one of the houses forming the street, yet practically formed part of it, within s. 105. *Id.*

Held, also, that the school board were owners within the definition in 18 & 19 Vict. c. 120, s. 230. *Id.*

By 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the cost of paving a new street, under the compulsory powers of the

former act, are payable by the owners of the houses forming and of the land abutting upon such street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter act the expression new street is to include a part of any such street. Buildings and land belonging to the guardians of a union abutted upon a new street which the vestry directed to be paved over half its breadth only; the part paved being that nearest the guardians' premises. The vestry apportioned the whole cost of the paving upon the houses forming the guardian's side of the street, omitting those on the other side:—Held, that the apportionment was invalid, and that the owners of the houses on both sides of the street ought to have been charged. *Mile End (Vestry) v. Whitechapel Union (Guardians)*, 1 L. R., Q. B. Div. 680; 46 L. J., M. C. 138; 24 W. R. 719; 35 L. T., N. S. 354—C. A.; affirming the judgment of the Queen's Bench, 45 L. J., M. C. 75; 24 W. R. 364; 34 L. T., N. S. 178.

**Power to make rates.]**—Under 18 & 19 Vict. c. 120, a precept was directed by the Metropolitan Board of Works to the vestry of a parish to raise a sum of money, as being the proportion chargeable on the parish for the expenses of the board, and the vestry made a precept, directed to the overseers of the parish, requiring them to make a rate for that purpose. By a local act, the affairs of the poor of the parish are committed to guardians; the precept was delivered to the guardians, who made a rate in obedience to it, signed by their own names:—Held, that the guardians were overseers within the act, and the rate was not objectionable on that ground. *Christie v. St. Luke's, Chelsea (Guardians)*, 8 El. & Bl. 992; 4 Jur., N. S. 733; 27 L. J., M. C. 153.

The rate did not state on the face of it the issuing of the precept:—Held, that the rate was sufficient, though not showing on the face of it the source of the authority of those who made it. *Id.*

Under 18 & 19 Vict. c. 120, s. 161, the only rates which a vestry is authorized to make are a sewers rate, a lighting rate, and a general rate; and no other rates but the sewerage and lighting rates can be made independently of and distinct from such general rate. *Reg. v. Great Western Railway Company*, El., Bl. & El. 600; 5 Jur., N. S. 386; 28 L. J., M. C. 59.

By a local act, all hereditaments whatsoever in a parish were made ratable upon one and the same scale to poor rates; but in respect of paving, watching, and lighting rates under the act, premises unoccupied, or in certain stages only of completion, were to be assessed respectively at certain lower rates than the rest:—Held, that under 18 & 19 Vict. c. 120, s. 161, all hereditaments in the parish were ratable upon one scale, without any exemption. *Id.*

By 18 & 19 Vict. c. 120, s. 158, vestries and boards of works, in ordering overseers of the



poor to levy and pay sums of money, by means of rates, for expenses of lighting, shall distinguish, in their orders, sums required for defraying expenses connected with sewerage:—Held, that this enactment is to be construed as requiring that there be distinguished, in the orders, the sum required for lighting the whole parish, which sum is to be ordered to be levied by a separate lighting rate made over the whole parish. *St. James, Westminster (Governors, &c.) v. St. Mary, Battersea (Overseers)*, 6 C. B., N. S. 878; 6 Jur., N. S. 100; 29 L. J., M. C. 26.

Parties were rated, under 18 & 19 Vict. c. 120, s. 161, in respect of their mains, and other pipes and apparatus fixed in the ground, and for the land occupied by them by means of their mains and apparatus; they had been held not ratable to a lighting rate under a local act:—Held, that this was a case of land “wholly exempted” within s. 165, and therefore they were not liable to be rated. *East London Waterworks Company v. Mile End Old Town (Overseers)*, 6 Jur., N. S. 222; 29 L. J., M. C. 60—Q. B.

By a local act, the hamlet of Spitalfields was constituted a distinct parish, and the rector, churchwardens and overseers for the poor of the parish, for the time being, were constituted the vestrymen for the time being of the parish. A subsequent local act authorized the churchwardens and overseers of the poor, and vestrymen of the parish, to meet together in the vestry room and make poor rates. The same persons were to appoint thirty vestrymen as governors and directors of the poor, to make regulations for their management and relief; and the laws relating to the relief of the poor were continued in force in the parish, except where altered by the act. A subsequent act empowered the churchwardens, overseers and vestrymen of the parish to sue for rates in the name of the collector. The poor rates were made, as directed by these acts, until the passing of 18 & 19 Vict. c. 120. Under section 2 of this statute a new vestry was duly elected for the parish of Spitalfields, and thenceforth made poor rates for the parish, from time to time, in making which the overseers, as such, took no part:—Held, that such rates were lawfully made; that the new vestry alone had authority to make them, and that the overseers were not entitled to vote, as such, at the making of them. *Vaughan v. Inray*, 1 El. & El. 633; 5 Jur., N. S. 980; 28 L. J., M. C. 78.

By an act the whole area of Grosvenor square was placed under the management of trustees, and they, many years ago, in pursuance of powers contained in the act, borrowed money, which, together with interest, was charged on the rates to be levied under the act, such rates being payable one-half by the owner, and the other by the occupier of each house in the square:—Held, that sections 90, 93, 94, 180 and 239 of the 18 & 19 Vict. c. 120, though it left in the trustees the inclosed ground and footway round it, together with all duties and powers in relation to the future

maintenance of such ground, and to levy rates for defraying the expenses incurred in the execution of such duties and powers, transferred the debt charged on the rates under the special act to the vestry of the parish; and the court granted a peremptory mandamus to the vestry to take the necessary steps for paying the principal and interest. *By v. St. George's, Hanover Square*, 32 L. J. Q. B. 160; 11 W. R. 722.

By 18 & 19 Vict. c. 120, s. 165, owners and occupiers of houses, buildings, and property other than land shall be rated to a lighting rate at a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated in such lighting rate:—Held, that “property other than land” meant property ejusdem generis, as houses and buildings, and that a water company was ratable for its pipes laid under ground as occupiers of land, and therefore at the lower rate. *Reg. v. Southwark and Vauxhall Water Company*, 6 El. & Bl. 1008; 3 Jur., N. S. 411.

By a local act, the vestrymen, governors and directors of the poor, or any nine of them, or, on their failure, the churchwardens, were to make a rate on the parish, called the composition rate, for raising a sum for payment of the rector's stipend, and for the repair and expenses of the church. By a prior act the governors and directors of the poor were made vestrymen:—Held, that the power of making this rate was by 18 & 19 Vict. c. 120, s. 90, and 19 & 20 Vict. c. 112, s. 3, transferred to the new vestry elected under those statutes; though it may be that, if the new vestry fails to make any rate, the churchwardens may still make one under the power of the local act. *Reg. v. Stretfield*, 33 L. J., M. C. 236; 11 W. R. 736—B. C.—Wigman.

The rate was voted in vestry on the 25th of June, and duly signed on the 10th of July:—Held, that a written demand of payment of the sum assessed, stating a demand of the sum as for the composition rate for the current year, made at Midsummer, was a sufficient demand, and that the error in the date of the rate was immaterial. *Id.*

Under 18 & 19 Vict. c. 120, the powers of the trustees of the parish of Islington conferred by a local act are transferred to the vestry:—Held, that a demand of an inhabitant to be inserted in the rate book of the poor rate should be made upon such vestry, and not upon the overseers. *Reg. v. Islington (Overseers)*, 11 W. R. 760; 8 L. T., N. S. 331—B. C.—Wightman.

Part of a parish, A., was included in a sewerage district or level, by the Metropolitan Commissioners of Sewers, under 11 & 12 Vict. c. 112, who, pursuant thereto, borrowed, for the purposes of the act, money upon the security of the rates of the several districts, and apportioned the same among the different parishes therein comprised. On the passing of 18 & 19 Vict. c. 120, when the powers of the commissioners under the former act

pired, the whole of the parish was excluded from the metropolis as therein defined, the sums borrowed by the commissioners, in pursuance of their act, still remaining due and unpaid. By s. 181, the board was empowered to assess rates upon parishes formerly portions of districts, under 11 & 12 Vict. c. 112, but now excluded from the metropolis, for the purpose of discharging their liabilities; such rates to be assessed and levied "in like manner as the expenses of the board in the execution of the act." The Metropolitan Local Board having made a rate upon A., purporting, on the face of it, to be for "defraying the expenses of the board in the execution of the act;"—Held, that the rate was void, the parish of A. for such purposes being beyond the jurisdiction of the board, and liable only to rates for the special purposes contained in s. 181. *Reg. v. Ingham*, 9 Jur., N. S. 1288; 82 L. J., M. C. 214; 11 W. R. 855; 4 B. & S. 205.

**Valuation lists of ratable property.**—The Westminster chambers consist of seven blocks of buildings, having seven principal entrances. Each block is divided into two ranges by an internal staircase, which has only one door at the principal or street entrance. The blocks are structurally divided into 117 different sets of rooms, which are quite distinct from each other, like chambers in the Inns of Court, and are capable of being let and occupied separately as residences or offices. Each set has an outer door opening on to one of the internal staircases, and also an inner private hall or passage. There are no means of communication between the sets except the internal staircase. The outer or street door to each block is kept locked at night, and a porter, who is hired by the lessors, resides in a distinct set of rooms in the basement of each block, and has a key of, and access to, the sets of rooms, for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he is employed in some cases to look after the rooms. The lessors provide gas for the staircase, halls, and passages, and water for the entire buildings, and pay all rates and taxes, charging their tenants higher rents in consequence. The sets of rooms are let under an agreement, by which the lessors let for a certain time, at a certain rent, with a covenant by the lessors to pay the rates, and a covenant by the lessee to repair internally, and a power to the lessors to enter to paint outside and to inspect the state of the inside, with a proviso for re-entry on the non-payment of rent or breach of the other covenants. The premises being taken subject to the following regulations:—The care of each entrance and the rooms connected therewith will be in charge of a resident porter appointed by the lessors. There are duplicate keys to the outer door of each set of chambers, one of which is to be always in the hands of the porter, and the other in the care of the tenant while the rooms are in use. The tenants have the right, free of charge, to the general services

of the porter; viz., he is to be constantly in attendance, to cleanse the general stairs, &c., every morning, to receive and deliver all letters and parcels, to receive the keys of the outer doors of the several sets of rooms from the tenants on their leaving at night, to attend to the regular and proper supply of coals to the several apartments. Coals are supplied by the lessors at a certain price; tenants are not allowed to have stores of coals in rooms;—Held, that each set of rooms was separately occupied by its tenant, and was therefore a ratable hereditament, and ought to be separately inserted and assessed in the valuation list under the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67. *Reg. v. Assessment Committee of St. George's Union*, 7 L. R., Q. B. 90; 41 L. J., M. C. 30; 25 L. T., N. S. 696.

In making out the valuation list under the above act, the gross value and ratable value, as defined by section 4, of each hereditament, must be inserted, without reference to any privilege of being assessed on an exceptional principle of valuation. *Reg. v. Foundling Hospital (Governors)*, 7 L. R., Q. B. 83; 41 L. J., M. C. 41; 25 L. T., N. S. 562.

J. and P. were the occupiers of ratable property situate in a parish within the limits of the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67. Upon the 27th of September, the overseers made and deposited a valuation list, in which the property was assessed at certain amounts. The list was transmitted to the assessment committee on the 18th of October. On the 7th of December the assessment committee met, when they objected to the amounts at which their property was assessed, and these were reduced by the committee; after the meeting of the assessment committee no special sessions were held to which J. and P. could have appealed, but they appealed to the assessment sessions, who confirmed the list;—Held, that delay in making, depositing, transmitting and approving the valuation list within the times prescribed by s. 43 of the Metropolis (Valuation) Act, 1869, did not make it a nullity, for the provisions of that section were directory and not imperative. *Reg. v. Ingall*, 2 L. R., Q. B. Div. 199; 46 L. J., M. C. 113; 35 L. T., N. S. 552; 25 W. R. 57.

The preparation of a valuation list under the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67, is not a duty of the vestry clerk. The vestry may appoint the vestry clerk to make a valuation list, and may pay him a lump sum to include his expenses and labor. *Reg. v. Cumberlandge*, 25 W. R. 605; 2 L. R., Q. B. Div. 366.

**Apportionment of rates.**—Under 18 & 19 Vict. c. 120, s. 159, it is the duty of the vestry, on making a general rate, to apportion the burden according to the benefit derived, and if the fact of inequality of benefit exists, although it has not appeared to the vestry, the party rated would, upon appeal, be entitled to have the rate amended. *Howell v.*

*London Dock Company*, 8 El. & Bl. 212; 4 Jur., N. S. 205; 27 L. J., M. C. 177.

The 18 & 19 Vict. c. 120, does not affect an exemption from rates which existed previously, unless it is proved that there is equality of benefit for equality of rate. *Id.*

**Appeal against rates.**—There is an appeal to the quarter sessions against an assessment made by assessors appointed under 19 & 20 Vict. c. 120, s. 168, in the same way as against a rate made by overseers under s. 161. Where there is a rate good upon its face, and duly allowed and published, a justice who is called upon to enforce it cannot go into any questions affecting its validity, which are matters of appeal. The question of whether or not a rate has been duly published is one of fact, and if there is any evidence to support the decision of the justice, the court will not interfere. *Empton v. Metropolitan Board of Works*, 3 L. T., N. S. 624—Q. B.

**Collecting rates.**—Under 5 & 6 Will. 4, c. 50, s. 18, a board was elected on 26th March, 1855, to serve the office of surveyors of the highways in a parish for the year ensuing. On 23d November, 1855, they made a highway rate. In August, 1855, the 18 & 19 Vict. c. 120, passed, and, by s. 251, it came into operation on 1st January, 1856. On 28th November, 1855, under ss. 81, 82, a district board of works was elected for the district comprehending the parish, which was included in part 1 of Schedule B. After 25th March, 1856, application was made, on the part of the late highway board, to a party rated to the highway rates, for payment of arrears, under 18 & 19 Vict. c. 120, s. 97. Payment not having been made, a summons was taken out against him, but the magistrate refused to issue a warrant for levying the arrears. Afterwards, the party paid the arrears to the district board of works. A rule having been obtained for an order directing the magistrate to issue the warrant, the court discharged the rule, on the ground that the collection of such arrears was not to be made by the late highway board. *Reg. v. Ingham*, 7 El. & Bl. 5.

**Auditing accounts.**—The proviso to the 18 & 19 Vict. c. 120, s. 197, which excepts from the jurisdiction of parish auditors appointed under the act, all accounts which, before the passing of that act, would have been subject to the audit of an auditor appointed under 4 & 5 Will. 4, c. 70, is not repealed by 19 & 20 Vict. c. 112, s. 8, and the Poor Law Commissioners have therefore the right to order the overseers or guardians of any parish to appoint an auditor to audit the poor law accounts. *Reg. v. St. Pancras (Directors)*, El., Bl. & El. 583; 5 Jur., N. S. 120; 27 L. J., M. C. 281.

**Official returns.**—[By 23 & 24 Vict. c. 51, the amount of rates levied by or under the order of any vestry or district board, under 18 & 19 Vict. c. 120, must be annually returned to a secretary of state.]

**Compensation by vestry for injuries to property.**—By two acts of Geo. 3, a vestry was empowered to alter the levels of streets without compensating those injured by such alteration. The Metropolis Local Management Act enables a vestry to purchase any right or easement over any land which may be necessary for the execution of works undertaken by them; it also incorporates the Lands Clauses Act, 1845, but excludes the operation of s. 16-68, being those sections which relate to "the taking of lands otherwise than by agreement;" and by s. 247, it repeals all acts which are inconsistent with it. The vestry, in raising the level of street under its statutory powers, obstructed the light of and the entrances to the plaintiff's houses, and refused to enter into any agreement with him or to pay any compensation.—Held, that in the absence of any agreement between the plaintiff and the vestry, the plaintiff was not entitled to compensation, as s. 68 of the Lands Clauses Act was not incorporated; and that the vestry was acting under the acts of Geo. 3, which were not repealed by the Metropolis Local Management Act. *Baker v. St. Marylebone (Vestry)*, 24 W. R. 848; 36 L. T., N. S. 129—Exch. Div.

**Liability of vestry to action or indictment.**—By 18 & 19 Vict. c. 120, vestries are required to execute the office of surveyor of highways within their parishes; and if they duly execute the same, and do not personally interfere, they are not liable to a passenger for an injury caused to him by a heap of paving-stones having been negligently left on the road by the workmen employed by the acting surveyor. *Holliday v. St. Leonard's, Shoreditch (Vestry)*, 11 C. B., N. S. 193; 3 Jur., N. S. 79; 30 L. J., C. P. 861; 9 W. R. 694.

A declaration alleged negligence on the part of a vestry in not repairing a common highway, whereby the plaintiff suffered special damage by injury to his horse.—Held, that, although the 18 & 19 Vict. c. 120, transferred the duties of surveyors to vestries, yet it did not put an end to the liability of parishes to indictment, and therefore an action does not lie against the vestries for non-repair. *Parsons v. Bethnal Green (Vestry)*, 17 L. T., N. S. 211; 16 W. R. 85; 37 L. J., C. P. 62; 3 L. R., C. P. 56.

In the absence of negligence on its part, a vestry or a local board is not responsible for any injury resulting to an individual from the disrepair of a sewer. *Hammond v. St. Pancras (Vestry)*, 9 L. R., C. P. 316; 43 L. J., C. P. 157; 30 L. T., N. S. 296; 22 W. R. 828.

The Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 72, imposes upon the vestry or local board the duty of properly cleansing the sewers, vested in them by the act. Under the premises of the plaintiff was an old drain which, by reason of other houses draining into it, had become a sewer. This drain having become choked, the soil therefrom flowed into the cellar of the plaintiff, &

ablican, and did damage. In an action against the vestry, founded upon a breach of the duty imposed upon them by s. 73, but not alleging negligence, the jury found that the existence of the drain was unknown to the vestry; that its existence might have been known to them by the exercise of reasonable care and inquiry; but that the obstruction of the drain was unknown to the vestry, and could not by the exercise of reasonable care have been known to them:—Held, that upon these findings the vestry was entitled to the verdict; and that the declaration disclosed no cause of action. *Id.*

The provisions of 25 & 26 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works or any district board in respect of anything done or intended to be done, under their parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction. *Att. Gen. v. Hackney Local Board*, 20 L. R., Eq. 626; 44 L. J., Chanc. 545—V. C. B.

The authority over sewers, and the drainage powers given by parliament to local boards, do not authorize the committal of a nuisance by the boards in their exercise of such powers. *Id.*

By the Metropolitan Management Act, 1855, 18 & 19 Vict. c. 120, s. 42, the vestry of a parish is constituted a body corporate, with power to sue and liability to be sued. By s. 125, vestries are required to employ a sufficient number of persons, or to contract with any company or persons for removing all dirt, ashes, rubbish and filth within their parishes. The guardians of a union were possessed of a workhouse situate within the parish. The vestry refused to remove from it the dirt, ashes, rubbish and filth there collected; the guardians were in consequence obliged to remove the same, and thereby incurred expense:—Held, that an action was maintainable by them to enable them to recover from the vestry the expense incurred by them in removing the dirt, ashes, rubbish, and filth from the workhouse. *Holborn Union (Guardians) v. St. Leonard, Shoreditch (Vestry)*, 2 L. R., Q. B. Div. 145; 46 L. J., Q. B. Div. 86; 33 L. T., N. S. 400; 25 W. R. 40.

As to actions against district boards of works,—see this title, IV.; against contractors, surveyors, and others,—see this title, VI.

As to powers, duties, and liabilities of metropolitan and district boards of works,—see this title, II., IV.

#### Acting as vestryman without qualification.]

A candidate for the office of vestryman, whose name does not appear on the rate-book, either as sole or joint occupier, is not duly qualified under the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, s. 6, and is liable to an action for penalties under s. 54. *Goodhue v. Williams*, 26 W. R. 107; 37 L. T., N. S. 454—C. A.

The decision of the inspectors of votes appointed under s. 16 as to the qualification of a candidate is not final. *Id.*

The Metropolitan Local Management Act Amendment Act, 19 & 20 Vict. c. 112, s. 4, does not protect from an action for penalties any one who, after acting as vestryman without qualification, claims to have his name put on the rate-book and pays the rate. *Id.*

#### IV. DISTRICT BOARDS OF WORKS.

**Powers as to management, taxation and expenditure, generally.]**—The effect of the 18 & 19 Vict. c. 120, is to substitute districts for the parishes of which they are composed, for all purposes of management, taxation, and expenditure; not for purposes of management only. The rates leviable in the component parishes, under the order of a district board, are raised for the benefit of the whole district, though apportioned between the parishes; *prima facie*, the rates ought to be apportioned between the parishes according to their respective ratable value, and not according to the outlay in them respectively; subject to allowances, at the discretion of the board, in cases falling within s. 159. An order of a district board on a parish, distinguishing between the sums required for sewerage and for other expenses, is good, under s. 158, and is final, if made by the board after an impartial exercise of the discretion given to it by s. 159; the decision of the board, so arrived at, as to the amount proper to be required from a parish, being, even if erroneous, conclusive. *St. Botolph, Aldgate, v. Whitechapel Board of Works*, 3 El. & El. 89; 6 Jur., N. S. 1073; 29 L. J., M. C. 228; 8 W. R. 691.

When an order of the Metropolitan Board of Works has been made, under 18 & 19 Vict. c. 120, s. 140, ordering that the whole of a street situate in more than one district should be under the exclusive management of one particular vestry, and that vestry makes an order upon one of the other districts for contribution towards the expenses, if the order is good on the face of it, the only mode of appeal open to the district is by contesting the propriety of the assessment at the audit; and the court, on a return to a mandamus ordering the payment of the sum assessed, will not go into the matter, but grant a peremptory mandamus. *Reg. v. Strand District Board of Works*, 4 B. & S. 526; 33 L. J., M. C. 33; affirmed on appeal, 4 B. & S. 551; 33 L. J., Q. B. 299; 11 L. T., N. S. 188; 13 W. R. 828—Exch. Cham.

A board of works passed a resolution that a road should be repaired, and having done so, divided it into four sections, making a separate estimate for each section, and apportioning the rate to pay the expenses of each section on the owners of property situate therein:—Held, this apportionment of the expenses was not warranted by 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, ss. 77, 112, and that the board, having repaired

the whole of the road, should have made one general and entire apportionment on all the owners. *Whitchurch v. Fulham Board of Works*, 1 L. R., Q. B. 233; 12 Jur., N. S. 553; 35 L. J., M. C. 145; 14 W. R. 277; 13 L. T., N. S. 631.

At the time of the passing of the 18 & 19 Vict. c. 120, there was an ancient parish called the precinct of the Old Tower Without, adjacent to the Tower of London, and between that parish and certain parishes in the city of London, an extra-parochial place called Great Tower-hill, in the county of Middlesex, and partly in the city of London. Great Tower-hill, for paving and lighting purposes, was vested in trustees under a local act, who had power to make rates. By 18 and 19 Vict. c. 120, s. 90, all the powers of trustees under local acts in relation to paving, lighting, &c., any parish in schedule B. are to cease to be so vested, and to become vested in the board of works for the district. In schedule B., part 1, the Whitechapel district of works is to include "Tower, district of." There was no known district of that name:—Held, that it was intended to include within the description "Tower, district of," as well the area of Great Tower hill as the parish of the precinct of the Old Tower Without; and that since the 18 & 19 Vict. c. 120, the power of trustees under the local act had ceased. *Reg. v. Great Tower-hill (Trustees)*, 14 L. T., N. S. 792—Q. B.

**Powers as to drainage.**—A metropolitan district board of works has not authority under 18 & 19 Vict. c. 120, to lay down any general or arbitrary rule requiring owners or occupiers of houses situate within its district to convert privies into water-closets. *Tinkler v. Wandsworth District Board of Works*, 2 De G. & J. 201; 4 Jur., N. S. 298; 27 L. J., Chanc. 342.

A district board of works made an ex parte order on a party to turn into water-closets the privies attached to cottages belonging to him, and on his failing to do so, they proceeded to enter upon the premises for the purpose of doing it themselves. The order appeared to have been made, not with regard to the state of this particular property, but in consequence of a previous determination to substitute water-closets for privies throughout the district:—Held, that the board was exceeding its statutory powers, and ought to be restrained from entering on the property for the purpose of making the alteration. *Ib.*

The metropolitan board of works constructed a sewer on the high road, and the Lewisham District Board made a branch sewer running into it. The combined effect of the two was, to drain an ornamental pond and rivulet on the adjoining lands of the plaintiff:—Held, first, that neither of the boards was, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining land-owners. *Stainton v. Woolrych*, 23 Beav. 225; 3 Jur., N. S. 257; 26 L. J., Chanc. 300.

Held, secondly, that they had not exceeded their statutory right, so as to be liable to be restrained by injunction. *Ib.*

Held, thirdly, that if either of the boards was producing injury to the plaintiff by its unskillful or improper construction of the sewer, the court would interfere to prevent it. *Ib.*

Held, fourthly, that such not being the case, the rights of the plaintiff were limited to a claim for compensation under 11 & 12 Vict. c. 112, s. 50, and 18 & 19 Vict. c. 120, s. 86. *Ib.*

A vestry, in exercise of the powers given by 19 & 20 Vict. c. 120, s. 76, served the plaintiff with a notice, requiring him, in the construction of the drainage to certain houses which were being erected by him in their district, to use stoneware pipes of the best quality. The plaintiff used pipes of the Aylesford manufacture, as coming within the description of stoneware mentioned in the notice; but to them the vestry, who required pipes of Lambeth manufacture, or of manufacture similar to that of Lambeth, to be used, objected; and they refused, unless their requisitions were complied with, to make an opening into the main sewer for his drainage. The plaintiff thereupon made the opening himself, and completed his drainage by means of Aylesford pipes:—Held, that the act gave the vestry the right to determine which of the two materials should be used; and it appearing that the evidence of scientific men as to the comparative merits of the two manufactures was conflicting, refused to grant an injunction, but dismissed the bill, with costs. *Austin v. St. Mary, Lambeth (Vestry)*, 4 Jur., N. S. 274, 1032; 27 L. J., Chanc. 677—V. C. S.

The power given by 18 & 19 Vict. c. 120, s. 76, by which a district board is authorized to demolish a house, on neglect of the builder to give seven days' notice of his intention to build, does not empower the board to demolish the house without first giving the person guilty of the omission an opportunity of being heard. *Cooper v. Board of Works for Wandsworth District*, 14 C. B., N. S. 180; 9 Jur., N. S. 1155; 33 L. J., C. P. 185; 11 W. R. 646.

The right to sue is not taken away by s. 24, giving a right of appeal to the Metropolitan Board of Works. *Ib.*

The 18 & 19 Vict. c. 120, ss. 83 and 85, do not apply to the case of the mere removal of a building from an adjoining building without disturbing the party structure, and no previous notice under the act need in such case be given. *Major v. Park Lane Company*, 3 L. R., Eq. 453; 14 L. T., N. S. 543—V. C. W.

As to sewers, in general, and metropolitan sewers before the Metropolis Management Acts,—see SEWERS; as to powers of Metropolitan Board of Works,—see this title, II.

**Apportionment and recovery of expenses of drainage, paving, and other works.**—A held premises under a lease, with a covenant



to pay, bear and discharge "all such parliamentary, parochial and county, district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burdens, duties and services whatsoever, as during the term should be taxed, assessed or imposed upon or in respect of the premises, or any part thereof." He granted an under-lease (at a rack-rent) to B., the latter covenanting "that the covenants, conditions and agreements contained in the original lease, on lessee's part to be performed and observed (except the covenants to pay rent and to insure), should during the continuance of the demise be performed and observed by him:"—Held, that B. was liable for the expense of drainage works done upon the premises under the authority of the 18 & 19 Vict. c. 120. *Sweet v. Seager*, 2 C. B., N. S. 110; 3 Jur., N. S. 588.

A wall had been erected from time immemorial on land adjacent to a tidal river, and it kept out from such land the river at high water, the land being drained into the river by drains at a considerable distance from the wall. Before 18 & 19 Vict. c. 120, the wall was within the jurisdiction of the Metropolitan Commissioners of Sewers, and it was within a district mentioned in the schedule B. K., the occupier of the land on which the wall stood, cut away part of the wall, and built houses thereon, without the consent and in violation of the express prohibition of the board of works of the district. The board demolished the houses, reinstated the wall, and claimed the expenses from K.:—Held, that the wall was a sewer, and that the district board was entitled to claim the expenses, under ss. 68, 204. *Poplar Board of Works v. Knight*, El. Bl. & El. 408; 5 Jur., N. S. 106; 28 L. J., M. C. 37.

Held, also, that the board might recover these expenses under s. 76, although no foundation for the houses had been dug out, but they were simply erected on the surface of the ground. *Ib.*

K. had applied for permission to the district board of works, and had in his correspondence with them treated the matter as exclusively within their jurisdiction, and the Metropolitan Board of Works had not interfered or exercised any jurisdiction over the wall:—Held, that it was not competent to K. to resist the claim of the district board, on the supposed ground that the statute vested the wall in the Metropolitan Board of Works. *Ib.*

The words "new street," as used in the Metropolis Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 103, s. 77, include a new street in the ordinary and popular sense of the term. *Pound v. Plumstead Board of Works*, 7 L. R., Q. B. 183; 41 L. J., M. C. 51; 25 L. T., N. S. 461; 20 W. R. 177.

Therefore, a country lane, which was bounded by hedges and fields, and was repaired by the parish time out of mind, becomes a new street within the meaning of those

statutes, when houses are built along the sides of the lane. *Ib.*

The Metropolis Management Amendment Act, 1862, s. 77, provides that where any vestry or district board shall have paved any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expense of paving the same:—Held, that the words "land bounding or abutting on such street" include the soil of private roads leading out of a new street. *Ib.*

Prior to the Metropolis Management Act, 1855, an ancient highway, which was a country lane, and had been repaired by the parish from time out of mind, existed in a district within the act; after the passing of that statute, and before the passing of the Metropolis Management Amendment Act, 1862, twenty-one houses were built along the side of the lane, several of which belonged to P.; afterwards ninety houses were built along the sides of the lane. N. was the owner of the soil and freehold of five new private roads leading out of the lane; but he had no exclusive occupation or possession of them:—Held, that the lane, after the erection of the houses, became a new street within the meaning of the acts; that P. and N. were the owners of land bounding or abutting thereon, and that they were liable to contribute to the expense of paving the same. *Ib.*

A contribution to the costs of paving streets under 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 103, s. 77, may be recovered from the mortgagee in possession of the adjoining property as owner, notwithstanding that another person was owner of the property at the date at which the improvement was resolved upon. *Plumstead Board of Works v. Planet Building Society*, 21 W. R. 77—Exch.

Under 18 & 19 Vict. c. 120, s. 105, the vestry or district board of a parish or district, after having once compelled the owners of the houses forming a new street, to pay the cost of providing and laying the pavement, is bound for the future to keep it in repair, and this obligation may be enforced by mandamus. *Reg. v. Iluckney Board of Works*, 42 L. J., M. C. 151; 8 L. R., Q. B. 528.

A board of works, acting under the powers of the 18 & 19 Vict. c. 120, s. 105, paved and flagged a new street, charging the expense on the adjoining owners. The board afterwards neglected to repair the road, on the ground that the barrier had been erected upon it by the owner of the soil:—Held, that the board, having exercised their power to pave a new street at the expense of the adjoining owners, was bound to keep it in repair, and that the obstruction by the owner of the soil did not exonerate the board from the performance of such duty. *Ib.*

The assessments for paving expenses apportioned by the vestry or district board under 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 103, s. 77, are a charge upon the premises in respect of which they are assessed; and the amount may be recovered from the future owners of such premises, although

there has been no arrangement to accept payment by installments. *Plumstead Board of Works v. Ingoldby*, 8 L. R., Exch. 63; 42 L. J., Exch. 50; 21 W. R. 77; 27 L. T., N. S. 656; affirmed, 8 L. R., Exch. 174; 42 L. J., Exch. 186; 21 W. R. 817; 29 L. T., N. S. 875—Exch. Cham.

An owner of houses occupied land bounding or abutting on a new street, which a board of works had paved under 18 & 19 Vict. c. 120, s. 105, and sewered under 25 & 26 Vict. c. 102, s. 52. Among other items which the board had apportioned to his contribution were costs of collecting apportioned amounts, of survey plan and obtaining names of owners, and of filling up, printing, advertising and serving notices. These sums were all paid to persons employed for the purpose, and not board's servants, although they had in their employ a surveyor and a clerk, and payments were requested at their office. The owner of the houses occupied the land under a building agreement, by which the owner of the land agreed to demise to the owner of the houses or his nominees the several pieces of land upon which he was to build, as the houses and buildings respectively became erected and covered, for eighty years, at the rent of a peppercorn for two years, and of sums increasing every year up to 364*l.* in the sixth and following years. He was to be considered as holding the undemised portion on the terms of the leases. There was a power of re-entry upon non-completion of the building covenants. The houses at this time were in every stage of building progress, and some had been demised to other persons at defendant's nomination:—Held, that, with the exception of the houses demised to other persons, he was liable as owner of all the premises, and that the above items were incidental costs and charges within 25 & 26 Vict. c. 102, s. 77. *Poplar Board of Works v. Love*, 29 L. T., N. S. 915—Q. B.

A land company, being owners of lands in 1863, laid them out for building purposes, and made roads and ways across them; and nearly the whole of the estate was sold in lots to different purchasers, and conveyed to them by metes, bounds, and admeasurements set forth on colored plans attached to the conveyance. Each lot had a frontage upon one of the roads. The roads had been dedicated to the public, as far as any act of the land company could do so, but no proceedings were taken to make them repairable by the parish. The board of works of the district from time to time paved the new streets formed by the houses on the estate, and apportioned the costs among the owners of houses forming the streets and the owners of land bounding and abutting on the street; and in so doing they assessed the land company in respect of the new streets and roads, where bounding or abutting on the sides or ends of the streets paved, as lands abutting on those streets, under 25 & 26 Vict. c. 102, s. 77:—Held, that assuming the soil of the roads to be in the land company, they were

improperly charged under 25 & 26 Vict. c. 102, s. 77; for that they were not, in respect of the roads which had been irrevocably dedicated to the public, the owners of land within the meaning of that section and s. 250 of 18 & 19 Vict. c. 120. *Plumstead Board of Works v. British Land Company*, 10 L. R., Q. B. 203; 44 L. J., Q. B. 88; 23 W. R. 634; 32 L. T., N. S. 94—Exch. Cham.; reversing the judgment of the Queen's Bench, 10 L. R., Q. B. 16; 31 L. T., N. S. 732; 21 W. R. 133.

When, within the metropolis, as defined by 18 & 19 Vict. c. 120, s. 250, a new street is paved for the first time, the vestry or district board executing the work cannot at their discretion charge the cost upon the general rate under ss. 96, 98; they are bound to charge the expense of laying the pavement upon the owners of the adjoining houses and land, under s. 105, as varied by 25 & 26 Vict. c. 102, s. 77. *Dryden v. Putney (Overseers)*, 1 L. R., Exch. Div. 223; 34 L. T., N. S. 69—D. C. A.

In 1855 a road within the metropolis as defined by 18 & 19 Vict. c. 120, s. 250, ran between an irregular line of houses and market gardens upon the south side, and market gardens upon the north. Between that year and 1874, a continuous line of houses was built along the north side, and several houses along the south. The district board, within whose jurisdiction the road lay, in 1874 paved a footpath by the side of the road, and paid for the cost of the work under 18 & 19 Vict. c. 120, ss. 96, 98, out of the general rate levied upon the inhabitants:—Held, first, that between 1855 and 1874 the road had become a new street within 18 & 19 Vict. c. 120, s. 105. *Id.*

Held, secondly, that the district board had no power to charge the cost of paving the footpath upon the general rate, but that it was compulsory upon them to obtain payment from the owners of the adjoining houses and land, under that section, as varied by 25 & 26 Vict. c. 102, s. 77. *Id.*

S. was the owner of a piece of land upon which streets had been laid out since the 7th of August, 1863; building land not belonging to him bounded and abutted upon the ends of all the streets except one, which terminated at a cemetery. The district board of works laid down sewers in the streets and apportioned the whole of the cost between S., his tenants, and the owners of the cemetery. Sewer rates had for many years been levied in respect of the houses upon his land, although no sewer had previously existed in the streets thereon:—Held, that the word street, in 25 & 26 Vict. c. 102, s. 53, included new streets as defined by s. 112, as well as old streets, that s. 52 did not apply, and, therefore, that the apportionment was invalid, as it did not provide that a portion of the cost of the sewers should be defrayed by the board out of the sewers rate levied in their district. *Sheffield v. Fulham Board of Works*, 1 L. R., Exch. Div. 305—D. C. A.

Scumble, that even if s. 52 had been appli-

cable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding and abutting upon the ends of the streets. *Id.*

G., within the limits of the Metropolis Management Acts, and with the sanction of the Metropolitan Board of Works, constructed a sewer for the drainage of a road, in which he owned certain houses, and which was a new street within the meaning of the above-mentioned acts. Afterwards the district board took up the sewer constructed by G., and in its place laid down another for the drainage of the neighborhood:—Held, that he was not liable to pay any portion of the cost of the sewer laid down by the board. *Fulham Board of Works v. Goodwin*, 1 L. R., Exch. Div. 400; 35 L. T., N. S. 907—D. C. A.

The principle on which the expenses of paving a new street have been apportioned among the adjoining owners by a district board, pursuant to 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, cannot be questioned before any tribunal. *Nesbitt v. Greenwich Board of Works*, 10 L. R., Q. B. 465; 44 L. J., M. C. 119; 33 L. T., N. S. 762; 24 W. R. 223.

When within the metropolis a road has become a new street within the Metropolis Management Act, 1853, 18 & 19 Vict. c. 120, s. 105, and the district board has improperly charged the cost of paving the footpath of such new street upon the general rate of the parish in which it is situated, the court will order the district board to restore to the general rate the amount so expended, and to levy the same upon the owners of the adjoining houses and land, as provided by that section, as varied by s. 77 of the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102. *Att. Gen. v. Wandsworth District Board of Works*, 6 L. R., Ch. Div. 530; 46 L. J., Chanc. Div. 771—R.

**Liability to actions.**—An action upon a contract for cleansing the streets of a parish, entered into by the trustees under a local act, is, by virtue of 18 & 19 Vict. c. 120, ss. 29, 93, 94, 95, properly brought against the district board. *Sinnott v. Whitechapel Board of Works*, 3 C. B., N. S. 674; 4 Jur., N. S. 263; 27 L. J., C. P. 177.

And an action lies against a board of works for not keeping a sewer cleaned, whereby it became choked up, and the overflow therefrom ran into the plaintiff's premises. *Meek v. Whitechapel Board of Works*, 2 F. & F. 144—Wilde.

A local board of works, in executing drainage works in its district, polluted a stream, which in its onward course flowed through the plaintiff's land, out of the district, and by such pollution caused an injury to the plaintiff:—Held, that his remedy was by action, and not under the compensation clauses of the 18 & 19 Vict. c. 120, the local board not having any power to foul a stream belonging to other persons. *Cutor v. Lewis-*

*ham Board of Works*, 5 B. & S. 115; 11 Jur., N. S. 840; 34 L. J., Q. B. 74; 13 L. T., N. S. 212; 13 W. R. 234—Exch. Chanc.

As to actions against metropolitan vestries,—see this title, III.; against contractors, surveyors and others,—see this title, VI.

As to powers, duties and liabilities of metropolitan board of works and vestries,—see this title, II., III.

## V. METROPOLITAN BUILDINGS.

**Statutes.**—18 & 19 Vict. c. 122, "The Metropolitan Building Act, 1855," (amended by 23 & 24 Vict. c. 52, "The Metropolitan Building Act (Amendment), 1860"), repeals 7 & 8 Vict. c. 84, except ss. 54 to 68, and 9 & 10 Vict. c. 5, and regulates the construction and use of buildings in the metropolis and its neighborhood.

The 7 & 8 Vict. c. 84, repealed so much of the 14 Geo. 3, c. 78, as related to the regulation of buildings and party-walls within the cities of London and Westminster: which act, as regarded most of its clauses, was an act of a local and personal nature. *Richards v. Easto*, 3 D. & L. 515; 15 M. & W. 244; 10 Jur. 695; 15 L. J., Exch. 163.

3 & 4 Vict. c. 85, regulates the construction of chimneys.

By 32 & 33 Vict. c. 32, The Metropolitan Building Act, 1869, s. 4, the powers given by Part II. of the Metropolitan Building Act, 1855, to the commissioners of police of the metropolis, with respect to the survey of and securing and notice respecting structures in a dangerous state, and to taking down, securing, or repairing such structures, and to the recovery of the expenses thereof, and to the appointment of persons, and making of regulations for carrying into execution Part II. of the act relating to such structures, shall on the 1st of October, 1869 (by s. 2), be transferred to and vest in, and may be exercised by the Metropolitan Board of Works; and the expression, "The Commissioners" throughout the said part (so far as regards structures situate within the limits of the said act, and not within the city of London) shall mean the Metropolitan Board of Works.

By s. 5, all payments directed by Part II. of the Metropolitan Building Act, 1855, as amended by the act, to be made by the Metropolitan Board of Works in respect of any structure situate within the limits of that act, and not within the city of London; and all expenses incurred by the board in carrying into execution Part II. of the act, shall be deemed to be part of their expenses in carrying into execution the said act, and shall be raised and paid accordingly.

All payments directed by Part II., as amended by this act, to be made to the Metropolitan Board of Works, shall be made in the same manner in which payments are made to the Board in the ordinary course of their business.

34 & 35 Vict. c. 39, amends the Metropolitan Buildings Act, 1855, by adding to its exemptions the buildings of the New Foreign Cattle Market on the site of Deptford Dockyard.]

Operation of the statutes generally; and what buildings are within their provisions.]—A contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act of 1855, cannot be enforced. *Stevens v. Gourley*, 7 C. B., N. S. 99; 6 Jur., N. S. 147; 27 L. J., C. P. 1; 1 L. T., N. S. 33; 1 F. & F. 498.

A structure of wood of considerable size (sixteen feet by thirteen), and intended to be permanently used as a shop, is a building, although not let into the ground, but merely laid upon timbers upon the surface. *Id.*

By the 18 & 19 Vict. c. 122, s. 12, and schedule 1, "every building shall be inclosed with walls constructed of brick, stone, or other hard and incombustible substance."—Held, that these words amount to a prohibition against building the walls of wood or other combustible substance. *Id.*

The rules of construction contained in the first schedule of the 18 & 19 Vict. c. 122, have no reference to public buildings, which class of buildings are to be constructed as may be approved by the district surveyor, with an appeal, in case of disagreement between him and the builder, to the Metropolitan Board of Works. *Reg. v. Carruthers*, 10 Jur., N. S. 767; 33 L. J., M. C. 107; 12 W. R. 372; 9 L. T., N. S. 825; 4 B. & S. 804.

A company, incorporated by and acting under a statute, constructed its railway by a viaduct formed of arches of brickwork, and used the viaduct and arches for the railway; afterwards a space was inclosed, under an archway, by building walls, with gates at each end, and constructing two stores in the inclosed space. The space so inclosed was used by a lessee of the company as a stable, and not for the purposes of the railway. After the passing of the 18 & 19 Vict. c. 122, alterations were made in the inclosing walls. The district surveyor having claimed fees in respect of such alterations:—Held, that the fees were not claimable, and the structure not liable to the operation of part 1, but exempt. under s. 6, as a building belonging to a railway company, used for the purposes of such railway, under the provisions of an act of parliament, since the archway itself was so used, and the addition did not, of itself, constitute a building; and that this was not the case of an alteration of, or addition to an old building, within s. 9, that section applying only where the old building is itself within the operation of the act. *Bulger, In re*, 8 El. & Bl. 728; 4 Jur., N. S. 454; 27 L. J., M. C. 106.

A building is not an old building within 18 & 19 Vict. c. 120, and 18 & 19 Vict. c. 123, s. 8, unless the inclosing walls (which expression is not satisfied by two mere boundary walls at either side of the ground) were carried higher than the footings before the 1st of January, 1856. *Tear v. Freebody*, 4 C. B., N. S. 228.

A party having erected a building in contravention of 18 & 19 Vict. c. 120, s. 143, a resolution of a vestry was passed, directing their surveyor to demolish the portion which

encroached beyond the line. The surveyor having taken down the offending building, placed the materials within a boarding on the carriage-way and afterwards removed them to the parish stone-yard, and detained them there as a security and pledge for the costs and expenses of so taking down the building, in the bona fide belief that he was entitled so to do under the resolution of the vestry; and the case (settled by an arbitrator) found that the plaintiff could not have obtained the materials back without paying the costs and expenses:—Held, a conversion. *Id.*

A company was empowered by their special act to widen a branch of their railway passing through London, and to build additional stations. In conformity with the powers so given, the company proceeded to erect a station on their land by the side of a highway, within the distance required to be left between buildings and highways in London by the Metropolis Management Act, which had passed shortly after the special act of the company:—Held, that the powers conferred on the company by their special act were not controlled by the latter statute, and that the company was authorized so to build their station. *London and Blackwall Railway Company v. Limehouse District Board of Works*, 3 Kay & J. 123.

By a statute passed prior to the railway act, the trustees of the particular highway had power to prevent any building being erected so near to the road as the station was being built. The Metropolis Management Act repealed this statute, and vested this authority in the managing body thereby constituted:—Held, that the trustees of the road must be taken to have been present at the passing of the railway act, as well as of the metropolis act, and therefore the powers given by the railway act must prevail. *Id.*

The 25 & 26 Vict. c. 102, s. 75, does not apply to ground formerly covered with buildings, unless the owner has relinquished his right of rebuilding on the same site. *Auckland v. Westminster Local Board of Works*, 41 L. J., Chanc. 723; 7 L. R., Ch. 597; 20 W. R. 845; 26 L. T., N. S. 961. But see *Kerr v. Preston Corporation*, 6 L. R., Ch. Div. 463, 467.

If, therefore, the district board of works threatens to proceed under s. 75 to demolish houses which are being rebuilt on an old site, on the ground that they are beyond the general line of buildings, it is acting ultra vires, and may be restrained by the Court of Chancery. In such a case the metropolitan board ought to proceed under s. 74, which provides for compensation to the land-owners. *Id.*

A railway company took land covered with houses, and pulled down houses for the purpose of constructing their railway, and then sold the land as building ground:—Held, that the purchaser had not lost the right to rebuild the houses on the same site as that occupied by the houses before they were pulled down; and that for this purpose the yard of

a house was held to be equivalent to a house.  
*Id.*

The corporation of Folkestone had power, under the Folkestone Improvement Act, 1855, to prescribe the line in which any house to be thereafter built or taken down for the purpose of being rebuilt or altered should be erected, on payment of compensation to the owner of any house required to be set back, and it was also provided that no new street to be thereafter laid out should be of less width than forty feet, inclusive of footways, and in the case of existing streets, houses to be thereafter erected were to be set back so as to allow of a width of forty feet:—Held, that a church was a house, and a perpetual curate, in whom the freehold of the site was vested, under 43 Geo. 3, c. 108, an owner, within the meaning of the act. *Folkestone (Corporation) v. Woodward*, 15 L. R., Eq. 159; 43 L. J., Chanc. 782—V. C. M.

A temporary church fronting to a road within the borough, less than forty feet wide, having been pulled down with a view to erecting a permanent church, the corporation gave notice to the clergyman in charge at the time of a resolution passed by them, that the road on which the church abutted must be not less than forty feet wide; but there was no statement that the additional width was to be gained on the side on which the church abutted, and the street might have been widened on the side opposite without removing any buildings. Afterwards, but not till the foundations of the new church had been put in, the corporation prescribed a line of building which came within the limits of the church as designed:—Held, that they were too late, and could not restrain the erection of the church in the manner in which it had been commenced.  
*Id.*

**In general or regular line.]**—Buildings erected by the commissioners of lieutenancy of the city of London, under 1 Geo. 4, c. 100, s. 89, and 17 & 18 Vict. c. 105, s. 2, for the custody of the arms and stores of the militia, are within the exemption in 18 & 19 Vict. c. 122, s. 6, as employed for her Majesty's use or service; and it is not necessary to give notice to the district surveyor before commencing the buildings. *Reg. v. Jay*, 8 El. & Bl. 469; 4 Jur., N. S. 407; 27 L. J., M. C. 25.

By 18 & 19 Vict. c. 120, s. 143, after the 1st of January, 1856, no building is to be erected beyond "the regular line of buildings in the street in which the same is situate."—Held, that this does not mean a strict mathematical line, but a substantially regular line. *Tear v. Freebody*, 4 C. B., N. S. 228.

By 25 & 26 Vict. c. 102, s. 75, no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, such general line of buildings to be decided by the superintending architect of the Metropolitan

Board of Works for the time being. A magistrate having decided that a small conservatory, consisting of an iron frame (glazed) projecting beyond the wall of the house, but not beyond the shop-front, was not an erection within the statute, and that it was not beyond the general line of buildings in the street, the court upheld his decision. *St. George (Vestry) v. Sparrow*, 16 C. B., N. S. 209; 10 Jur., N. S. 771; 33 L. J., M. C. 118; 12 W. R. 832; 10 L. T., N. S. 504. See *Simpson v. Smith*, 6 L. R., C. P. 87; 40 L. J., M. C. 89, 95.

Where a man, under contract to build according to a specified plan, and according to the metropolitan building acts, commenced building according to the plan, which was in some particulars in contravention of the building acts, and upon being cautioned by the board, stopped building, and refused to proceed:—Held, that he was bound to rebuild in conformity with the plan, modified so as to meet the requirements of the statutes. *Cubitt v. Smith*, 11 L. T., N. S. 298—V. C. S.

Where B. applied to the Metropolitan Board of Works for consent to build a house which was granted, but without procuring the conditions upon which the consent was granted, he built the house higher than those conditions permitted:—Held, that a magistrate, upon a summons charging him with having erected a building beyond the general line of buildings in the street, and contrary to the conditions on which the consent of the Board of Works was obtained, might order him, under 25 & 26 Vict. c. 102, s. 75, to demolish so much of the house as was beyond the general line of buildings, although this line had only been decided by the superintending architect on the day previously to the hearing of the summons. *Beauman v. St. Pancras (Vestry)*, 8 B. & S. 446; 36 L. J., M. C. 127; 2 L. R., Q. B. 528; 15 W. R. 904.

The ecclesiastical commissioners have no power, by virtue of the exceptions contained in 19 & 20 Vict. c. 112, s. 3, to contravene the provisions of 14 Geo. 3, c. 78, or of 18 & 19 Vict. c. 120, s. 143, by erecting the chancel of a church, part of which projects beyond the general line of buildings in a street, without the sanction of the Board of Works, as required by the 18 & 19 Vict. c. 120, s. 143. *Ecclesiastical Commissioners for England v. Clerkenwell (Vestry)*, 7 Jur., N. S. 310; 30 L. J., Chanc. 454; 3 De G., F. & J. 688; 9 W. R. 681; 4 L. T., N. S. 599.

In determining the general line of buildings of a street the architect of the metropolitan board of works ought to have regard to the frontage of houses previously existing, and which may be rebuilt, as well as to those still standing. *Auckland v. Westminster Local Board of Works*, 7 L. R., Ch. 597; 41 L. J., Chanc. 723; 26 L. T., N. S. 901; 20 W. R. 845.

The general line of building referred to in 25 & 26 Vict. c. 102, s. 75, exists independently of the certificate of the architect. That



certificate does not create the general line of building, it merely points it out for the guidance of the magistrate. *Wandsworth District Board of Works v. Hall*, 17 W. R. 256; 38 L. J., M. C. 69; 4 L. R., C. P. 85; 19 L. T., N. S. 641.

In a proceeding before a magistrate for erecting a building, without the consent of the Metropolitan Board of Works, beyond the general line of buildings in a street, the certificate of the superintending architect of the board is not absolutely conclusive, but the magistrate is entitled to judge for himself whether the line fixed by such certificate is in fact the general line of buildings in the street. *Simpson v. Smith*, 6 L. R., C. P. 87; 40 L. J., M. C. 89; 24 L. T., N. S. 100; 19 W. R. 355.

**Alterations.**—For many years before the 18 & 19 Vict. c. 122, came into operation, the houses Nos. 66 and 67 in A. had been united by means of an opening in the party-wall between them. In June, 1862, B., being the occupier of these two houses, and of No. 6 in a lane, made two openings in the wall dividing No. 6 and No. 66. The three houses together contained more than 216,000 cubic feet, but Nos. 6 and 66 taken alone did not contain so much:—Held, that the two houses Nos. 66 and 67 must be considered as one building, and that the openings between Nos. 6 and 66 must be made in accordance with the requirements of the 18 and 19 Vict. c. 122, s. 23. *Ashby v. Woodthorpe*, 33 L. J., M. C. 68; 12 W. R. 209; 9 L. T., N. S. 409—Q. B.

The alteration of an old building by an addition is not a uniting of two buildings within r. 2 of s. 28 of 18 & 19 Vict. c. 122, unless the addition was at some time a separate building in itself. *Scott v. Legg*, 46 L. J., M. C. 267; 36 L. T., N. S. 456; 25 W. R. 594—C. A.; reversing the decision of the Exchequer Division, 2 L. R., Exch. Div. 39; 46 L. J., M. C. 117; 35 L. T., N. S. 487.

Section 9 confines the operation of r. 4 of s. 27 to cases where an addition to an old building, taken by itself, contains more than the statutory number of cubic feet. *Ib.*

**Right to surveyor's fees, and their amount.]**

—By 7 & 8 Vict. c. 84, if any surveyor demand or willfully receive any higher fee than he shall be entitled to under this act, or if in his capacity of surveyor he receive a fee for any act or omission in respect of which he is not entitled to any remuneration, he shall be subject to fine, or to be discharged from his office:—Held, by Erle, J., that the second clause applied to cases where the demand was knowingly made without a color of right; and by Coleridge, J., and Wightman, J., that it was confined to the case where the surveyor received a fee wholly unauthorized by the statute, even if he had done or omitted to do the act on the doing or omitting to do which he founded his claim to receive it. *Reg. v. Badger*, 6 El. & Bl. 137; 2 Jur., N. S. 419; 25 L. J., M. C. 81.

A railway was constructed upon a viaduct formed of arches of brickwork, standing upon

ground belonging to the company, constituting an essential part of the viaduct, and used for the purposes of the railway. The company erected at each end of three of the arches a brick wall, with doors and other openings therein, thus inclosing spaces which were divided into two stories, and in which a person occupied as stables, by the permission of the company. Alterations were made in the brick walls erected at the ends of the arches, and the surveyor, under the 18 & 19 Vict. c. 122, claimed to be entitled to certain fees. Section 6 exempts from liability to such fees the buildings belonging to any railway company, and used for the purposes of such railway under the provisions of any act of parliament. The company having refused to pay the fees claimed, were convicted by a magistrate for such refusal:—Held, that these inclosed arches fell within the exemption, and that the surveyor was not entitled to fees. *North Kent Railway Company v. Badger*, 21 L. J., M. C. 106; S. C., nom. *Badger, la re*, 8 El. & Bl. 728; 4 Jur., N. S. 454.

A structure within the metropolis having been surveyed and reported dangerous, notice was served on the owner, under 18 & 19 Vict. c. 122, ss. 69, 73; and not having repaired it, he was summoned by the Metropolitan Board of Works before a magistrate; the summons was adjourned from time to time, and ultimately withdrawn, the owner having in the meantime duly repaired the structure. The board sought to charge against the owner, under s. 73, as "expenses incurred in respect of a dangerous structure," in addition to the surveyor's fees allowed by ss. 77, 79, the following items, which, by resolution of the board, had been resolved should be charged against owners in respect of dangerous structures, viz., 3s. 6d. for preparation of notices and forms; 2s. 6d. for clerk's time in service of notices; and 2s. 6d. for general office expenses:—Held, that the board was not entitled to charge the last item, but was entitled to charge the other two. *Metropolitan Board of Works v. Flight*, 9 L. R., Q. B. 58; 43 L. J., M. C. 46; 29 L. T., N. S. 608.

Under the Building Act, 18 & 19 Vict. c. 122, s. 49, and the schedule thereto, the district surveyor is entitled to a fee of 10s. "for inspecting the arches or stone floors over or under public ways."—Held, that, where a builder is employed to construct a series of arches for cellars under a public street or streets surrounding a vacant piece of land which is to be let for building, the district surveyor is entitled to a fee of 10s. in respect of each distinct building to which any given number of the arches is intended to be appropriated,—a matter of fact which is to be ascertained and determined by the magistrate before whom the fee is sought to be recovered. *Power v. Wignmore*, 7 L. R., C. P. 386; 27 L. T., N. S. 143.

The decision of the magistrate upon such a summons is the subject of an appeal under 20 & 21 Vict. c. 43, notwithstanding s. 106 (the appeal clause) of the Building Act. *Ib.*

As to liabilities of surveyors,—see this  
le, VI.

**Who are liable, as owners, for expenses, surveyors' fees, &c.**—Under 18 & 19 Vict. c. 122, s. 51, an owner of land in fee simple, who lets it on a building lease at a peppercorn rent, is not liable, as owner, to the surveyor for fees in respect of buildings afterwards erected on such land, a peppercorn rent not being within the meaning of the words "of one whole or of any part of the rents or profits of any land or tenement," in the interpretation clause, s. 3. *Evelyn v. Whichcord*, El., Bl. & El. 126; 4 Jur., N. S. 808; 27 L. J., M. C. 211.

**E.**, the owner in fee of land, agreed to let it to **S.** on a building lease for eighty-one years, at a peppercorn rent for the first year, 6l. for the second, and 12l. for the remainder of the term. **S.** built houses upon the land, in respect of which, during the first year of the term, certain fees became payable to the district surveyor, under 18 & 19 Vict. c. 122, s. 51, from the builder, or from the owner or occupier of the building:—Held, that **E.** was not liable for the fees as owner within ss. 3 and 51. *Id.*

A tenant in possession, having an equitable interest only under an agreement for a lease for a term, is, in equity, an adjoining owner under 18 & 19 Vict. c. 122, and three months' notice must be given to him before any alterations affecting his premises can be commenced by his neighbor, under the powers of that act. *Coven v. Phillips*, 33 Beav. 18; 9 Jur., N. S. 657; 11 W. R. 706; 8 L. T., N. S. 622.

A lessee of a house for a term of ninety-nine years, having demised some portions of the house to separate persons for terms varying from seven to twenty-one years, is the owner of the house within 18 & 19 Vict. c. 122. *Hunt v. Harris*, 19 C. B., N. S. 13; 11 Jur., N. S. 485; 34 L. J., C. P. 249; 13 W. R. 742; 13 L. T., N. S. 421.

When a chapel was leased by **A.** to **B.** for twenty-one years, and expenses were incurred by the commissioners under 18 & 19 Vict. c. 122, s. 73:—Held, that such expenses were recoverable from **B.**, who was the owner as designated by s. 3, and not from **A.** *Reg. v. Mourilyan*, 3 L. T., N. S. 668—Q. B.

A house occupied by a tenant under a lease for twenty-one years was, during the term, accidentally burnt, and being ruinous, was pulled down under 7 & 8 Vict. c. 84. By the lease the tenant was exempt from paying rent during the time that the house was untenable by reason of an accidental fire:—Held, that the expenses incurred could not be recovered from the landlord, a tenant for life of the reversion, under s. 42, which throws the burden upon "the owner of every such building, being the person entitled to immediate possession thereof." *Saffron Hill (Overseers), Ex parte*, 13 Jur. 1104; 24 L. J., M. C. 56—B. C.—Crompton.

In 1866, notice was given by a builder to

the district surveyor of his intention to erect three houses, under 18 & 19 Vict. c. 122, s. 38. The surveyor inspected the houses, and the roofs were covered in on the 9th of July, 1866; and on the 9th of August, 1866, the surveyor became entitled to certain fees from the "builder, owner, or occupier," under s. 51. **T.** first became owner in 1869; and the surveyor, after due demand, took out a summons against **T.** for the fees:—Held, that "owner" meant owner for the time being when the fees became due; and that **T.** was, therefore, not liable. *Tubb v. Good*, 5 L. R., Q. B. 443; 39 L. J., M. C. 135; 23 L. T., N. S. 885.

By 18 & 19 Vict. c. 122, s. 73, if the owner or occupier of a dangerous structure fails to comply with the order of a justice for taking down, repairing, or otherwise securing the same, the commissioners may do what is necessary, and all expenses incurred by them shall be paid by the owner. By s. 3, the term owner shall apply to every person in possession or receipt either of the whole or of any part of the rent or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year, or for any less term, or as a tenant at will. The appellants, being seized in fee of a building used as a chapel, leased it for twenty-one years to **N.**, who was then in possession of it:—Held, that **N.** was the owner within the meaning of the act, and therefore an order upon the appellants for expenses incurred by the commissioners was bad. *Mourilyan v. Labalmondiere*, 1 El. & El. 533; 7 Jur., N. S. 637; 30 L. J., M. C. 95; 9 W. R. 841; 3 L. T., N. S. 668.

**C.** being seized in fee of certain building land situate within the limits of the Metropolitan Building Act, 1855, entered into an agreement with **L.** to grant leases of ninety-nine years of certain plots of the land, so soon as **L.** should have erected houses thereon, at a peppercorn rent until the 24th of June, 1870, and afterwards at 28l. a year. **L.** built houses which were roofed in about September, 1870, and **C.** became entitled to receive the first quarter's ground rent on the 29th of September; the houses were surveyed by the district surveyor, and he, on the 26th of October, 1870, delivered a bill for his fees to **L.**, who afterwards became insolvent. The surveyor afterwards claimed payment of his fees from **C.**:—Held, that he was not liable to pay the fees, as he was not the owner of the houses within the meaning of ss. 3, 51; for that **L.**, the lessee for ninety-nine years, whether he had a legal or only an equitable title, had the power to let the houses and receive the profits, and was therefore owner. *Caudwell or Canwell v. Hanson*, 7 L. R., Q. B. 55; 41 L. J., M. C. 8; 25 L. T., N. S. 595; 20 W. R. 202.

**Proceedings in county courts; recovery of expenses and penalties.**—In proceedings in the county courts under the Metropolitan Building Act, a plaint shall be entered, and

a summons shall be issued thereon, and the rules and practice of the court shall be adopted with respect to such proceedings, so far as the same are applicable. C. C. R. 276 (1868).

By 18 & 19 Vict. c. 122, s. 73, all expenses incurred by the commissioners in respect of any dangerous structure shall be paid by the owner, and being recoverable in a summary manner, may, by s. 102, be recovered in manner directed by 11 & 12 Vict. c. 43. In January, 1857, the commissioners took down a dangerous structure, in pursuance of the 18 & 19 Vict. c. 122, and on the 30th April, 1858, gave the owner notice of the expenses, and demanded payment. On the 11th May a complaint was laid before a police magistrate for the non-payment of the expenses:—Held, that the matter of complaint was the non-payment of the expenses, and therefore the six months limited by 11 & 12 Vict. c. 43, s. 11, ran from the demand and refusal, and not from the completion of the works, and therefore that the complaint was in time. *Labalmondiere v. Addison*, 5 Jur., N. S. 433; 28 L. J., M. C. 25; 1 El. & El. 41.

An order by a justice under 18 & 19 Vict. c. 122, s. 73, after reciting that a complaint had been made by the assistant commissioner that he had caused notice in writing to be given to F., the owner of a structure, requiring him to repair it, and that he had failed so to do, ordered F. to repair the same. On a summons before a second justice to recover from F. the expenses incurred by the commissioner in repairing the structure, on F. having failed to repair, the justice dismissed the summons, on the ground that the order, which was put in evidence, was defective, for not containing any averment that F. had been summoned to answer the complaint, or any adjudication that the complaint was true:—Held, that such second justice had jurisdiction, upon the hearing of the summons, to enter into the question of the sufficiency of the order; and that the order was insufficient and bad, upon the face of it, on the above grounds. *Labalmondiere v. Frost*, 1 El. & El. 527; 5 Jur., N. S. 789; 28 L. J., M. C. 155; 7 W. R. 205.

L. erected a brewery in a new street in the metropolis. At the time of commencing the building, and up to the completion of it so as to prepare it for being roofed in, the general line of frontage of the buildings intended to be erected in the street had not been fixed on and indicated by the surveyor to the local board of works under 25 & 26 Vict. c. 102, s. 75. When the building was so ready to be roofed in the surveyor fixed upon and indicated the line of frontage, of which L. had notice, but continued nevertheless constructing such edifice so as to cause it to project beyond the line, until the building was nearly completed, without having obtained the permission of the Metropolitan Board of Works for such projection, as required by 25 & 26 Vict. c. 102. For this offense in contravention of the provisions of the statutes he was

indicted:—Held, that the ~~statute creating the~~ offense pointed out the ~~remedy whereby the~~ building complained of might be demolished by order of a justice, and that was the only remedy that could be pursued, and an indictment therefore would not lie. *Reg. v. Lezibond*, 19 W. R. 753; 24 L. T., N. S. 357—Q. B.

When there is a known owner or occupier, the proper person to proceed against for an infringement of the Metropolis Local Management Amendment Act, 25 & 26 Vict. c. 102, s. 75, is such owner or occupier, and not the builder, and a summons upon the builder is only valid while he is engaged in the work. *Brutton v. St. George, Hanover Square (Vestry)*, 41 L. J., Chanc. 134; 13 L. R., Eq. 339; 25 L. T., N. S. 513; 20 W. R. 84—V. C. M. But see *Bermundsey (Vestry) v. Johnson*, 8 L. R., C. P. 441, 445, 446; cited *infra*.

The offense, six months after the commission or discovery of which complaint is, under s. 107, to be made, is committed when first an intrusion is made upon the general line of building, and the time begins to run from the day such intrusion is discovered. *Id.*

Where, therefore, a vestry having on the 25th of August discovered that an owner of a house had on the 24th of August put up the framework of a conservatory which intruded on the space beyond the general line, and was finished on the 23d of September, but such vestry, not having received the certificate of the superintending architect until the 31 of March, took no step till the 4th of March, when they issued a summons against the builder, who had in the meantime been paid, and gone abroad:—Held, first, that the summons was issued against the wrong person. *Id.*

Held, secondly, that it was out of time. *Id.*

The limitation clause in 25 & 26 Vict. c. 102, s. 107, imposing a limit of six months for making a complaint for the payment of any penalty or forfeiture for an offense against that act, does not apply to a complaint for the erection of a building beyond the general line of buildings of a street without the consent of the Metropolitan Board of Works, contrary to s. 75, which provides the means of obtaining an order for the demolition of such buildings. *Bermundsey (Vestry) v. Johnson*, 43 L. J., M. C. 67; 8 L. R., C. P. 441; 21 W. R. 623; 28 L. T., N. S. 663.

#### VI. LIABILITY OF SURVEYORS, CONTRA VENI AND OTHERS, FOR INJURIES.

**Grounds of action.**—Where a contractor has opened a road under 18 & 19 Vict. c. 120, s. 110, and 25 & 26 Vict. c. 102, s. 33, his obligation as between him and the public ceases as soon as he has properly reinstated the road, and it is the duty of the parish authorities to look to its subsequent repair, whether its defective condition arises from

a natural subsidence of the soil, or from ordinary wear and tear. *Hyams v. Webster*, 3 L. J., Q. B. 21; 4 L. R., Q. B. 138; 17 J. R. 232—Exch. Cham.; affirming *S. C.*, L. R., Q. B. 264; 15 W. R. 619; 16 L. T., J. S. 118; 36 L. J., Q. B. 160; 8 B. & S. 42.

The defendant, under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; three or four months after the work was finished damage ensued by the plaintiff's horse stumbling in a hole in the road. The filling in of the road had been properly done by the defendant, and the hole was owing to the natural subsidence of the materials, which sometimes takes place, sooner or later, after such an excavation:—Held, that he was not liable for the damage. *Id.*

The owner of premises within 18 & 19 Vict. c. 120, was authorized, under s. 77, to make a drain from his house into one of the public sewers. He employed a contractor to do the work, and in the course of doing it a trench was cut across the public footway, which was afterwards insufficiently reinstated, and in consequence a party sustained an injury:—Held, that the owner of the premises as well as the contractor was liable, by reason of the statutory duty cast on the owner to reinstate the highway properly. *Gray v. Pullen*, 34 L. J., Q. B. 265; 5 B. & S. 970; 11 L. T., N. S. 569; 13 W. R. 257—Exch. Cham.

Held, also, that the penalty imposed by s. 111 was cumulative, and did not take away the right of action. *Id.*

If in carrying out the working of a sewer authorized to be made by 18 & 19 Vict. c. 120, s. 135, due and proper care is not used, and in consequence of the want of such due and proper care damage is done to property, the owner of such property is entitled to bring an action, and is not put to his compensation under ss. 135, 225. *Clothier v. Webster*, 31 L. J., C. P. 316; 10 W. R. 624; 6 L. T., N. S. 461; 9 Jur., N. S. 231; 12 C. B., N. S. 790.

**Limitation and form of actions.**—The 14 Geo. 3, c. 78, s. 100, limited actions to be brought within three months. A. had begun to build a party wall, partly on the soil of B., more than three months before the action, but had not completed it till within that time:—Held, that B. might recover for such part of the trespass as was committed within the time limited; but that, if nothing had been done within the three months, he must have brought ejectment. *Trotter v. Simpson*, 5 C. & P. 51—Parke.

**Notice of action.**—If an act of trespass complained of was done with a bona fide intention to pursue the directions of the former Building Act, 14 Geo. 3, c. 78, though not justified by it, the defendant was entitled to notice of action. *Wells v. Ody*, 2 C., M. & R. 128, 184; 7 C. & P. 22; 1 Gale, 137; 5 Tyr. 725.

By 18 & 19 Vict. c. 122, s. 108, no writ or process shall be sued out against any district surveyor, or other person, for anything done or intended to be done under the provisions of the act until one month after notice; and every such action shall be brought within six months after the accrual of the cause of action. By s. 83 (8) a building owner has a right to cut into any party structure upon condition of making good all damage occasioned to the adjoining premises by such operation. By s. 94, a building owner who fails to make good any damage he may occasion to adjoining premises by works authorized to be executed by him incurs a penalty not exceeding 20*l.* for each day during which such failure continues. The defendant, in fulfilling a contract with a building owner to build a house adjoining a house of the plaintiff, so negligently dug the ground for the foundation of the house about to be built, and underpinned the party wall, that the plaintiff's house was injured:—Held, that the words "other person," in s. 108, included only official persons discharging official duties cast upon them by the act, or persons doing some act in respect of which they were performing or intending to perform a statutory duty, and that the defendant therefore was not entitled to notice of action under that section. *Williams v. Golding*, 1 H. & R. 18; 11 Jur., N. S. 952; 35 L. J., C. P. 1; 14 W. R. 60; 13 L. T., N. S. 291; 1 L. R., C. P. 77.

A contractor employed by the Metropolitan Board of Works to enlarge a sewer running into a tidal creek, erected a dam in the sewer, the water above which was removed by pumping. Owing to his negligence in not working the pumps, the sewage flowed back into the plaintiff's premises and injured them. No notice had been given to the contractor before commencing the action:—Held, that the injury was occasioned by acts "done or intended to be done under the powers of the Metropolitan Board of Works," within the 25 & 26 Vict. c. 102, s. 106; and that he, therefore, was entitled to a notice of action. *Poulsum v. Thirst*, 2 L. R., C. P. 440; 36 L. J., C. P. 225; 15 W. R. 706; 16 L. T., N. S. 324.

As to actions against metropolitan vestries, and district boards of works,—see this title, III., IV.

## VII. MATTERS OF POLICE.

**Statute.**—[2 & 3 Vict. c. 47, *regulates different matters of police in the city and metropolis, and prohibits the commission of a variety of nuisances by persons in any thoroughfare or public place within the limits of the metropolitan police district, under a penalty of 40*s.* The extent of such district is defined, by s. 2, to be fifteen miles in a straight line from Charing Cross.*]

As to the metropolitan police,—see POLICE.

**Committing nuisances.**—The 2 & 3 Vict. c. 47, having declared several acts misdemeanors, inflicts a penalty, on summary conviction, on various other offenses, and among

them the laying shells in a thoroughfare. It likewise enacts that any person found committing any offense punishable either upon indictment or as a misdemeanor upon summary conviction by virtue of the act, may be apprehended by the owner of the property on or with respect to which the offense shall be committed, or by his servant, or any person authorized by him, and detained until he can be delivered to a constable; and notice in writing must be given of all actions against any person for anything done in pursuance of the act. A person employed by the owner to keep clean a thoroughfare, finding that another person was in the habit of laying oyster-shells upon it, consulted an inspector of police, and by his advice gave that party into custody:—Held, that he was entitled to notice of action, this being an act done in pursuance of the statute. *Daneers v. Morgan*, 1 Jur., N. S. 105—Exch.

An owner of property is not justified in giving a person into custody found (popularly speaking) committing a nuisance against his premises, nor is he entitled to notice of action for having done so, unless he is fairly justified in believing that the person had the intention to soil or deface them, within the 2 & 3 Vict. c. 47, s. 54, or the intention to commit damage or injury or spoil to them within the 24 & 25 Vict. c. 97, s. 52. *Bayley v. Alured*, 10 L. T., N. S. 523—Q. B.

A. had communicated to B. and C., who were distillers, a method of rectifying spirits, and they were to pay him an annuity, and sixpence a gallon on all spirits rectified by his method, and to keep an account. A. having a sum due to him, B. & Co. offered to pay it at their solicitor's office, and to produce the account there. A. sent B. & Co. a letter, stating that he should come to the distillery for a sight of the account and for payment; to which G., one of the firm of B. & Co., replied by letter, stating that if A. came to the distillery, and either rang or knocked, he would be punished. A. went to the distillery and gently rang the gate bell, when H., who was the cashier of the firm, gave A. into the custody of a policeman, on a charge of having rung the bell, contrary to 2 & 3 Vict. c. 47, s. 54:—Held, that this was not a case within that act, and that G. and H. were not justified under that act, and that they were not entitled to notice of action. *Horne v. Grimble*, Car. & M. 17—Denman.

As to nuisances, generally,—see NUISANCE.

**Noxious trades.**—[87 & 38 Vict. c. 67, *regulates and otherwise deals with slaughter-houses and other noxious businesses in the metropolis.*]

Ashes arising from coals burnt in the furnace of a steam-engine used for the purpose of sawing and lifting timber and other materials for carrying on the business of a pianoforte manufacturer, are "refuse of a trade, business, or manufacture," within the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, s. 128. *Gay v. Cadby*, 2 L. R.,

C. P. Div. 391; 46 L. J., M. C. 260; 35 L. T. N. S. 410—D. C. A.

Semble, that the ashes of coals consumed in an hotel or a bakery are refuse within the meaning of the same section. *Id.*

**Keeping swine.**—The powers conferred upon the commissioners under Michael Angelo Taylor's Act, 57 Geo. 3, c. 29, absolutely to prevent the keeping of swine in any house, building, yard, or garden in or within forty yards of any street or public place within the district comprised in that act, is not extended by 25 & 26 Vict. c. 102, s. 73, to the larger district comprised within such last-mentioned act. *Chelsea (Vestry) v. King*, 17 C. B. N. S. 625; 10 Jur., N. S. 1150; 34 L. J. M. C. 9; 13 W. R. 157; 11 L. T. N. S. 419.

**Turning cattle into the streets.**—The owner of land on both sides of a highway, who claimed the grass and herbage growing on such parts of it as were not graveled, put his cattle under the care of a servant, but who had no hold of them, to graze upon it;—Held, that they were not turned loose within the meaning of the 2 & 3 Vict. c. 47, s. 54, clause 2. *Sherborn v. Wells*, 3 B. & S. 784; 9 Jur., N. S. 1104; 32 L. J., M. C. 170; 11 W. R. 594.

**Street music.**—[By 27 & 28 Vict. c. 55, s. 1, section 57 of the 2 & 3 Vict. c. 47, is repealed, and in lieu thereof the following provision shall take effect as part of the act, namely, any householder within the metropolitan police district, personally, or by his servant, or by any police constable, may require any street musician or street singer to depart from the neighborhood of the house of such householder on account of the illness or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause;

And every person who shall sound or play upon any musical instrument, or shall sing in any thoroughfare or public place near any such house, after being so required to depart, shall be liable to a penalty of not more than 40s., or, in the discretion of the magistrate before whom he shall be convicted, may be imprisoned for any time not more than three days; and it shall be lawful for any constable belonging to the metropolitan police force to take into custody without warrant any person who shall offend as aforesaid:

Provided always, he shall be given into custody by the person making the charge; provided also, that the person making a charge for an offence against the act shall accompany the constable who shall take into custody any person offending as aforesaid, to the nearest station-house, and there sign the charge-sheet kept for such purpose.

By s. 2, whenever any person charged with an offence under the act shall be brought to any station-house during the time when the police court shall be shut, it shall be lawful for the constable in charge of the station-house to require the person making the charge to enter into a recognizance, conditioned as is provided by 3



**8 Vict. c. 47, s. 72**; and upon the refusal of *any person to do so, it shall be lawful for such constable to discharge from custody the person so charged.*]

**Unlawful possession of property.**—Upon information against two persons, charging that they unlawfully had in their possession, and contrary to 2 & 3 Vict. c. 47, s. 66, a number of sacks, the property of the complainants, and which were reasonably suspected of being stolen and unlawfully obtained, the magistrate issued summonses to these persons to appear before him to answer the charge; they appeared accordingly and were convicted. The sacks were found at their steam flour-mills:—Held, that they were brought before the magistrate within the meaning of the 2 & 3 Vict. c. 71, s. 24. *Hadley v. Perks*, 6 B. & S. 875.

Held, also, that they had possession of the sacks within the meaning of that section, and therefore the conviction could not be supported. *Id.*

The jurisdiction of a metropolitan magistrate under 2 & 3 Vict. c. 71, s. 24, is confined to cases in which a constable can arrest under 2 & 3 Vict. c. 47, s. 66, which applies to persons having or conveying things in the streets, and not to persons having possession of things in a house or other building. *Id.*

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See PRACTICE.

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## I. RIGHT TO MINERALS, IN GENERAL.

**The crown.]**—[5 Hen. 4, c. 4. *which enacted, that none from thenceforth should use to multiply gold or silver or use the craft of multiplication, and if any the same do, they should incur the pain of felony, was repealed by 1 Will. & M. c. 30, ss. 1, 2.*

By 1 Will. & M. c. 30, s. 8. *all the gold and silver that shall be extracted by the act of melting and refining of metals, and otherwise improving of them and their ores, be henceforth employed for no other use or uses whatsoever but for the increase of moneys, and the place for the disposal thereof shall be their Majesties' mint within the Tower of London, at which place they are to receive the full and true value for their gold and silver so extracted from time to time, according to the assay and fineness thereof, and so for any greater or lesser weight, and none of that metal of gold and silver so refined and extracted be permitted to be used or disposed of in other places or places within their Majesties' kingdoms and dominions.*

But by s. 4, *no mine of copper, tin, iron, or lead, shall be adjudged, reputed, or taken to be a royal mine, although gold or silver may be extracted out of the same.*

And by 5 & 6 Will. & M. c. 6, s. 2, *all and every person or persons, being subjects of the crown of England, bodies politic or corporate, who shall be the owner or owners, proprietor or proprietors of any mine or mines within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, wherein any ore shall be discovered, opened, found, or wrought, and on which there is copper, tin, iron, or lead, shall and may hold and enjoy the same mine or mines and ore, and continue in the possession thereof, and dig and work the mine or mines or ore, notwithstanding that such mine or mines or ore shall be pretended or claimed to be a royal mine or royal mines, any law, usage, or custom to the contrary notwithstanding.*

By s. 3, *their Majesties, their heirs and successors, and all claiming any royal mines under them, shall and may have the ore of any such mine or mines in any part of the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed (other than tin ore in the counties of Devon and Cornwall), paying to the proprietors or owners of the mine or mines wherever such ore is or shall be found within thirty days after the ore is or shall be raised and laid upon the banks of the mine or mines, and before the same be removed from thence, the rates following (that is to say), for all ore washed, made clean, and merchantable, wherein there is copper, the rate of 16l. per ton; wherein there is tin, the rate of 40s. per ton; wherein there is iron, the rate of 40s. per ton; and where there is lead, the rate of 9l. per ton (raised to 25l. per ton by 55 Geo. 3, c. 134). And in default of payment of such sums, it shall and may be lawful for the owners and proprietors of the mine or mines, wherein such ore is, are or shall be found, to sell and dispose of the said ore to their own use.]*

As to grants by the crown,—see this title, III., 1.

**Owners of soil.]**—*Prima facie, the owner of the surface is entitled to the surface itself, and all below it, ex jure nature; and those who claim the property in the minerals below must do so by some grant or conveyance by him or from the crown. Bonobothum v. Wilson, 6 Jur., N. S. 965; 8 H. L. Cas. 348; 39 L. J., Q. B. 49; affirming S. C. in Exchequer Chamber, 8 El. & Bl. 123; 3 Jur., N. S. 1297; 27 L. J., Q. B. 61; and in Queen's Bench, 6 El. & Bl. 593; 2 Jur., N. S. 736; 25 L. J., Q. B. 302.*

The rights of a grantee of the minerals, by whomsoever granted, must depend upon the terms of the deed of conveyance; but *prima facie* it will be presumed, if the minerals are to be enjoyed, that a power to get them was also granted or reserved as a necessary incident. *Id.*

**Tenants in common.]**—It is not destructive waste for a tenant in common of a coal mine to get, or to license another to get, the coal, he, the working tenant, not appropriating to himself more than his share of the proceeds. *Job v. Potton, 20 L. R., Eq. 84; 44 L. J. Chanc. 262; 33 L. T., N. S. 110; 23 W. R. 588—V. C. B.*

The plaintiff, a tenant in common of a coal mine, had notice of a negotiation, which was followed by a lease for three years (in which he did not join) by his two co-tenants, dated in December, 1865, of two undivided thirds of the coal, with license to work the coal. Under this license some coal, but considerably less than two-thirds of the whole, was raised, and one-third of the royalty was kept by the licensee for the plaintiff. A negotiation for a further license was on foot, when, in October, 1872, the plaintiff filed a bill against his co-tenants and the licensee, praying for an inquiry as to the value of the coals raised; and an account against all the defendants as trespassers; for an injunction and receiver; and for damages:—Held, that the working was not a trespass; and the plaintiff electing to dismiss the bill with costs against his co-tenants, a decree was made without costs, against the licensee for an account of the value, at the pit's mouth, of the coal raised, less costs of getting and raising, and for payment of one-third to the plaintiff. *Id.*

**Possession and enjoyment, without ownership of soil.]**—In trover for copper ore raised under the plaintiff's land, the presumption that the right to the minerals accompanied the fee simple of the land may be rebutted by the absence of enjoyment of the minerals by the plaintiff, and the user by persons not the owners of the soil. *Rowe v. Grenfel, R. & M. 306—Abbott.*

Where, in trover for copper ore, it was proved that the plaintiff was in possession of land, in which he had sunk a shaft and raised the ore in question, and the same witness on cross-examination proved that ore was taken

may by a person who had a shaft in an adjoining close, and who was getting the same lode of copper ore under the plaintiff's land, when he sunk his shaft:—Held, that this was *prima facie* evidence of the plaintiff's title to the ore, which must be left to the jury. *Rouse v. Brenton*, 8 B. & C. 787; 3 M. & R. 133.

The plaintiffs were lessees under certain persons called the lords of Mold, of all mines and minerals under a large tract of waste land called Mold mountain. In trover, for ore wrongfully extracted by the defendants from a spot which the plaintiffs alleged to be part of Mold mountain:—Held, that it was not necessary for the plaintiffs to prove the title or seizin of their lessors; but that it was enough for them, as against the defendants, who were wrong-doers, to show a possession and an enjoyment by themselves under the lease; and that, for this purpose, acts of ownership exercised by the plaintiffs, by working mines on other parts of the mountain, were evidence of their right under the spot in question, being part of the waste. *Taylor v. Parry*, 1 Scott, N. R. 576; 1 M. & G. 604; 4 Jur. 967.

Trespass, and not case, will lie for encroaching on a lead mine, though the plaintiff has no property in the soil above the mine, but only a liberty of digging. *Harker v. Birkbeck*, 1 W. Bl. 482; 3 Burr. 1556.

**Tenants for life.**—A tenant for life has no right to open mines or clay-pits; but where the author of the settlement has previously worked them, the tenant for life may continue. *Viner v. Vaughan*, 3 Beav. 446.

A client devised all his real estates in such manner that the plaintiff was entitled in tail in remainder expectant on a life estate. The plaintiff, by his bill, which impeached the purchase by the solicitor, offered to confirm certain sales of minerals which had been made by the solicitor after the death of the client:—Held, that the plaintiff having adopted the sales of the minerals, could not claim to be entitled in present to the moneys arising from them on the ground that the working mines was an act of waste, but was entitled to them only after the death of the tenant for life. *Gresley v. Mousley*, 3 De G., F. & J. 483.

A tenant for life, impeachable for waste, may properly work opened mines; whether he may also work dormant or abandoned mines must depend upon the circumstances under which, and the period of time during which, the mines have been abandoned. *Bagot v. Bagot*, 9 Jur., N. S. 1022; 12 W. R. 35; 32 Beav. 509.

A lease was granted of two seams of coal, and all other the seam and seams of coal under an estate. After the death of the grantor, a third seam, lying under the two seams, was discovered, which could only be worked by opening a new shaft:—Held, as between the tenant for life and the remainderman, under the will of the lessor, that the working of this new seam was not opening a

new mine. *Spencer v. Scurr*, 31 Beav. 334; 9 Jur., N. S. 9; 31 L. J., Chanc. 802.

**Mortgages.**—When a mortgagor knows that a mortgagee in possession is working mines under the mortgaged premises, and for a number of years allows the working to go on without objection or complaint, the court will not allow him to surcharge the mortgagee with the value of the ores raised by him or his lessees, or of the surface land necessarily damaged by reason of such working. *Millett v. Davey*, 11 W. R. 176; 31 Beav. 470.

**Ecclesiastical persons.**—The coal under parts of the glebe of a vicarage had at different times since 1750, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicars for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe:—Held, that no presumption could be drawn from these facts that there had been any grant authorizing the vicars to open mines. *Bartlett v. Phillips*, 4 De G. & J. 414.

The incumbent of a living cannot open mines without the consent of the patron and ordinary. *Holden v. Weekes*, 1 Johns. & H. 278; 6 Jur., N. S. 1288; 30 L. J., Chanc. 85; 9 W. R. 94; 3 L. T., N. S. 437.

The patron of the living is the proper person to institute a suit in equity to restrain the opening of mines, and generally the only proper person: but semble, the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent. *Id.*

**In Cornwall.**—[21 & 22 Vict. c. 109, *defines the rights of the crown, the Prince of Wales and of the Duke of Cornwall, to the mines and minerals in or under land lying below high-water mark, within Cornwall.*]

In ejectment, for a mine and land in Cornwall, the defendant cannot defend for a right of entry to dig for mines, and take the minerals known there by the name of tin-bounds. *Doe d. Falmouth v. Alderson*, 1 M. & W. 210; 4 D. P. C. 701.

As to customs and prescriptions in Cornwall,—see this title, II.

**What are mines and minerals.**—A testator bequeathed to his wife all shares in mines of which he should die possessed. At the date both of the bequest and of his death he was possessed of shares in a Welsh slate company, but other than these of no shares in mines. The slate worked by this company had at first been obtained by open quarrying, but for several years back the excavations in the stratum had become so steep as to make it necessary to carry on the works by means of ordinary underground mining operations. The slate works were rated to the relief of the poor, whereas mines are exempt from such rating:—Held, that these slate works came under

the definition of a mine, such definition depending upon the mode of working, and not upon the material obtained from the mine; and that the intention of the testator being also regarded, the shares passed under the bequest. *Cleveland v. Meyrick*, 17 L. T., N. S. 288; 87 L. J., Chanc. 124—V. C. M.

A canal company was empowered by act of parliament to prevent the owners of land adjoining the canal from working the mines and minerals within ten yards of it, but was required to give compensation for stopping any such workings:—Held, first, that stone used for mending roads, and worked by quarrying from the surface, was within the description of mines and minerals. *Midland Railway Company v. Checkley*, 15 W. R. 671; 36 L. J., Chanc. 380; 4 L. R., Eq. 19; 16 L. T., N. S. 260—R.

Held, secondly, that the company might prohibit the working of mines beyond the ten yards, if in their opinion the working would endanger the canal, but that they must compensate the owner for stopping mines beyond the ten yards. *Id.*

In an agreement for a partition of lands, and in the deeds carrying out the agreement, the mines of lead and coal, and other mines and minerals, were excepted; and in another part of the deed it was agreed, that the profits of the mines excepted should be taken between the parties according to their respective estates:—Held, that minerals meant substances of a mineral character which could only be worked by means of mines as distinguished from quarries, and that limestone quarries out of the surface were not within the exception. *Darvill v. Roper*, 8 Drew. 294; 24 L. J., Chanc. 779.

Stones got from quarries are minerals. *Micklethwaite v. Winter*, 6 Exch. 644; 20 L. J., Exch. 313. S. P., *Bell v. Wilson*, 1 L. R., Chanc. 303; 12 Jur., N. S. 263; 35 L. J., Chanc. 337; 14 L. T., N. S. 115; 14 W. R. 493.

Coprolites beneath the surface of a copyhold tenement are minerals, the property in which is in the lord. *Att. Gen. v. Tomlins*, 5 L. R., Ch. Div. 750; 46 L. J., Chanc. Div. 654; 36 L. T., N. S. 684; 25 W. R. 802.

## II. CUSTOMS AND PRESCRIPTIONS; COPYHOLD AND CUSTOMARY ESTATES; WASTES AND COMMONS.

**Custom and prescription, generally.]—**The right to an unopened mine of coal, under the close of another person, is a right to land, and cannot be claimed by prescription. *Wilkinson v. Proud*, 11 M. & W. 33; 7 Jur. 284; 12 L. J., Exch. 227.

Where, to an action for entering a close of the plaintiff, called a garden, the defendant pleaded an immemorial custom, to search for minerals in the district within which the locus in quo was situate ('the sites of houses, &c., gardens, orchards, and highways excepted'), and it was proved that the locus in quo was planted with shrubs within the last six years,

and with potatoes just before the trespass was committed:—Held, that it was a garden within the meaning of the exception. *Gilbet v. Tomison*, 4 D. & R. 232.

**In Cornwall.]—**Though the lord of a manor in Cornwall may by conveyance and acts of ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements, and the wastes; yet, consistently therewith, the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may, by acts of ownership for more than twenty years past, establish their right to copper mines, as well under the waste and customary lands as under the freehold lands within the vill. *Curtis v. Daniel*, 10 East, 273.

A custom that any tinner within Cornwall may acquire a right to the tin within certain limits; taking proceedings in the stannary court, of which the land-owner has notice, and completing his title in that court, and, in case of minerals being found, rendering a portion of the produce to the lord or owner of the soil; and that the right so acquired may be preserved by an annual renewal of the bounds; and that it is not necessary for its preservation that the minerals (if any) within the limits should be sought after, and the land worked for mineral purposes by the bound-owner, or on his behalf, is bad for unreasonableness. *Rogers v. Brenton*, 10 Q. B. 26; 12 Jur. 263; 17 L. J., Q. B. 31.

An ancient mine, worked from a remote period by tin-borders, under the custom of Cornwall, had from time immemorial been supplied with water by a stream originally artificial; and when the borders ceased to work and mine, possession thereof was taken by the owners of the minerals:—Held, that the right thus acquired by prescription to the use of the water in question was the right of the owner of the minerals. *Isimey v. Stocker*, 1 L. R., Ch. 396; 12 Jur., N. S. 419; 14 W. R. 743; 14 L. T., N. S. 427; 43 L. J., Chanc. 632.

**In copyhold lands, generally.]—**In copyhold lands, although the property in mines is in the lord, the possession of them is in the tenant. The latter, therefore, may maintain an action against the owner of an adjoining colliery, for breaking and entering the sub-soil and taking coal therein, although no trespass is committed on the surface. *Lewis v. Branthwaite*, 2 B. & Ad. 487.

The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within his manor, under which there are mines and veins of coal, in order to bore for and work the same; and the copyholder may maintain trespass against him for so doing. *Bourne v. Taylor*, 10 East, 189.

Where a lord of a manor, who claims against the tenants the mines within the manor, has stood by for a long period and allowed the tenants to work the mines, and to expend large sums of money, a court of equity will not give him an injunction or account against the ta-

ts, but will leave him to his legal remedy.

*Irrott v. Palmer*, 3 Mylne & K. 632.

The right to coal under customary freeholds, the same as in the case of lands of ordinary copyhold tenure. The onus lies on the tenant of customary freeholds to prove that he has the right by custom to dig for coal under his lands of that tenure. *Portland v. Hill*, 2 L. R., Eq. 765; 12 Jur., N. S. 286; 35 L. J., Chanc. 439; 15 W. R. 88.

The customary of a manor, compiled within the period of legal memory, recognized a right in the tenants to dig coal propriis usis. It appeared, from subsequent documents, that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures. There was evidence of tenants having during a long period dug coal in their customary inclosures, for sale:—Held, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coals under their customary inclosures. *Id.*

A declaration stated that the plaintiff was possessed of land, and that the defendant wrongfully and without leaving sufficient support, worked the mines beneath the land, by reason whereof part of the land fell in and sunk. Plea, that the lord of a manor being seized of the common and waste land, parcel of the manor, and of the coal mines underneath, and certain persons being entitled to a right of common over the same, an act was passed, whereby the common and waste land was divided and allotted among the persons so entitled to rights of common, but reserving to the lord all original rights by him enjoyed in respect of the manor, and the right of working all mines underneath the common and waste land, together with convenient and necessary rights of way. That from time whereof the memory of man is not to the contrary, up to the time of the act, the lord for the time being and his assigns had been used and accustomed as of right to search for, win, and work the coal mines lying and being under the commons, without let or interruption, and without leaving any support for the lands in and under which the mines were situate, and without making or paying satisfaction for any injury caused by working the mines, and that the mines had always been so worked without leaving support; and justified under a lease granted by the lord of the mines:—Held, a bad plea. *Blackett v. Bradley*, 1 B. & S. 140; 8 Jur., N. S. 588; 31 L. J., Q. B. 65; 5 L. T., N. S. 832.

Plea that, for forty years and for twenty years, the lord of the manor and his tenants had been used and accustomed of right to work the mines, without leaving any support for the lands; that the defendants were tenants to the lord of the mines, and that the working of the mines without leaving any support for the land was a working of the mines in the exercise of and according to the right and cus-

tom:—Held, that both pleas were bad, as not showing any acts done on the plaintiff's land; acts done on the land of another, though done as of right for twenty or forty years, not affecting the plaintiff's rights. *Id.*

In an ordinary estate of copyhold the property in the trees and minerals is in the lord, the possession in the copyholder. If a stranger or the copyholder cuts trees or takes minerals, the lord can bring trover; if a stranger or the lord cuts trees or takes minerals, the copyholder can maintain trespass. *Eardley v. Granville*, 8 L. R., Ch. Div. 836; 45 L. J., Ch. Div. 660; 34 L. T., N. S. 609; 24 W. R. 538—R.

In a crown manor, where the crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the defendant, the lessee of the crown mines, who was also the lessee of the Sneyd mine outside the manor, claimed a right to use a cut or an underground way beneath the land of the plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the Sneyd mine to the deep pit by which the manorial mines were worked, and thence by a branch railway, constructed by the defendant over part of the same copyhold, to the main line:—Held, that such user was a trespass, and that no case of acquiescence on the part of the plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the defendant from carrying the Sneyd minerals over or under their copyhold land. *Id.*

Coprolites beneath the surface of a copyhold tenement are minerals, and the property in them is in the lord, though, in the absence of a special custom, he cannot dig for them, without the permission of the tenant. *Att. Gen. v. Tomline*, 5 L. R., Ch. Div. 750; 46 L. J., Chanc. Div. 654; 36 L. T., N. S. 684; 25 W. R. 803.

The lord of a manor, in which there was no custom authorizing him so to do, entered without permission on the land of a copyhold tenant, which was in the occupation of a tenant, and dug for and carried away coprolites. A large trench was dug, which, at the time when the copyhold tenant commenced a suit against the lord to restrain the trespass, was not filled up, though it was filled up and the surface restored before the suit came to a hearing. The digging was continued after filing the bill, and until the coprolites were exhausted:—Held, that, under the circumstances, the copyholder, though only a reversioner, could maintain a suit against the lord for an injunction and damages. *Id.*

Held, also, that the proper measure of damage was the gross amount produced by the sale of the coprolites, less the expenses of the working, and such a sum by way of profit as would have induced a stranger to undertake the working. *Id.*

— upon inclosure or allotment of wastes and commons.]—An act for inclosing a com-



mon, which directs that the allotment to the commoners shall be deemed to be within the township wherein the lands of such commoners lie, does not alter the rights or liabilities of the owners of coal mines, either worked or unworked, under such allotments. *Rea v. Pitt*, 2 N. & M. 363; 5 B. & Ad. 565.

At the time of the passing of an inclosure act, the soil and freehold of the common land were vested in the lord of the manor, subject to certain rights of common, and he was also entitled to the coals and minerals and unopened stone quarries, &c., under the common lands, as part of the freehold. The act did not recite the particular rights of the lord, but enacted that certain allotments should be made to the commoners in lieu of their rights, and to him as lord of the manor, for his right to and in the soil of the common lands, and also "to and for the damage and injury he would sustain by being obliged to make satisfaction to the proprietors of the lands for digging coals or minerals;" and it also enacted, that if the lord should enter on any of the lands for the purpose of digging, getting, &c., any coals or other minerals, he should make compensation for damage done. There was no express reservation of the mines or minerals to him. The allotments were made pursuant to the act:—Held, that the lord of the manor for the time being was entitled to the mines and minerals under the land so inclosed, paying compensation to the owners of the allotments for any damage done by working the mines. *Micklethwaite v. Winter*, 6 Exch. 644; 20 L. J., Exch. 313.

An act of Geo. 3, for inclosing the moors and commons within the manor of Lanchester, contained a saving of all the seigniorial rights of the Bishop of Durham as lord of the manor, and also provided that the bishop, his successors, lessees and assigns, should at all times thereafter work and enjoy all mines under the moors and commons, and free liberty of winning and working mines belonging to the see and bishopric of Durham, wheresoever the same should be, and of leading and carrying away the coals gotten thereout, or out of any other lands or grounds whatsoever:—Held, that the bishop had no right to carry over the inclosed lands coal gotten from mines within the manor, but not belonging to the see. *Hodley v. Fenwick*, 3 H. & C. 349—Exch. Cham.

An inclosure act provided that the lord of the manor should have power to enter upon the waste lands allotted, and dig for and get minerals, and erect works for that purpose, making satisfaction to the persons whose allotments should be damaged or injured. Another clause provided that the lord should upon no account open, dig, or carry on any work on the surface within forty yards of any dwelling-house, nor get any coal under any dwelling-house within the perpendicular distance of forty yards from the foundation of any such building. And power was given to persons entitled to dwelling-houses to inspect the mines, in order to see whether works were

carried on within the prohibitive distance:—Held, that the effect of this was to give the lord a right of entering upon the surface of the allotments, making compensation for surface damage, subject to an absolute prohibition against working at all within forty yards of a dwelling house; but that it left the common law right of an owner of the surface to have the support of the minerals below untouched; and therefore, that the lord was liable to an action for working the mines as to cause the surface to subside, although the works were carried on in a proper and usual manner, and not within the prohibitive distance. *Robert v. Haines*, 7 El. & Bl. 65; 3 Jur., N. S. 833; 27 L. J., Exch. 49—Exch. Cham.

In an action for working mines under ground near to a house, so that the house was injured, and in danger of falling for want of support, the defendant claimed, as lessee of the manor in which the house was situate, and of the mines therein, a prescriptive right to work the mines under any houses parcel of the manor, paying to the occupiers of the surface a reasonable compensation for the use of the surface, but without making compensation on any other account, and justified under that right:—Held, first, that such a prescription was bad, as being unreasonable. *Hilton v. Granville*, D. & M. 614; 5 Q. B. 701; 8 Jur. 310; 13 L. J., Q. B. 193. But see *Wakefield v. Buccleugh*, 4 L. R., H. L. Cas. 377; 30 L. J., Chanc. 411; 23 L. T., N. S. 102; and compare *Rowbotham v. Wilson*, 8 H. L. Cas. 348; 30 L. J., Q. B. 49; 6 Jur., N. S. 965; 3 L. T., N. S. 642.

Held, secondly, that such a right could not exist by custom. *Id.*

Action for injuring the plaintiff's reversion, by removing the minerals without leaving support to the surface, on which were houses more than twenty years old, whereby they were injured. Ninety years before action, the locus in quo was inclosed by an award made under an inclosure act; the surface was allotted to P., whose estate the plaintiff had, and the minerals to H., whose estate the defendant had. On the face of the award, it was stipulated that the allottees of the mines should have the liberty to work the mines, and the allottees of the surface should have no claim to compensation for any consequent sinking of the surface. P. executed the award as a deed. H. did not execute it, but accepted the allotment under it. The houses were afterwards built. By the defendant's mining, without negligence, the surface unavoidably sank:—Held, that upon the severance of the minerals and surface, the owner of the surface took it as a separate tenement, with only a qualified right of support; that no further right of support was gained by the erection of the houses, though they had stood for more than twenty years; and that the subsequent owners of the surface took it with only the qualified right of support originally created, and that therefore the plaintiff was not entitled to maintain the action. *Do-*

*botham v. Wilson*, 6 El. & Bl. 593; 2 Jur., N. S. 736; 25 L. J., Q. B. 362; affirmed on appeal, 3 Jur., N. S. 1297; 8 El. & Bl. 123; 27 L. J., Q. B. 61, in Exch. Cham.; and in Dem. Proc., 8 H. L. Cas. 348; 30 L. J., Q. B. 49; 6 Jur., N. S. 965.

W. purchased lands, formerly part of the waste of a manor, which were sold under a local inclosure act to defray the expenses of the act. The lord of the manor leased the mines under the lands so sold to K., who commenced working by sinking shafts. W. filed a bill against the lord of the manor and K., to restrain the working of the mines, or at least such a working as to cause a subsidence of the surface. It having been proved that the mines could not effectually be worked without causing a subsidence of the surface:—Held, that the lord of the manor, or his tenant, had a right to work the mines, to an extent which might cause the utter destruction of the land above, making compensation to the owner of the surface for the damage done. *Wakefield v. Buccleugh*, 23 L. T., N. S. 103; 39 L. J., Chanc. 411; 4 L. R., H. L. Cas. 377. See *S. C.*, 4 L. R., Eq. 613; 36 L. J., Chanc. 703; 16 L. T., N. S. 475; 15 W. R. 768.

Semble, that there may be a valid claim by custom, or prescription in a manor, for the lord or his licensees to work mines so as to destroy the tenant's surface. *Ib.*

The Lanchester Inclosure Act, 1773, for dividing and inclosing Lanchester Common and making roads over it, reserves to the lord of the manor all mining rights, and large powers for working the mines:—Held, that no reservation of power could justify the lord of the manor working the mines in such a way as to injure the roads, or to render them in any way less useful to the public. *Benfield-side Local Board v. Consett Iron Company*, 26 W. R. 114—Exch. Div.

As to grants and demises of mines in copyhold lands,—see this title, III., IV.

### III. GRANTS AND RESERVATIONS; LICENSES.

#### 1. Operation and Effect, in General.

**Grants by the crown.**—The prerogative right of the crown to gold and silver found in mines will not pass under a grant of land from the crown unless the intention that it shall so pass is expressed by apt and precise words. *Woolley v. Att. Gen. (Victoria)*, 36 L. T., N. S. 121; 25 W. R. 832; 2 L. R., App. Cas. 163; 46 L. J., P. C. 18.

The act for regulating the sale of waste land belonging to the crown in the Australian Colonies (5 & 6 Vict. c. 36) contains no reference to the rights of the crown in the precious metals to be found under the soil:—Held, that the statute has not so modified the common law that a sale of waste lands under it must be taken to include a grant of the gold and silver that may be found under the lands so sold. *Ib.*

A grant by letters patent by the crown as lord of a manor of "all those coal mines found, or to be found, within the commons, waste grounds, or marshes within the lordship," &c., with a proviso that the grant should be construed strictly against the crown, and most strictly and beneficially for the grantees, passes coal lying under the foreshore of the estuary of the river Dee, between high and low water marks, and forming part of the manor. *Att. Gen. v. Hammer*, 27 L. J., Chanc. 837.

— **in the Forest of Dean.**—By virtue of an award made by the commissioners under 1 & 2 Vict. c. 43, the plaintiffs were galees of a section of upper veins of coal in the Forest of Dean; and by the rules attached to the award, any underlying veins not galed "might be galed to other parties, but to be so worked as not to impede or injure the working of the tracts already allotted, or thereafter to be allotted or galed."—Held, that the rule reserved to the crown the power of granting to subsequent galees of the lower veins a right to sink a shaft through the upper veins previously galed, and that the restriction as to the mode of working must be so construed as not to render the reservation nugatory; i. e., as a restriction only upon the mode of working the lower seams, when reached, and not as limiting the right of the crown to grant liberty to sink a shaft through the upper veins in order to reach the lower. *Gould v. Great Western Deep Coal Company*, 11 Jur., N. S. 865; 2 De G., J. & S. 600; 13 W. R. 1111; 13 L. T., N. S. 109.

The 1 & 2 Vict. c. 43, s. 68, provided that every free miner entitled to any gale within any inclosed lands shall pay to the owner of such lands compensation for surface damage occasioned by opening or working any gale therein or thereon, which compensation shall be determined by the gavelor or deputy gavelor; and if not paid within ten days after an award by him, and a copy thereof served on the party required to pay the same, the amount may be recovered by action. A declaration in an action under that section alleged that the deputy gavelor awarded that the amount of compensation for surface damage done to the inclosed lands of the plaintiff, by the working of a gale therein or thereon by the defendant, was 60*l.* The plea set out the award, by which the deputy gavelor, after reciting that application had been made to him, to determine the compensation for surface damage to lands and buildings of the plaintiff, alleged to be inclosed lands, awarded that the amount of compensation for surface damage to the lands and buildings by reason of the working thereon and thereunder by the defendant was 60*l.*, but whether the lands and buildings were inclosed lands within the statute, he had made no award:—Held, first, that the award was good, although the deputy gavelor had not found that the lands were inclosed. *Allaway v. Wagstaff*, 4 H. & N. 307; 29 L. J., Exch. 51.

Held, secondly, that assuming surface damage to mean damage on the surface, the award was not bad, because the deputy gaveler had found that the damage was occasioned by working under the lands, for by such working there might be damage on the surface. *Id.*

Held, thirdly, that as the word lands comprehends buildings, the declaration was good, although it appeared by the award that the compensation was in respect of the lands and buildings. *Id.*

An award made under 1 & 2 Vict. c. 43, defined the southern boundaries of a level colliery thus: "commencing at the point where the level struck the coal, and extending in an eastward direction as deep as the level will drain." There was an old existing excavation (termed by miners a level), not horizontal, but running upward into the coal eastward from the point where it struck the coal bed. This excavation was described on the plan annexed to the award as the line of boundary:—Held, that this existing old level was the boundary meant by the award, and not an imaginary mathematical line drawn horizontally eastward from the point where the old excavation struck the coal. *Brain v. Harris*, 10 Exch. 908; 24 L. J., Exch. 177—Exch. Cham.

By virtue of a custom, in the Forest of Dean, persons called free miners were at liberty to apply to the gaveler of the hundred of St. Briavels to allot them a particular spot of land for a coal-pit, and when the spot was agreed upon, the gaveler cut a turf, and having cut a stick, so many notches were cut on it as there were to be partners in the intended work, and also one for the king and one for the gaveler; that the stick was fastened down with pegs on the spot where the turf was pared off, and the turf laid down again, after which that spot was considered appropriated; when coal was found, a money payment was made to the king, in lieu of his share of the coal. A share in a coal-pit so appropriated was held to be freehold. *Doe d. Thompson v. Pearce*, Peake's Add. Cas. 242—Wood.

When a free miner in the Forest of Dean has had three gales or allotments granted to him, and has surrendered one of such gales on the ground that there was not sufficient coal to make the gale worth working, he will be entitled to another gale equally as if the coal in one of the three gales had been exhausted within the language of 1 & 2 Vict. c. 43, s. 61. *Ellway v. Davis*, 16 L. R., Eq. 294; 43 L. J., Chanc. 75; 21 W. R. 806—V. C. M.

A free miner of the Forest of Dean applied for an unoccupied gale. The gaveler acceded to the application, duly entered it in his book, and gave notice of his intention to make the grant upon a certain day. Conflicting claims being set up, the actual grant of the gale was delayed, and, in the meantime, the free miner died. The devisees under his will then presented their petition of right,

praying that the gale might be granted to them in right of their testator:—Held, that 1 & 2 Vict. c. 43, s. 38, applied only to the state of things at the passing of the act, and that the free miner had acquired a title transmissible by will. *James v. Reg.*, 43 L. J., Chanc. 754; 17 L. R., Eq. 502; 23 W. R. 460; 30 L. T., N. S. 84—V. C. M.

The gaveler of the Forest of Dean granted a gale or colliery to a free miner, he paying for all coal brought out 2d. per ton, and so working the colliery as to gain 24,000 tons a year: provided that if the coal gotten should not amount to that quantity, a minimum rent of 200*l.* should be paid: provided also, and the grant was made upon the further condition, that the gale should be worked in manner therein mentioned. The gale not being worked, the galee paid the minimum rent for several years; but upon arrears of rent becoming due, the gaveler declared the gale forfeited, and entered into possession thereof. Ten months after the declaration of forfeiture the galee tendered the arrears of rent, which were refused:—Held, that the grant was properly made upon conditions, one of which was the payment of rent; that upon breach of that condition by non-payment, there had been a legal forfeiture and a right of the crown to re-enter: and that the arrears not having been tendered, nor any proceedings taken within six months, there was no power in the court to relieve against the forfeiture. *Brain, In re*, 18 L. R., Eq. 389; 44 L. J., Chanc. 103; 23 W. R. 867; 31 L. T., N. S. 17—V. C. M.

By 1 & 2 Vict. c. 43, s. 23, free miners shall have the exclusive right of having gales granted to them to open mines in the Forest of Dean, and it shall be lawful for such free miners to sell, transfer, assign, or dispose of such gales, and s. 60 enacts that the gaveler or deputy gaveler shall grant gales to free miners in the order of their application. In 1872, D., a free miner, applied for a gale. In 1873 the deputy gaveler gave notice of his intention to grant the gale to D., but D. died before the grant could be perfected, having by will given all his real and personal estate to certain trustees who were not free miners:—Held, that D. had not acquired any transmissible interest, and the grant could not be made to his devisees. *James v. Reg.*, 46 L. J., Chanc. Div. 516; 5 L. R., Ch. Div. 153; 36 L. T., N. S. 903; 25 W. R. 615—C. A.; reversing the decision of Malins, V. C., 24 W. R. 944.

**Grants, by owners of fee, in general.**—A grant of mines to take the whole stratum of the land of others is a grant of a real hereditament in fee simple. *Stoughton v. Leigh*, 1 Taunt. 402.

A close, held by copyhold tenure, contained an unopened coal mine. B. was tenant from year to year of the close to the copyholder in fee; B. in fact occupied the surface; and it did not appear that in the demise to B. there had been any exception or reservation of the

ne. While B. was such tenant, in 1821, the copyholder in fee granted the mine, for valuable consideration, to B. and P. In 1832, B.'s tenancy from year to year ceased:—Held, that before and at the time of the grant of 1821, B. was in possession of the mine by virtue of his tenancy from year to year, though without the right to work the mine; that he, therefore, by the grant, became possessed of the mine for the term without actual entry, and that his possession inured to the benefit both of himself and P.; and therefore B. and P. were both possessed of the mine from the time of the grant, and had not a bare interesse termini. *Keyes v. Powell*, 2 El. & Bl. 132; 17 Jur. 1052; 23 L. J., Q. B. 805.

Where an owner of the fee simple of a close with minerals under it conveys the surface, reserving the minerals, with the right of entry to get them, and he afterwards grants the minerals with such right, mere non-user for more than forty years, no other person having worked or having been in possession of the minerals, is not sufficient under 3 & 4 Will. 4, c. 27, ss. 2, 3, to bar the grantee's right of entry to get the minerals. *Smith v. Lloyd*, 9 Exch. 562; 2 C. L. R. 1007; 23 L. J., Exch. 194.

The plaintiffs were seized in fee of lands to which their predecessors derived title under a conveyance in the reign of Elizabeth, wherein the grantor reserved to himself and his heirs male a rent-charge of 7s. 8d. and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon. The defendant, claiming title under a demise from a descendant of the grantor, had for more than twenty years worked from mines of his own under adjacent lands into, and had taken coals from, the mines under plaintiff's lands:—Held, first, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it. *Ashton v. Stock*, 6 L. R., Ch. Div. 719; 25 W. R. 862—V. C. H.

Held, secondly, that the defendant had not acquired any title to the mine by possession under the Statute of Limitations, and that the plaintiffs were entitled to an injunction, with an account for six years. *Ib.*

Held, thirdly, that, as the defendant had been working under a bona fide belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal, as well as bringing it to bank. *Ib.*

**Exceptions and reservations.**—A. conveyed to B., in fee, a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the lands and hereditaments; with liberty to enter and sink pits for getting all such coal, and to erect

engines and make drains necessary for working the coal; except as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead:—Held, that the seller thereby reserved to himself the right to dig coals under the messuage, buildings, and homesteads, and within 150 yards of the same, but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead. *Bowler v. Wolley*, 15 East, 444.

A. being seized in fee of lands, granted the lands to P., his heirs and assigns, reserving to himself, his heirs and assigns, "all and all manner of coals, seams and veins of coal, iron ore, and all other mines, minerals, and metals which then were, or at any time, and from time to time thereafter, should be discovered in or upon the premises, with free liberty of ingress, egress, and regress, to come into and upon the premises, to dig, delve, search for, and get the mines and every part thereof, and to sell, dispose of, take, and convey away the same at their freewill and pleasure; and also to sink shafts for the raising up works, carrying away and disposing of the same or any part thereof, making a fair compensation to P. for the damage to be done to the premises, and the pasture and crops growing thereon:"—Held, that, under this reversion, A. was not entitled to take all the mines, but only so much as he could get, leaving a reasonable support to the surface. *Harris v. Ryding*, 5 M. & W. 60.

A conveyance of lands contained a reservation of the mines to the grantor, with free and full power and liberty to work, sink, dig for, or win the same, and to drive drifts, make watercourses, or do any other act necessary or convenient for the working, winning or getting the same, with a covenant by the grantor to pay to the grantee treble the damages, loss or prejudice which the grantee should sustain by reason of such digging, working, &c.:—Held, that the reservation was subject to the implied right of the grantee of the surface to support from the minerals, and did not empower the grantor to remove the whole of the minerals without leaving a support for the surface. *Smart v. Morton*, 1 Jur., N. S. 825; 24 L. J., Q. B. 260; 5 El. & Bl. 80.

A. being seized of a manor, and of the demesne lands thereof, and of all the coal mines therein, in fee, granted part of the lands to B. in fee, excepting and reserving to himself, his heirs and assigns, all tithes of corn arising therefrom, and also excepting and always reserving out of the grant, to himself and his heirs, all the coals in the lands so granted, together with free liberty for himself, his heirs, and his and their assigns and servants, from time to time, and at all times thereafter, during the time that he and his heirs should continue owners of the demesne lands, to sink and dig pits, or otherwise to sough and get coals in the lands, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals, at his and

their will and pleasure, he and his heirs, from time to time, giving and paying to the grantee, his heirs and assigns, such satisfaction for damage as the grantee and his heirs should sustain by reason of getting and carrying away the coals in the lands, as two gentlemen, neighbors, indifferently chosen by the grantor and grantee, their heirs and assigns, should from time to time award. An heir of the grantor by descent having aliened the manor and demesne lands, and the coals therein, in fee to C., the latter entered the lands granted to B., and dug pits, and carried away coals therefrom, and an action having been brought against him and his servant:—Held, first, that under the general exception and reservation, contained in the grant to B., the title to the coals remained in A. and his heirs, and would pass to his or their assigns, under the word "heirs;" and, secondly, that the special liberty as to the manner of taking the coals was not restrictive, but in furtherance of the previous exception of the coals out of the grant, and would inure for the benefit of C. as owner, by purchase, of the manor and demesne lands. *Curdigan v. Armitage*, 3 D. & R. 414; 2 B. & C. 197.

By a lease, dated 1827, D. demised to W. a dwelling-house and fifteen closes of land, and granted all streams of water that might be found in four of those closes, called The Clough, The Moorin Clough, The Brow, and The Masleds, excepting out of the demise all "timber and other trees, mines and minerals, stone, gravel, sand, and clay, and all streams of water, except those above granted, then being or thereafter to be found in or upon the premises demised, with power for D. his heirs and assigns, and his and their servants and workmen, from time to time to enter upon the premises, and to crop, fall, search for, and make marketable all or any of the before-mentioned articles, to make any clay into bricks or tiles on the premises, and to direct or alter the course of any river, brook, spring, or water." There was a plan annexed to the lease, showing a stream of water on the north side of the premises, and flowing through their whole extent from west to east. The Clough, the Moorin Clough, the Brow, and the Masleds were situate on the banks of this stream. There was no other stream on the surface, but certain wells were in existence in those closes, and others were subsequently found:—Held, that the wells and all water in the Clough, the Moorin Clough, the Brow, and the Masleds passed by the grant to W., and that neither D. nor his lessees could work the mines, so as to cut off the springs in the closes in question. *Whitehead v. Parks*, 2 H. & N. 870; 27 L. J., Exch. 169.

D. mortgaged in fee lands, having beds of coal under them, the conveyance expressly mentioning the mines, to T., for securing a sum of money and interest; then, devised all the mines under the lands to her seven children, as tenants in common in fee, and all other her real estate to A., B. and C., their

heirs and assigns, upon trust to sell; then demised to A. and B. two seams of coal under the lands, for fifty years, at 10s. per acre, and afterwards died; and after her death the rent was paid to the seven children. Previously to her death T. died, after having devised all freehold estates held by him in mortgage to H. and J., their heirs and assigns. Afterwards, by lease and release between A., B. and C. of the first part, H. and J. of the second, mortgage of other premises of the third part, and K. of the fourth part, receiving that A., B. and C. had put up for sale the lands comprised in the mortgage, and K. had been declared purchaser of the lands (except the beds of coal underneath), it was witnessed that H. and J., at the request of A., B. and C., did bargain, sell, and release unto K. the closes of land, together with all and singular quarries (omitting the word "mines"), except and always reserved unto A. and B. during the term of thirty years, all the mines and beds of coal under the lands, &c., to hold the said closes of land (except as before excepted) unto K., his heirs and assigns, forever:—Held, that the mines or seams of coal did not pass to K. *Holliday v. Denison*, 3 H. & N. 670; 4 Jur., N. S. 1002; 28 L. J., Exch. 25—Exch. Chanc.

A lease of waste land of a manor, recently inclosed by the lessee, contained a reservation to the lessor, the lord of the manor, of the mines and quarries, with full power to win and work the same, with free way leave and passage to, from and along the same, on foot or on horseback, with all manner of carriages; and a covenant by the lessor, that in working the mines and using the liberties and privileges reserved, he would do as little damage and spoil to the soil and herbage of the premises demised as he conveniently could:—Held, that the lessor and those claiming under him were entitled not merely to a right of way for the purpose of working the reserved minerals, but to an absolute way-leave which might rightfully be used for the purpose of working minerals not under the demised property. *Proud v. Bates*, 34 L. J., Chanc. 406; 13 L. T., N. S. 61—V. C. W.

Held, also, that the lessee was entitled to support for the surface of the land, as incident to the demise thereof. *Id.*

In a conveyance of land in Northumberland, a reservation was made to the grantor of all "mines or seams of coal, and other mines, metals, or minerals," under the land granted, with liberty to dig, bore, work, lead, and carry away the same, and to make pits, &c.:—Held, that the term "minerals" included freestone, but that the grantor had liberty only to get the freestone by underground mining, and not by working in an open quarry. *Bell v. Wilson*, 1 L. R., Chanc. 303; 12 Jur., N. S. 263; 35 L. J., Chanc. 337; 14 W. R. 493; 14 L. T., N. S. 115—L. J.

A contract for the sale of lands, with their appurtenances, belonging to a rectory, was entered into under 38 Geo. 3, c. 60, and 39 Geo. 3, c. 6, which enabled ecclesiastical cor-



porations to sell lands for the redemption of land tax. Before the payment of the purchase-money into the bank of England, as directed by the acts, and the execution of the conveyance, the 39 Geo. 3, c. 21, was passed, which enacted that all minerals under lands belonging to any ecclesiastical corporation, which should be sold, should be absolutely excepted and reserved; and that the provisions of that act should, in the execution of the former acts, be applied as if they had been specially enacted in those acts:—Held, that the minerals passed to the purchaser. *Wilson v. Grey*, 3 L. R., Eq. 117; 36 L. J., Chanc. 62.

In 1799, the Duke of Cornwall, as lord of a manor, granted the freehold in a copyhold tenement to the copyholder, reserving "all mines and minerals within and under the premises, with full and free liberty of ingress, egress and regress, to dig and search for, and to take, use, and work the excepted mines and minerals." the deed not containing any provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been gotten out of the lands of the duchy, though the existence of tin was well known. It was admitted in the cause that china clay could not be gotten without totally destroying the surface, and the process of getting tin by streaming, which was an ancient, and at the time of the grant the most usual mode of getting tin, was almost equally destructive. A bill by the owner of the surface to restrain the owner of the minerals from getting china clay having been dismissed by Wickens, V. C., on the ground that the reservation included china clay, with the power to get it:—Held, that the china clay was included in the reservations, but that the surface-owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface. *Heat v. Gill*, 7 L. R., Ch. 669; 41 L. J., Chanc. 761; 27 L. T., N. S. 291; 20 W. R. 957; coram Wickens, V. C., 41 L. J., Chanc. 293; 20 W. R. 520; 23 L. T., N. S. 502.

When a land-owner sells the surface, reserving to himself the minerals, with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power. *Id.*

The deed granted the property by the description of "all that copyhold tenement called Greys, consisting of a house, with divers parcels of land containing 103 acres (that is to say)"—then followed parcels, concluding with "a parcel of land running with Garka Moor, containing twenty-seven acres, which tenement called Greys is now held for the life of H. by copy of court roll:"—Held, that a piece of uninclosed land, containing twenty-seven acres, and forming part of the

waste of the manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing else to answer the twenty-seven acres mentioned in the deed, and the 103 acres could not be made up without it. *Id.*

Seemly, that if a freeholder grants lands, excepting mines, he severs his estate vertically, i. e., he grants out his estate in parallel vertical layers, and the grantee only gets the parallel layer granted to him. The freeholder retains the reserve stratum as part of his ownership, and whether or not he takes the minerals out of the stratum, such stratum still belongs to him as part of the vertical section of the land. *Eardley v. Granville*, 3 L. R., Ch. Div. 826; 45 L. J., Ch. Div. 669; 34 L. T., N. S. 600; 24 W. R. 528.

When in a feu charter the superior reserves the coal and limestone, with the right to work them, giving satisfaction for damages, the right reserved is a right of property, or an absolute ownership, and not a mere servitude or easement; the surface and the minerals becoming separate tenements severed in title, and in such a case the superior, as absolute proprietor of the reserved coal and limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent. *Hamilton v. Graham*, 2 L. R., H. L., Sc. App. 160.

As to compensation for injuries by working mines under grants,—see this title, V., 2, 4.

**Licenses to search for, dig for and raise minerals.**—The owner of the fee granted to A., his partners, fellow-adventurers, free liberty to dig for tin, and all other metals, throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use; and to make adits, &c., necessary for the exercise of that liberty, together with the use of all waters and water-courses, excepting to the grantor liberty for driving any new adit within the lands thereby granted, and to convey any water-course over the premises granted; habendum for twenty-one years; covenanted by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work effectually the mines during the term; and then, in failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor:—Held, that this deed did not amount to a lease, but contained a mere license to dig and search for minerals, and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee. *Doe d. Hanley v. Woods*, 2 B. & A. 724.

The grantee commenced working the mines, but after some time discontinued, not being prevented by the want of water, or any other inevitable accident. The grantor, after some lapse of time, verbally authorized other persons to dig for ore throughout part of the land described in the deed, and met those persons on part of the land, and pointed out

the boundaries within which they were to exercise the liberty: and himself subsequently entered into a mining adventure with other persons, which was carried on within the limits described in the indenture; and afterwards, in consideration of the surrender of the first grant, and of certain payments, demised the premises to a lessee for twenty-one years; and upon the execution of this lease, the original deed was delivered up, but there was no surrender in writing:—Held, that these acts amounted to a re-entry by the grantor, inasmuch as, unless referred to the exercise of that right, they would be acts of trespass by him. *Id.*

A license to search for and raise metals, and also to carry them away, and to convert them to the licensee's own use, passes an interest which is capable of being assigned. *Muskett v. Hill*, 5 Bing. N. C. 694; 7 Scott, 855.

A license to mine was granted, with a proviso that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, and the grantor fixed notice on the premises that he intended to avoid the license, it should be lawful for the grantor to re-enter within a month after fixing the notice, and then the license should be void:—Held, that notice to the grantee, that unless he kept six miners at work the grantor would re-enter at the expiration of a month, did not avoid the license, or render the grantor's re-entry lawful. *Id.*

An action on the case is maintainable against the grantors of a lease of mines, for unlawfully expelling the assignees and his workmen, and forcibly preventing them from having access to, or working, the mines. *Id.*

A. and B. were severally seized of parcels of woody ground, and B., having other lands adjoining to his woody ground, intended to make a colliery under his ground; A. granted to B., his heirs and assigns, liberty for him, his heirs and assigns, to carry up a sough or a drain through A.'s woody ground into B.'s woody ground, and also liberty for B., his heirs and assigns, to make two little sough pits, in A.'s woody ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, and the other to be kept open for examining the sough so long as was necessary for that purpose, and no longer; and B. covenanted that he, his heirs and assigns, would not damage the trees growing on A.'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough; and that A., his heirs and assigns, from time to time, and at all times after, might go down into any pit or pits of B., his heirs or assigns, to discover whether any coals of A., his heirs or assigns, should be gotten; and that B., his heirs and assigns, should repair any injury to A.'s fence:—Held, that by the grant to B., his heirs and assigns, of the liberty of making the sough in A.'s land, the liberty of

making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto; and that the use of such sough, for the carrying up of which into B.'s woody ground liberty was granted, was not confined to the getting of coals under B.'s woody ground, but extended also to the adjoining lands of B., and that the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered in by mutual consent, was not controlled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have a continuing operation while any coals in B.'s woody ground and adjoining lands remained to be gotten. *Hobgson v. Field*, 7 East, 613; 3 Smith, 538.

A. granted to B. a license to enter upon his lands to search and dig for ores for a term of twenty-one years, with a proviso that if B. ceased to work the mines for six months, or broke any other of the covenants contained in the license, then the "supposed indenture, and the liberties, licenses, powers and authorities thereby granted shall cease, determine, and be utterly void and of no effect."—Held, that the word "void" was to be construed to mean voidable, and that some act of A. to show his election to enforce the forfeiture was necessary to put an end to the license. *Roberts v. Dacey*, 1 N. & M. 443; 4 B. & Ad. 665.

A. being mortgagee in fee of lands, and B. the mortgagor entitled to the equity of redemption, by lease and release, A. conveyed and B. released the land to C. in fee, who by the same instrument covenanted with and granted to B. that it should be lawful for B., his heirs and assigns, at all times to enter upon the lands to search and dig for coal and to take and carry away the same to his and their own use:—Held, that this was only a license, and conveyed no interest in the soil, so as to exclude C. and those claiming under him, from getting coal there, nor could it operate as an exception or a reservation out of the grant in respect to B., who had not the legal title in him at the time. *Chatham v. Williamson*, 4 East, 469; 1 Smith, 278.

A party claiming the ownership of a field, granted to the plaintiff a parol license to search therein for minerals. The plaintiff, acting under this license, dug pits in the field, and threw up sand and gravel mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel, and ore, the party who gave the plaintiff the parol license granted him a similar license by deed:—Held, that under these circumstances the plaintiff was entitled to maintain an action for the gravel, sand, and ore as against the defendant, who was a wrong-doer. *Northam v. Bowden*, 11 Exch. 70; 24 L. J., Exch. 237.

**Sales by mortgagees, trustees, tenants for life, &c.**—[By 25 & 26 Vict. c. 108, *powers of sale, exchange, partition and enfranchisement by trustees and others are confirmed, notwithstanding want of reservation of minerals, and trustees may dispose of lands or minerals separately, unless forbidden.* See *Buckley v. Howell*, 29 Beav. 546.]

Mortgagees are within the Confirmation of Sales Act, 25 & 26 Vict. c. 108, and may have liberty to sell under their power of sale, with a reservation of the mines and minerals in the land sold, and incidental powers of working them. *Beaumont, In re*, 12 L. R., Eq. 86; 40 L. J., Chanc. 400; 19 W. R. 767—V. C. M.

It is not necessary for mortgagees, in order to exercise the power of selling with such a reservation, to serve the petition on any subsequent incumbrancers. *Id.*

Mortgagees in possession, with a power of sale, after filing a bill for foreclosure, and setting down the cause for hearing on motion for a decree, presented a petition not entitled in the cause, but in the matter of the 25 & 26 Vict. c. 108, for liberty to sell the surface, excepting the mines and minerals, of the hereditaments comprised in the mortgage deeds:—Held, that they were entitled to the order asked. *Wilkinson, In re*, 13 L. R., Eq. 634; 41 L. J., Chanc. 392—V. C. W.

The cestuis que trust ought to be made parties to an application under 25 & 26 Vict. c. 108, s. 2, for sale of the surface apart from the minerals. *Palmer, In re*, 13 L. R., Eq. 408; 41 L. J., Chanc. 511—V. C. W.

A petition was presented, under the Confirmation of Sales Act, 25 & 26 Vict. c. 108, by trustees with a power of sale, and the first tenant for life, and the tenant for life in remainder, for leave to sell the land and minerals separately:—Held, that the next remainderman need not be served with the petition. *Powell, In re*, 23 W. R. 151—V. C. B.

A petition under 25 & 26 Vict. c. 108, s. 2, by trustees of settled land with power of sale, exercisable with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the beneficiaries entitled in remainder. *Pryse, In re*, 10 L. R., Eq. 531; 39 L. J., Chanc. 760; 18 W. R. 1064—V. C. M.

**Settlements of mining property.**—[The court has power under the Confirmation of Sales Act, 25 & 26 Vict. c. 108, to give a general direction that persons having powers of sale and exchange in a settlement or will, which do not expressly authorize the reservation of mines and minerals on a sale of the settled property, or the sale of minerals apart from the land, may exercise the powers as if they did authorize such reservation or separation. *Wynn, In re*, 16 L. R., Eq. 237; 43 L. J., Chanc. 95; 21 W. R. 695—V. C. M.]

**Sale of mines under misrepresentation.**—[Upon the sale of certain collieries the vendors stated the annual profits to be 66,000*l.*, and estimated the total value at

423,000*l.* The purchasers contracted to buy the collieries for 365,000*l.* It being proved that the amount of annual profits was overstated by 9,500*l.*:—Held, that in order to arrive at the amount to be deducted from the purchase-money, the purchase-money of 365,000*l.* must be taken as the capitalized value of the annual profits stated, and that the sum to be deducted must bear the same ratio to the 9,500*l.* as the 365,000*l.* bore to the 66,000*l.* *Powell v. Elliott*, 23 W. R. 777—C. A.

When the purchasers of a colliery, which it was necessary should be to a certain extent worked, had entered into possession and afterwards filed a bill to rescind the contract on the ground of fraudulent misrepresentation, the court, on the application of the purchasers, who alleged that the colliery was worked at a loss, appointed a receiver and manager to work the colliery until the hearing, the means of working to be supplied by the purchasers. *Gibbs v. David*, 23 W. R. 786—V. C. M.

#### IV. DEMISES OF MINES.

##### 1. Leases and Agreements, in General.

**Contracts for leases; and specific performance of contracts.**—[A person contracting for the lease of a mine, cannot resist its performance, on the grounds of his ignorance of mining matters, and of the mine turning out worthless. *Haywood v. Cope*, 25 Beav. 140; 4 Jur., N. S. 227; 27 L. J., Chanc. 458.]

The taking possession of a mine by intended lessee is not an acceptance of the title. *Id.*

A. had worked the coal under his estate, but abandoned it as unprofitable. Twenty years afterward B. cleared the pit and examined the coal in the shaft with two other persons, and subsequently contracted for a lease. The colliery turned out worthless:—Held, that B. could not resist a specific performance on the ground of A. not having communicated the fact of his having worked the mine and found it unprofitable. *Id.*

A., on the application of B. and C., agreed to grant them a lease of a vein or seam of coal, called the S. vein, "about two feet thick, with the overlying and underlying beds of clay," on and under a farm called X., at 100*l.* per annum as certain or dead-rent, and royalties of 9*d.* per ton for the coal and 4*d.* per ton for the clay; the lessees to have any part of the farm at the rent of 10*l.* per acre, and to expend not less than 500*l.* in the erection of a manufactory and buildings for the purpose of working the coal and clay; way-leave of 1*d.* per ton for foreign coal and clay; lessees to have power to determine the lease at the end of three years on giving one-year's notice. On action by A. for specific performance, B. and C. alleged that the S. vein did not exist under the farm, and it was proved that on search it had not been found, but counter evidence was given to show that

the searches were insufficient:—Held, that under the agreement, B. and C. had, in consideration of the dead-rent reserved, obtained license to enter and search for the vein, but not a warranty that such vein was to be found; and, accordingly, that A. was entitled to specific performance of the contract whether the S. vein existed or not. *Jefferys v. Fairs*, 4 L. R., Ch. Div. 448; 46 L. J., Chanc. Div. 113; 25 W. R. 227; 36 L. T., N. S. 10—V. C. B.

**Power to demise; and validity and effect of leases, and agreements creating tenancies, in general.**—A power was reserved in a deed of settlement to a tenant for life to lease collieries and coal mines, "together with all such powers, authorities, accommodations, liberties and privileges as shall be necessary, or are usually contained in leases of collieries or mines in the county, place, or neighborhood where the collieries or mines are situate, for seeking, winning, working, drawing, taking and carrying away the coals within and under the same;" the leases were not, except in the cases provided for, to be made punishable for waste by any express words. A mining lease, granted in pursuance of this power, authorized the lessee to build and erect all such engines, workmen's cottages, &c., as should be necessary and proper for the carrying out the works, and also to dig and take building materials for buildings required for the purpose of the colliery. The lessees built several cottages for workmen. It was found by a jury that the power to build cottages in places convenient to the works of the mine was a necessary and usual power in mining leases:—Held, that the lease was valid. *Morris v. Rhydyfedd Colliery Company*, 3 H. & N. 473; 27 L. J., Exch. 480; affirmed on appeal, 5 Jur., N. S. 339; 3 H. & N. 885; 28 L. J., Exch. 119; 7 W. R. 95—Exch. Cham.

An estate, with the mines and minerals, was settled, and power was given to the trustees to demise the hereditaments and the coal and minerals, but so as the lessees should not be punishable for waste:—Held, that the last clause was repugnant, and that the trustees might demise mines, both opened and unopened, at the date of the settlement. *Daly v. Beckett*, 24 Beav. 114; 3 Jur., N. S. 754.

Held, also, that the royalty reserved by the lease was in the nature of rent, and was payable to the tenant for life, and did not form corpus. *Id.*

A lessor granted a lease or license to mine under lands to two persons as trustees for a mining company. The company repudiated the lease, and alleged that they were entitled to mine under the custom of the district independently of the lease, and proceeded to mine accordingly. The applicability of the custom to the particular lands was disputed by the lessor. He filed a bill against the surviving trustee and the managing committee of the company, praying that the lease might be declared binding, not only at law on the trustee, but also in equity on

the partners in the company, and that the trustee at law and the other defendants in equity were bound by the covenants in the lease; the bill also prayed on account of that the trustee or the company might be ordered to pay to the lessor the royalty to which he was entitled under the lease, and an injunction to restrain the working of the mine except in accordance with the lease:—Held, that the lease must be treated as binding in equity on the company, and a decree made in accordance with the prayer against the company. *Wright v. Pitt*, 12 L. R., Eq. 408; 40 L. J., Chanc. 558; 25 L. T., N. S. 13; 20 W. R. 27—V. C. M.

A proviso for re-entry on non-observance of the lessee's covenants is not a usual clause in a mining lease, to be inserted in the absence of express stipulation. *Hodgkinson v. Cross*, 44 L. J., Chanc. 680; 10 L. R., Ch. 662; 23 W. R. 885; 33 L. T., N. S. 388; reversing the decision of Bacon, V. C., 19 L. R., Eq. 591; 23 W. R. 406; 44 L. J., Chanc. 238; 33 L. T., N. S. 122.

D. and H. agreed between themselves, in writing, to purchase lands then in the market. By this agreement D. was to have the surface at three-fourths, and H. the minerals at one-fourth of the whole purchase-money. H. afterwards entered into a contract with the owner of the lands to purchase them from him. The lands were duly conveyed to D. by the owner, H. being a party to the purchase deed, and executing a release of all his interest in the lands to D. Afterwards, by an indenture of the 12th July, 1834, D. granted, bargained and sold to H., his executors, administrators and assigns, all the minerals lying under the lands, upon terms substantially the same as those contained in the previous agreement between D. and H. The indenture of the 12th July, 1834, was not enrolled as a bargain and sale, and there was no livery of seizin to make it operate as a feoffment. There were seven seams of coals and minerals, lying under the lands, and soon after the execution of the deed, H. began to work and get the coal under the lands, and continued so to do between 1834 and 1844. He did not, however, go below the two first seams of coal, and on his ceasing to work in 1844, H. left tramways, implements, &c., in the tunnels and levels he had made. In 1855, H. by deed, conveyed the minerals (except the two first or upper seams), with power to dig for and get the coal, to the plaintiffs, who shortly afterwards entered, and bored down below the two first seams, in order to try for, but they did not work the coal. D. died in 1848, and in 1857 his devisee and heir at law, by deed, granted the lands (except the coal thereunder theretofore sold and conveyed to H.) to S., subject as to the beds of coal under the same to the indenture of the 12th July, 1834. In 1872, S. granted a lease of the coal under the lands to the defendants, and they entered and worked, and got coal under the lease in 1872. On the 1st January, 1873, the surviving trustee for sale of D. granted and con-

ed unto S. and his heirs, all the seams of coal lying under the lands, subject to such right or interest as legally passed to H., his executors, administrators or assigns, under the indenture of the 12th July, 1834.

**Died in 1861:**—Held, that the plaintiffs, through H., had sufficient possession of all the seams of coal to entitle them to maintain an assize against the defendants, who were mere wrong-doers, for intruding upon the plaintiffs' mines. *Low Moor Company v. Stanley Coal Company*, 34 L. T., N. S. 186—A.; affirming *S. C.*, 33 L. T., N. S. 436—Exch.

The deed of the 12th July, 1834, and the possession taken under it by H., operated to make H. tenant at will to D. of the mines. The Statute of Limitations began to run from the first year of such tenancy, and had given the plaintiffs a good title when the trespasses were committed. *Ib.*

When the thing let turns out to be a nonentity, the lessee is not bound. *Gowan v. Christie*, 2 L. R., H. L., Sc. App. 273.

In such a case it is perfectly reasonable that the lease should be subject to reduction. *Ib.*

When there is a total destruction or an exhaustion of the subject-matter of a lease, the lessee is entitled to abandon it. *Ib.*

The lessee of a mine, although entitled to rely on the existence of the subject-matter, takes all risk of its failure, either as to quantity or value, unless either is expressly warranted. *Ib.*

At common law, the mere fact of "unworkability to profit" affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes. There is in such a case no legal warranty on which the lessee can rely. *Ib.*

What is termed a mineral lease is really a sale out and out of a portion of the land. *Ib.*

**What lands and mines demised.**—In construing the words "or thereabouts," when used to qualify the statement of the estimated quantity of mines agreed to be demised, the same principles ought to be acted upon as would guide the court in construing the same words in an agreement for a sale or a demise of the surface. *Davis v. Shepherd*, 1 L. R., Ch. 410; 35 L. J., Chanc. 581; 15 L. T., N. S. 122.

A lease professed to demise to lessees all mines and minerals "in, upon, or under all or any part of the messuages or tenements, fields, closes, or parcels of land, described and set forth in the map thereunto annexed; and also, in, upon, or under all or any part of that large tract of land, called Mold mountain; all which premises are situate, &c., and are bounded, &c.; and all which are particularly described, delineated, and distinguished in the map or plan, annexed to these presents, and which, by agreement of all parties thereto, was meant and intended to be taken as part of that indenture:—Held, that the words of

the demise were not to be controlled or restrained by the map, but might receive full effect, and be held to include a particular spot, the boundary of which could not be traced with strict accuracy upon the map, by reason of the smallness of the scale upon which it was drawn. *Taylor v. Parry*, 1 Scott, N. R. 576; 1 M. & G. 604; 4 Jur. 967.

A lease of land (without mentioning mines) will entitle the lessee to work open but not unopened mines. If there are open mines, a lease of land with the mines therein will not extend to unopened mines; but if there are no open mines, a lease of land, together with all mines therein, will enable the lessee to open new mines. *Clegg v. Rowland*, 2 L. R., Eq. 160; 35 L. J., Chanc. 396; 14 W. R. 530; 14 L. T., N. S. 217.

Where there was a conveyance to trustees of land, together with the mines thereunder, and a power to grant leases for fourteen years without mentioning mines:—Held, that the trustees had no power to grant leases of unopened mines. *Ib.*

By a deed of the 20th of September, 1854, R. demised to C. a fire-brick manufactory, and he granted to C. power to dig fire-clay from under lands therein described, the term of the demise and license being twenty one years from the 6th of April, 1854. By a deed of the 31st of August, 1863, R. demised to B. all the coal mines and seams of coal, and also all the mines, seams, veins or beds of ironstone and fire-clay found in connection with such coal seams as are workable as coal seams," under the same lands as those to which C.'s license applied, for forty two years from the 22d of November, 1858. In 1866, C. commenced opening an old pit, called the Montague Pit, with the intention of reaching a seam known as the Stone Coal Seam, in order to work the fire-clay in connection with that seam. Previously to this, in 1864, B. had sunk a pit through the Stone Coal Seam, to get at a lower coal seam, and he had taken samples of the fire-clay in the Stone Coal Seam, some of which samples he had sent to C. to be tested, and he had afterwards sold some of the fire-clay to C. for the purpose of being manufactured. After C. had expended a considerable amount of money on his works at the Montague Pit, but before he had reached the Stone Coal Seam, B. gave notice to him that he had already proved the Stone Coal Seam, and was about to work it, and that it would be an invasion of his rights if C. was to work that seam. Ultimately C. filed in equity a bill to restrain B. from working the fire-clay or the coal in the Stone Coal Seam under any part of the lands to which C.'s license applied, during the continuance of C.'s term:—Held, that the words "coal seams workable as coal seams" must be construed, regard being had to all and every the powers conferred by the lease in which those words were found, and that, looking at those powers and at the evidence, which, in the opinion of the court, showed that the Stone Coal Seam was workable at a profit when both the coal



and the fire-clay were taken into account, that seam must be considered to be comprised in B.'s lease. *Carr v. Benson*, 3 L. R., Ch. 524; 18 L. T., N. S. 696; 10 W. R. 744.

Held, also, that as C.'s license was not an exclusive license, the licensor had still a right to deal with the property comprised in that license in any manner not inconsistent therewith. *Id.*

Held, also, that B. had first taken possession of the Stone Coal Seam, and that C. had no right to an injunction to restrain B. from working that seam. *Id.*

Held, also, that no knowledge could be imputed to the licensor of the extent of C.'s business, or of the probability that he would require for the purposes of that business during his term of twenty-one years the whole of the fire-clay lying under the lands comprised in his license. *Id.*

#### Covenants for title and quiet enjoyment.]

—In 1844 the defendant was party to a twenty-one years' lease of coal mines, which gave certain powers over the surface incidental to the working of those mines and an adjoining colliery. The coals so demised were substantially worked out before September, 1845. In October, 1845, the defendant sold and conveyed the land to J., who knew of the workings, and the defendant covenanted with him for title, for quiet enjoyment, and against incumbrances. In July, 1846, J. sold and conveyed to the plaintiff, who was ignorant of the workings. In 1865, in consequence of these mining operations, the land subsided, and houses built on it by J. and the plaintiff were damaged. In 1848, subsequently to the plaintiff becoming owner of the land, and within twenty years before action, the lessees, or persons acting under their authority, entered the mines and took some fire-clay (which was not included in the demise) and a few loose pieces of coal. In an action on the covenants, the declaration in which alleged that while the plaintiff was seized the lessees entered upon the land, and worked, got, and carried away the coal, whereby he had lost the coal, and the land subsided:—Held, that as to the breach of the covenant for quiet enjoyment by the removal of coal which caused the subsidence, there was a fatal variance between the declaration and the evidence, which under the circumstances the court declined to amend. *Spoor v. Green*, 9 L. R., Exch. 99; 43 L. J., Exch. 57; 22 W. R. 547; 30 L. T., N. S. 893.

Held, also, by Bramwell, B., and Cleasby, B., first, that the fact of the coals having been worked out was no breach of the covenant for title, J. never having bought those coals; that the subsistence of the lease in respect of the coal left unwrought, and the powers (not exercised) incident to the working of other collieries, did not constitute a breach; that the breach (if any) was complete in the time of J.; and (by Bramwell, B.) that the action was barred by the Statute of Limitations. *Id.*

Held, secondly, that neither the acts of trespass in taking the fire-clay, in 1848, nor the subsidence caused in 1865 by the workings in 1845, were breaches of the covenant for quiet enjoyment, on the ground that the first was a mere trespass, and that, as to the second, the subsidence gave no new cause of action; the principle of *Bonomi v. Backhouse* (9 H. L. Cas. 503) not applying to a case where the subsidence is caused by a wrongful taking of the plaintiff's minerals. *Id.*

Held, by Kelly, C. B., first, that the subsistence of the lease was a continuing breach of the covenant for title, in respect of which the plaintiff was entitled to nominal damages; and, secondly, that the removal of the small pieces of coal, in 1848, was a breach of the covenant for quiet enjoyment, in respect of which the plaintiff was also entitled to nominal damages; and, thirdly, that, the removal of the coal by the lessees being lawful, the subsidence in 1865 gave a new cause of action to the plaintiff. *Id.*

A lessor of a mine or vein of coal lying under certain closes covenanted that the lessee should and might, peaceably and quietly, have, hold, occupy, possess and enjoy the mine, without any let, suit, trouble, molestation, interruption or disturbance whatsoever. The lessor, in working iron-stone lying between the surface of the soil and the demised coal, caused part of the roof of the coal-mine to crash and fall in, and to be flooded. The working of the iron-stone was done in a workmanlike manner:—Held, that these acts constituted a breach of the covenant, for which the lessee might maintain an action thereon, and being continued at the time of action brought, also entitled him to an injunction restraining the lessor from working the iron-stone within such a distance of the surface as interfered with the lessee getting the coal with full advantage and profit. *Shaw v. Stenton*, 2 H. & N. 858; 27 L. J., Exch. 253.

As to interpretation of covenants in respect of mode of working mines,—see this title, V., 3; remedies for unauthorized workings,—see this title, V., 4.

**Reservation of rent, royalties, &c.]—A** mining lease contained the following covenant:—That the lessees should deliver, quarterly, to the landlord, two equal thirteenth parts of all coal which should be raised, or should pay him, quarterly, the value in money: provided, that, in case at the end of the first quarter of any year such deliveries or payments should not have equaled in value or amount 38*l.* 10*s.*, then the lessees should also pay at the end of every such quarter such additional rent or sum of money as would make up 38*l.* 10*s.*; and in case at the end of the second quarter such deliveries or payments for that and the preceding quarter should not have equaled in amount 75*l.*, then the lessees should also pay at the end of every such second quarter such further sum as would make up 75*l.*; and in case at the

A of the third quarter such deliveries or payments for that and the two preceding quarters should not have equalled in amount value 111*l.* 10*s.*, then the lessees should pay at the end of every third quarter such other sum as would make up 111*l.* 10*s.*; and in case on the 24th day of June in any year the deliveries and payments for that and the three preceding quarters should not have equalled in amount or value 150*l.*, then the lessees should pay on 24th day of June such an additional rent or sum as would make up 150*l.*, it being the intent and meaning of the parties to the lease that the royalties reserved should always amount to 150*l.* 10*s.* per annum at the least:—Held, that, in calculating the amount due to the plaintiff at the end of each year, the excess of royalty above 38*l.* 10*s.* occurring in one quarter, was not to be set against the deficiency in a previous quarter, and deducted from the sum payable to the plaintiff in respect of the latter quarter. *Bishop v. Goodwin*, 14 M. & W. 260; 14 L. J., Exch. 290.

A. demised to B. for fifty years all his right and interest in the coals and other minerals in an estate, in as ample a manner as was demised to him, A., by D., yielding and paying yearly for every ton of coal that should be worked, raised or got by B., in each year, not exceeding 13,000 tons in any year, 8*d.* per ton, or yielding and paying that amount of money, viz., 433*l.* 6*s.* 8*d.*, each year as fixed rent, whether the coal should be worked or not; and for every ton of coals that should be worked, raised or got in each year, above 13,000 tons, 9*d.* per ton; and B. covenanted that he would raise and work 13,000 tons of coal in each year, and pay 8*d.* per ton royalty for the same, or would pay that amount of money, viz., 433*l.* 6*s.* 8*d.*, each year as a fixed rent, whether the coals were worked or not. There was a distinct reddendum and covenant for payment of rent in respect of other minerals. In an action on this indenture, the breach assigned was, that B. did not raise or work 13,000 tons of coal in each year, and pay at the rate of 8*d.* per ton for the same, or pay that amount of money, viz., 433*l.* 6*s.* 8*d.*, each year as a fixed rent, whether the coals were worked or not, but on the contrary thereof, 210*l.* 13*s.* 4*d.* of the rent for half a year became due and was unpaid:—Held, first, that the whole rent claimed was payable, although the mine was so exhausted that the lessee could not raise 13,000 tons of coal in a year. *Bute v. Thompson*, 13 M. & W. 487; 14 L. J., Exch. 487.

Held, secondly, that the breach was well assigned. *Id.*

Coal mines were demised at a royalty per ton upon the coal which might be got, and also at a rent of 800*l.* a year, or so much thereof as, with the royalty, should amount to that sum, such rent of 800*l.* to be a minimum rent for the coal demised, and the lessee covenanted to pay the rents and to work the

mine:—Held, that a court of equity would not restrain an action by the lessor for the minimum rent, although the coal proved to be not worth the expense of working; but that if the lessor was to sue upon the lessee's covenant to work the mine, the court would interfere. *Ridgway v. Sneyd*, 1 Kay, 627.

A lessee of mine A., took a lease of B., an adjoining mine, from the plaintiff, by which he was entitled to get the coal from the B. mine at a certain rent, and also to be at liberty to bring the coal got in the A. mine to the surface by way of outstroke through the B. mine, on payment of 11½*d.* per ton for outstrokes, watercourse rent and shaft rent. No rent was to be paid for any coal got from the B. mine which should be used or consumed on or for any engine employed in working or carrying on the mines demised:—Held, that no rent was payable for coal used in working the engine of the B. mine when employed in bringing up the coal from the A. mine, such engine being at the same time used for keeping the B. mine free from water. *Senhouse v. Harris*, 5 L. T., N. S. 635—Q. B.

The owner of land, with mines underneath the surface, granted a lease of part of his land, and the mines under it, to the Pontypool Iron Company, carrying on the manufacture of iron. The lease contained this covenant: "yielding and paying to the lessor, his heirs and assigns, for every quantity of 2,520 lbs. of coal, ironstone, fire-clay, limestone, building stone, or any other mines or minerals, the produce of any lands or mines not intended to be included in the present demise, but which shall be raised within the distance of twenty miles from any part of the premises hereinbefore expressed to be demised, and shall be brought through, over, or under the lands, mines, and premises, the royalty or sum of one halfpenny." The company afterwards granted an under-lease of a part of the surface of the land to a railway company, which made sidings thereon, for the purpose of more conveniently and safely shunting trains for a time, before forwarding them to their destination. Trains containing minerals raised within the twenty miles (often mixed with minerals in no way coming within the words of the covenant, and sent by other companies upon the line) were frequently, for safety and convenience, shunted for a time on the sidings formed on the land, and afterwards taken out and conveyed to their destination:—Held, that the minerals raised within the described distance did come within the words of the covenant, even though brought on the land only for the temporary purpose of being shunted there, and were therefore liable to the payment of the royalty. *Great Western Railway Company v. Rous*, 4 L. R., H. L. Cas. 650; 39 L. J., Chanc. 553; 23 L. T., N. S. 360; 19 W. R. 169.

A covenant, in a lease of iron mines, to pay a certain rent "free of all rates, taxes and deductions whatsoever, parliamentary, parochial, or of any other nature," is not a

"specific contract to pay the poor-rate, in the event of the abolition of the exemption" of iron mines, within s. 8 of the Rating Act, 1874, 37 & 38 Vict. c. 54; and the lessee is therefore entitled under that section to deduct half the poor-rate from the rent. *Devonshire (Duke) v. Barrow Hematite Steel Company*, 2 L. R., Q. B. Div. 286; 46 L. J., Q. B. Div. 435; 25 W. R. 469; 36 L. T., N. S. 355—C. A.; affirming the decision of the Queen's Bench Division, 25 W. R. 60; 35 L. T., N. S. 474.

As to compensation for improper working of mines under demises,—see this title, V., 4.

**Assignment of leases; and liabilities of assignees.**—A mining lease contained a covenant by the lessee not to assign without the consent of the lessor. The lessee made an agreement with three other persons to give up his right in the lease to them, and to execute all necessary deeds to carry the arrangement into effect, and that, in the meantime, the agreement should have the same force as if such deeds had been executed. No consent of the lessor had been obtained, nor were any such deeds executed. The three entered into possession and worked the mines, and after a time they assigned their interest in the mines and other property comprised in the lease to a man of straw:—Held, that the three, being mere equitable assignees of the lease, were not liable to the lessor for the rents and covenants in the original lease for the time they were in possession of the property. *Cox v. Bishop*, 3 Jur., N. S. 499; 26 L. J., Chanc. 389; 8 De G., M. & G. 815.

A mining license was granted by deed to three persons as joint tenants, and the licensees covenanted jointly and severally to pay compensation in respect of damage to the surface. Two out of the three licensees assigned over. Damage having been done:—Held, that the covenant was one running with the subject-matter of the grant, and that the assignee from the two licensees was liable under the covenant for the whole compensation due to the grantor. *Norval v. Pascoe*, 34 L. J., Chanc. 82—V. C. K.

**Surrender of works.**—A lease of coal mines and iron works contained a covenant by the lessee, to yield up to the lessor, at the expiration or other sooner determination of the term, all ways and roads in or under the demised hereditaments, in such good order, repair and condition as that the coal and iron works might be continued and carried on by the lessor:—Held, that tram-plates, fastened to iron or wooden sleepers, which were not let into the ground, but rested thereon, were not included in the terms works or ways or roads, and consequently might be taken up, sold or removed by the lessee. *Beaufort v. Bates*, 3 De G., F. & J. 381; 31 L. J., Chanc. 481.

As to mode of working mines under demises,—see this title, V., 3.

## V. WORKING MINES.

### 1. By Owners of Adjoining Lands, or Owners of Minerals and not of Surface; in General.

**Right of support, vertical and lateral.**—It is the natural right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine, so long as such prejudice does not arise from the negligent or malicious conduct of his neighbor. *Smith v. Kenrick*, 7 C. B. 515; 13 Jur. 362; 18 L. J., C. P. 172.

Where the surface of land belongs to one man, and the minerals underneath it belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. *Humphries v. Brogden*, 15 Q. B. 739; 15 Jur. 124; 20 L. J., Q. B. 10.

If the surface, while unincumbered by buildings, and in its natural state, subsides and is injured by the removal of the subjacent mineral strata, although the operation may not have been conducted negligently, and contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. *Id.*

If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for his house from the adjoining land of another, at least not until twenty-one years have elapsed since the house first stood on the excavated land, and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land, of such right to support, may be inferred, for rights of this sort can have their origin only in grant. *Partridge v. Scott*, 3 M. & W. 220; 1 H. & H. 31.

The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property, and till that is interfered with, he has no legal ground of complaint, although in fact something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property. *Backhouse v. Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; 7 Jur., N. S. 809; 9 W. R. 769; 4 L. T., N. S. 754.

The title of the owner of surface land may be so acquired as to qualify the *prima facie* right to support from the subjacent strata, and to deprive him and those claiming under him of an action for damage caused by the working of the minerals underneath. *Botham v. Wilson*, 2 Jur., N. S. 756; 25 L. J., Q. B. 362; 6 El. & Bl. 593; affirmed on ap-

peal, 8 El. & Bl. 123; 27 L. J., Q. B. 61—Exch. Chanc.; and in House of Lords, 8 H. L. Cas. 348; 6 Jur., N. S. 965; 30 L. J., Q. B. 49.

Semble, that there may be a valid claim by custom, or prescription in a manor, for the lord or his licensors to work mines so as to destroy the tenant's surface. *Wikefield v. Buccleuch*, 23 L. T., N. S. 102; 39 L. J., Chanc. 411; 4 L. R., H. L. Cas. 377. See *S. C.*, 4 L. R., Eq. 613; 36 L. J., Chanc. 763; 16 L. T., N. S., 475; 15 W. R. 788.

Where the surface of land and the minerals under it belong to different owners, the owner of the surface is *prima facie* entitled to support from the subjacent strata; and the owner of the minerals in working them is bound to leave sufficient support for the surface in its natural state. *Smart v. Morton*, 1 Jur., N. S. 825; 3 C. L. R. 1004; 24 L. J., Q. B. 260; 5 El. & Bl. 30.

The plaintiff's house was built (more than twenty years before suit) upon land under which coal mines had been worked, according to the custom of the country, leaving the soil weaker than it would otherwise have been. The defendant, knowing this, worked his coal mines under land adjacent (but not immediately adjoining), so as to cause the soil intervening to give way, and thus to cause the soil under the foundation of plaintiff's house also to give way:—Held, that the defendant was liable; and semble, that after twenty years a house acquires a right to the lateral support of the soil around it. *Browne v. Robins*, 4 H. & N. 186; 23 L. J., Exch. 250.

The plaintiff in 1824 built a house on a certain waste, and in the following year obtained a grant from the crown of the surface, excepting mines. The house was about thirty yards from a quarry. In 1840, the tenant of the owner of the minerals, who claimed a right to take the minerals without making compensation for damage to the surface, began to get stone from under the house, in consequence of which and of the blasting operations the house became untenable. In 1853, the defendant cut away the supports which had been left under the house, and the house fell in. The judge left the question to the jury, who found that the plaintiff had enjoyed the right of support for his house, on the foundations on which it stood, without interruption for twenty years. On motion for a new trial, on the ground that the judge ought to have told the jury that the enjoyment was contentious and not as of right:—Held, that the question was properly left to the jury. *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J., Exch. 173.

The rights and obligations of the owner or occupier of adjacent and subjacent mines are not the same. The surface owner is entitled, as against the occupier of adjacent mines or surface, to that support only which the adjacent land and mines afford to his property in its natural condition, and can acquire a right to support for buildings on his land, only by possession or enjoyment for

twenty years. The occupier, therefore, of adjacent mines, working them so as to subvert buildings on the surface, is not liable to an action unless the buildings have existed for twenty years before the working which has caused the injury; whereas the surface owner may maintain an action against the subjacent mine occupier for an injury to buildings on the surface, however recently erected, if it is before the commencement of the title and possession of the occupier of the mines. *Richards v. Jenkins*, 18 L. T., N. S. 437; 17 W. R. 30—Exch.

Between the land of the plaintiffs and that of the defendants, who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was, that when the defendants worked the coal under their land, subsidence was caused in the surface of the plaintiffs' land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings:—Held, that the plaintiffs had no right of action against the defendants. *Birmingham (Mayor, &c.) v. Allen*, 6 L. R., Ch. Div. 284; 46 L. J., Chanc. Div. 673; 25 W. R. 810; 37 L. T., N. S. 237—C. A.

The support to which a land owner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state is sufficient to afford the requisite support. *Ib.*

**Obligation to fence shafts.]**—A person entitled to the minerals under the land of another, with license to make a mine shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil, to fence the shaft so as to prevent its being a source of danger to his cattle, which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing. *Williams v. Groucott*, 4 B. & S. 149; 9 Jur., N. S. 1237; 32 L. J., Q. B. 237; 11 W. R. 886; 8 L. T., N. S. 458.

As to statutes requiring shafts to be fenced,—see this title, VIII.

**Custom or prescription to divert or obstruct water-courses.]**—The stannars of Devonshire are not entitled by custom to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands. *Bastard v. Smith*, 2 M. & Rob. 120—Tindal.

The rights of tin-bonders, according to the customary law of Cornwall, to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under 2 & 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user, nor will this right be affected by an agreement with the tin-bonders for a money payment to abstain from fouling the water by streaming their tin therein. *Gavel v. Martyn*, 19 C. B., N. S. 732.

The privilege of washing away sand, stone and rubble, dislodged in the necessary working a tin mine, and of having the same sent down a natural stream running through the plaintiff's land, may be the subject of a grant, and may be pleaded as a prescriptive right, under the 2 & 3 Will. 4, c. 71, to an action charging the defendant with throwing such stone, and and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom. *Carlyon v. Lovering*, 1 H. & N. 784; 26 L. J., Exch. 251.

As to rights to mines under customs and prescriptions, in general,—see this title, II.

**Inundation; working under water-courses.]**

—An owner of freehold lands and his lessee will be restrained from working mines under a watercourse otherwise than in a manner not likely to prevent the plaintiff from enjoying an uninterrupted flow of water to his works. *Elwell v. Crouther*, 8 Jur., N. S. 1004; 31 Beav. 163; 31 L. J., Chanc. 763; 10 W. R. 615.

The owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage:—Held, that the party excavating was liable in trespass for breaking into the neighboring mine, but not in an action on the case for omitting to close up the aperture on his neighbor's soil, though a continuing damage resulted from its being unclosed. *Clegg v. Dearden*, 12 Q. B. 576.

An owner of a mine at a higher level than an adjoining mine has a right to work the whole of his mine in the usual and proper manner for the purpose of getting out the minerals in any part of his mine; and he is not liable for any water which flows by gravitation into such adjoining mine from works so conducted. But he has no right, by pumping or otherwise, to be an agent in sending water from his mine into the adjoining mine. *Baird v. Williamson*, 15 C. B., N. S. 376; 33 L. J., C. P. 101; 13 W. R. 150; 9 L. T., N. S. 412; 10 Jur., N. S. 152.

The defendants worked mines in two places (A. and B.), B. being to the deep of A., towards which the water from A. would naturally flow in a proper course of working, and to save pumping, stopped up the only opening between A. and B., so as to dam up the water, in A., which they abandoned. The water thus dammed up rose so high as to overflow by natural gravitation into the plaintiffs' mines, through openings made by their predecessors trespassing in the defendant's mines:—Held, that the plaintiffs were not entitled to any relief, but inasmuch as the defendants had, in the first instance, and until restrained by injunction, used artificial means (pipes) to send the water to the plaintiff's

mines, the bill was dismissed without costs. *Lomax v. Stott*, 39 L. J., Chanc. 834—R.

A. was the lessee of mines. B. was the owner of a mill standing on land adjoining that under which the mines were worked. He desired to construct a reservoir, and employed competent persons, an engineer and a contractor, to construct it. A. had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care was taken by the engineer or the contractor to block up these shafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passages and flooded A.'s mine:—Held, that A. was entitled to recover damages from B. in respect of this injury. *Rylands v. Fletcher*, 8 L. R., H. L. Cas. 330; 37 L. J., Exch. 161; affirming 8 C. 10, nom. *Fletcher v. Rylands*, 4 H. & C. 263; 1 L. R., Exch. 263; 12 Jur., N. S. 603; 35 L. J., Exch. 154; 14 W. R. 799; 14 L. T., N. S. 523—Exch. Cham.

The rule that a mine owner must protect himself against water flowing from a neighboring mine, in the ordinary course of mining operations, has no application to a case where the consequence of a man's mining operations is the tapping of a river bed, and the precipitating of the water of the river into his own mine and thence into that of his neighbor. *Crompton v. Lea*, 23 W. R. 53; 19 L. R., Eq. 115; 44 L. J., Chanc. 69; 31 L. T., N. S. 469—V. C. H.

A bill alleged that the result of certain mining operations of the defendant must inevitably be the tapping of a river bed, and the consequent flooding of the mines of the defendant and the plaintiff; and it further alleged, in substance, that the operations in question were not legitimate mining operations, and could not result in any good to the defendant; and it prayed for an injunction against the defendant:—Held, that the bill was sustainable. *Id.*

The owner of a mine, who by means of a pit or shaft intercepts water which previously flowed in unascertained underground channels, is not entitled by any means not in the ordinary and proper course of working his mine to cast the water thus intercepted upon the land of his neighbor, even though, if the water had not been thus intercepted, it would have flowed naturally upon that neighbor's land. *West Cumberland Iron and Steel Company v. Kenyon*, 6 L. R., Ch. Div. 773; 46 L. J., Chanc. Div. 850—Fry, J.

By intercepting the water the person who digs the pit or shaft makes the water his own property, and must take the burden as well as the benefit of it. And if he afterwards casts it wrongfully on his neighbor's land,



he will be liable for the damage thus done to him. *Id*

The plaintiff's mines adjoined the mines of the defendants, the former being at a lower level than the latter. The defendants had diverted a natural water-course which flowed over their land above their mines into a new channel which was of somewhat larger cubical dimensions than the old one, but contained several bends and curves. On the occasion of a rainfall of an exceptional character, the water overflowed the artificial water-course, carrying away a portion of its bank, and passing over the defendants' land escaped through certain fissures and holes, which had been made in the course of the working of the defendants' mines, into those mines, and thence into the mines of the plaintiff. In an action for the injury caused to the plaintiff's mines by the entrance of the water, the jury found that the flooding of the plaintiff's mine was caused by the act of the defendants, as distinguished from natural causes; that it was caused chiefly by the diversion of the stream, but also by the condition of the new channel; that there had been an exceptional rainfall, but that the new channel was insufficient; that the stream in its diverted course would be more likely to overflow and so to do more damage to the plaintiff; and that what was done by the defendants would have been done in the ordinary, reasonable, and proper working of their mine if the diversion of the stream had been properly executed.—Held, that the verdict was rightly entered for the plaintiff. *Musgrave or Fletcher v. Smith*, 26 W. R. 83; 37 L. T., N. S. 367; 2 L. R., App. Cas. 781—H. L.; and see *Smith v. Fletcher*, 9 L. R., Exch. 64; 43 L. J., Exch. 70; 31 L. T., N. S. 190—Exch. Cham.; and *S. C.*, 7 L. R., Exch. 305; 41 L. J., Exch. 193; 27 L. T., N. S. 164; 20 W. R. 987.

A. and B. were lessees under the same landlord of the minerals under two adjacent parts of the same estate. The soil over the mines was in its natural condition impervious to water. B. so worked his mine that the surface of the ground cracked and sank, and the rainfall and surface water flowed through the fissures and found its way into A.'s mine, which was at a lower level than B.'s.—Held, that B. was not liable for the damage so done in the natural course of user of his own land. *Wilson v. Waddell*, 35 L. T., N. S. 639; 2 L. R., App. Cas., Sc. 95—H. L.

Where mineral workings have caused a subsidence of the surface, and a consequent flow of rainfall into an adjacent lower coal field, the injuries, being entirely from gravitation and percolation, are not a valid ground for any claim of damages. *Id*

When there is an agreement between the owner and his tenant that, when the mines are worked out, the surface shall be restored, the owner may complain if it is not restored; but that gives no claim to any one else. *Id*

**Under canals.**—A canal act provided, that no owner of any mines should carry on any

work for the getting of coal or minerals within twelve yards from the canal, or any reservoir to be made by the company, nor should any coals or other minerals be got under any part of the canal, or towing paths thereunto belonging, or any such reservoir, or any land or ground lying within the distance of twelve yards of either side of the canal, or any reservoir, except as thereafter mentioned, without the consent of the company. By another clause it was provided, that when the owner of any coal mine, lying under the canal, towing paths, reservoir, &c., or within the distance thereinbefore limited, should be desirous of working the same, then such owner should give notice of his intention to the company, three months before he should begin to work such mines lying as aforesaid; and upon the receipt of such notice, it should be lawful for the company to inspect such mines in order to determine what coal or other minerals might be come at and gotten without prejudice to the canal; and if the company should neglect to inspect such mines within thirty days next after the receipt of such notice, then the owners of such mines were authorized to work such part of the said mines as lay under the canal, or within the distance aforesaid; and if upon inspection the company should refuse to permit the owners of the mines to work such part of the mines lying as aforesaid, or any part thereof, as they might have come to and gotten, then the company should within three calendar months pay the owners the value thereof. By another clause, nothing in the act contained was to defeat the right of any owner of lands or grounds in, upon, or through which the canal should be made, to the mines lying within or under the lands or grounds to be set out or made use of for such canal, but all such mines were reserved to such owners respectively; and it should be lawful to such owners, subject to the conditions therein contained, to work all such mines, provided that in working such mines no injury was done to the navigation.—Held, that this proviso was to be construed with some qualifications, viz., either as importing that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by working the mines out of the usual mode; and, therefore, where notice had been given by the lessee of a coal mine of his intention to work the same under a reservoir belonging to the canal company, and the latter had not purchased his right within the time limited by the act, that the lessee was entitled to work the mine under such reservoir in the usual and ordinary mode; and the reservoir having been damaged by reason of such working by the lessee, that no action was maintainable by the company against him for such damage. *Dudley Canal Company v. Grazebrook*, 1 B. & Ad. 59.

An act provided that the canal company should not be entitled, on purchasing lands for making a canal, to any coal mines under

the same, but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the company of their intention to work the mines within ten yards of the canal, and that the company might inspect the mines, and might stop the further working of them, on paying compensation to the owners:—Held, that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the company, the latter did not purchase out their rights; and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal owner for such injury, which happened by the default of the company in not purchasing. *Aliter*, where the house of one claiming under a grant from the owner of the soil was undermined. *Wyreley and Essington Canal Navigation v. Brulley*, 7 East, 368. And see *Rea v. Birmingham Canal Company*, 2 B. & A. 570.

A canal act prohibited any proprietor of mines from working the same under or within twenty yards of any tunnel, and directed that if he should be desirous of so working the same, he was to give notice of the intention to the company; and if they refused to permit him to work such part of the mines as he might have gotten, they were to pay him for it such sum as a compensation jury should assess. The lessees of minerals under a lease covenanted with the lessors to work the mines, and raise and get the coal thereout, until the whole of the mines, or as great a quantity as, by working, could be gotten, should be worked out, "except the ribs and pillars, which must necessarily or which the lessors might require to be left." The lessees accordingly gave notice of their intention to work the mines under a tunnel of the company; on which the company gave their refusal, and a jury assessed a sum to be paid by the company to the lessees for their ceasing to work such part of the mines;—Held, in an action by the lessees against the company for non-payment of the assessed sum, to which the company pleaded, that the mines which the lessee so ceased to work were a rib within the meaning of the covenant in their lease, and that the lessors did require the coal to be left by the lessees; also, that the lessees did not cease from working the minerals within twenty yards of the tunnel; also, that after refusal by the company, and before the summoning of the jury, the lessees abandoned their notice, and did, in fact, work and carry away a portion of the coal within twenty yards, that there was no answer to the action. *Swindell v. Birmingham Navigation Company*, 9 C. B., N. S. 241; 7 Jur., N. S. 190; 29 L. J., C. P. 364.

A canal act provided that no owner of mines should carry on any work for getting such mines under any tunnel, or within twenty yards of the same, without the consent of the company; and that no owner of any mines should, without such consent, carry on any

work for getting coal or mineral within twelve yards of the canal, "except as hereinafter mentioned." Then followed clauses which provided that the owner of mines may, without such consent, get coal and minerals beyond the prescribed limits; and that the company may enter upon lands and mines for discovering the distance of the canal from the working parts of such mines, and that if any mine shall be worked contrary to the act, they may use all necessary means for making the canal safe. By a subsequent clause it is provided, that when the owner of any mine lying under the canal, or within the limited distance, shall be desirous of working the same, he shall give the company three months' notice of his intention, and upon the receipt of such notice it shall be lawful for the company to inspect such mines in order to determine what materials may be gotten without prejudice to the canal; and if upon inspection the company shall refuse to permit the owners of such mines to work them, then the company shall within three months pay to the owners the value thereof. Another clause provided, that nothing in the act contained shall defeat the right of any owner of land through which the canal shall be made to the mines under the land used for the canal, and that it shall be lawful for such owner to work such mines, provided that no injury be done to the navigation:—Held, that the prohibition against working any mine within twenty yards of a tunnel, without the consent of the company, was not absolute, but subject to the same exception as working within twelve yards of the canal, and therefore if the company refused to permit the owner of a mine to work it within twenty yards of a tunnel, they were bound to pay him the value thereof. *Birmingham Canal Company v. Dudley*, 7 H. & N. 969; 9 Jur., N. S. 24—Exch. Cham.

By a canal act it was provided that no owner of any mine should work the same under the reservoir of the canal company, except as therein mentioned, without the consent of the company; and that when the owner of any mine under the canal works should be desirous of working the same, such owner should give notice in writing of such his intention to the company before beginning to work, that the company might then inspect such mine, and upon failure or neglect of the company so to inspect within thirty days after such notice, the owner of such mine might work and get such part of the mines as lay under the canal and works; and that if upon such inspection the company should refuse to permit the owner of the mines to work such part of the mine, the company should, within three calendar months after such refusal, purchase the same. And nothing therein contained should be construed to prejudice the right of the lord of the manor or waste, or any owner of any ground through which the company's works should be made, to the mines under such ground, such lord or owner being thereby empowered to work the same, subject to the conditions therein contained; provided

at no injury were done in the working to the navigation:—Held, that this last proviso was to be construed as rendering futile all the obvious provisions of the act; therefore where the owner of mines had given notice of his intention to work them, and the company had neglected to purchase the mines in the manner prescribed by the act:—Held, that the owner of mines might work the same under the company's works, and the company's works having been damaged in consequence of such working, that the company could not maintain an action against the mine-owner to recover compensation for such damage. *Stourbridge Canal Company v. Dudley*, 9 W. R. 158; 80 L. J., Q. B. 108; 7 Jur., N. S. 329; 8 L. T., N. S. 449—Exch. Cham.

By a local act, tenants for life were empowered to sell lands to a canal company for the purposes of their undertaking. It was provided that in case the parties should differ as to the amount of the purchase-money, a jury should assess the amount, and ascertain what sum should be paid for the land, and also what other sums should be paid for past and future damage. The mines and minerals under the lands conveyed were reserved to the owners, with power to the owners to get them, provided no injury should be done to the canal thereby. And the company was empowered to inspect the mines, and to compel the owners to desist from working so as to injure the canal. Under the act a tenant for life sold lands to the company, which were known to contain coal, though at the time it was not known whether the coal would be gotten. Some years afterwards a mine was opened for the purpose of getting the coal underlying the canal. The company restrained the owners of the mine from working so as to endanger the canal:—Held, that, in the absence of a special provision in the act to that effect, the company was not liable to make any compensation to the owners of the coal mine for the loss incurred by them by reason of this restriction on their powers of working the mine. *Reg. v. Aire and Calder Navigation Company*, 10 W. R. 40; 8 Jur., N. S. 115; 80 L. J., Q. B. 337.

An action was brought against a canal company by the owners of mines lying beneath a canal for so negligently managing the canal as to allow water to escape from it and flood the mines. The canal was constructed by a company under the provisions of a local act, by which it was enacted that if any proprietor of mines under the canal, or within twelve yards of either side of it, should be desirous of working them, he should give three months' notice to the company, who, if they failed to inspect the mines within thirty days, should be considered as permitting them to be worked; and if, on inspection, they refused permission, they should be compelled to purchase the same. There was a proviso that in working the mines, "No injury be done to the navigation, anything therein contained to the contrary notwithstanding." By the compensation clauses of the act, the company, in

making the canal, was to do as little damage as possible, and to make satisfaction for damage sustained by the owners of the lands, tenements or hereditaments taken, or used or prejudiced by the execution of the powers of the act, and compensation was made payable for the damage which should be at any time or times whatsoever sustained by the owners of the lands, &c., by reason of making, repairing or maintaining the canal, or by flowing, leaking or oozing of the water over or through the banks of the canal (if complaint be made within six months of the injury). The owners of the mines gave notice of their intention to work the mines within the prescribed distance of the canal. The company did not inspect the mines, and refused to purchase them. The owners proceeded to work the mines, the canal being then in good order, and water-tight. They worked the mines in the usual manner, without which they could not have had the full benefit of the coal, and the effect of such working was to let down and crack the bed of the canal, and to allow the water to flow into and cause damage to the mines. The company, during the working of the mines, took all proper precautions to keep the canal watertight:—Held, that the company was not responsible for the damage to the mines, as there was no proof of any negligence on their part, or of anything done in excess of their statutory powers. *Dunn v. Birmingham Canal Company*, 42 L. J., Q. B. 34; 8 L. R., Q. B. 42; 21 W. R. 266; 27 L. T., N. S. 683—Exch. Cham; affirming *S. C.*, 7 L. R., Q. B. 121; 41 L. J., Q. B. 121; 36 L. T., N. S. 241; 20 W. R. 573.

Under railways.]—A person gratuitously granted a portion of his land to a railway company for the formation of a line of railway thereon, with a reservation to him and his heirs of all the mines, metals and minerals in the land so granted, and with full liberty to dig, search for, work and carry away the same, so as the same be done without entering upon or breaking the surface of the land thereby granted:—Held, that the company was entitled to the subjacent and adjacent lateral support necessary for the maintenance of the railway. *Caledonian Railway Company v. Belhaven*, 3 Macq. H. L. Cas. 56; 5 Jur., N. S. 573.

A vendor of land having sold it under an act of parliament for the particular purposes of a railway, cannot afterwards work the minerals under the surface (though they have been expressly reserved to him, either by his grant or by the provisions of the company's own act), in such a manner as to prejudice the use of the land for the purposes for which it has been purchased; the common law right to adjacent support from the vendor's land attaches upon such a sale even beyond the limits of the purchased land. *Kirkst v. North Eastern Railway Company*, 10 H. L. Cas. 333; 9 Jur., N. S. 555; 32 L. J., Chanc. 402; 11 W. R. 604; 8 L. T., N. S. 837.

Whether a grant is voluntary or compulsory,

it must carry with it all that is necessary to the enjoyment of the subject-matter of it; and therefore, if a certain amount of lateral support is essential to the safety of the railway, the right to it must pass as a necessary incident to the grant. *Id.*

Held, also, that although the mine-owner could properly be restrained from working the mines underneath or adjacent to the land purchased, so as to cause an injury to the surface and superincumbent works, the company could not compel the owner to keep the mine filled with water, to the exclusion of any future working. *Id.*

A railway company is entitled to the vertical and lateral supports of the adjoining lands of the proprietor from whom the lands or easements required for the railway were purchased; and such proprietor is not at liberty to work the minerals adjoining the railway in such a way as to cause damage to it. *North-Eastern Railway Company v. Crosland*, 11 W. R. 83; 32 L. J., Chanc. 353; 4 De G., F. & J. 550—L. J.

The company having, by the terms of their purchase, precluded the owners of lands from working minerals in a way injurious to their property, cannot, in the absence of statutory provision to that effect, be compelled to purchase those minerals of the owners. *Id.*

A railway company which has taken lands for the purposes of their railway, under the Lands Clauses Act (8 & 9 Vict. c. 18) and the Railways Clauses Act (8 & 9 Vict. c. 20), and has them conveyed to them by a conveyance in the usual form, is not entitled to prevent the owner of the mines, subjacent or adjacent, from working and winning away the same without making compensation. It makes no difference that the mines and minerals are necessary for the support of the railway. *Great Western Railway Company v. Bennett*, 36 L. J., Q. B. 183; 15 W. R. 647; 16 L. T., N. S. 186; 2 L. R., H. L. 27. S. P., *Fletcher v. Great Western Railway Company*, 6 Jur., N. S. 961; 29 L. J., Exch. 253; 8 W. R. 501—Exch. Cham.

If the company, after notice of intention to work, refuses to make compensation for the mines requisite for the support of their railway, the company can only compel the mine-owner to work his mines in a proper manner according to the custom of the district. *Id.*

An owner of land, granting to a railway company the right to make and maintain a tunnel through his land, is in the same position, with respect to his right to work mines under the 77th and 78th sections of the Railways Clauses Act, as if the company had actually purchased the land; and the rule that the grantor cannot derogate from his own grant does not apply. *London and North-Western Railway Company v. Ackroyd*, 8 Jur., N. S. 911; 31 L. J., Chanc. 588; 10 W. R. 367—V. C. W.

A railway company, under the authority of an act, took for its line ground lying over mines, not worked, belonging to a former owner of the surface. In order to gain the level of its line, the company took away a

stratum of clay, and left a surface of porous rock; they carried on the line at a slight ascent, to a brook at some distance, over which they carried the line by a flat bridge, not constructed so as to contain the waters in times of flood. Between this brook and the surface of the mine there was originally a rising ground, through which the company made a cutting for the level of its line. Afterwards, the owner of the mines began to work them, and the line began to sink; the company kept up the level of the line by heaping ashes and such substances thereon, and on the drains by the side of the line, which had also sunk. The company was bound to keep up these drains, but after they had sunk did not. A flood came, and the waters of the brook, where it was crossed by the bridge, overflowing the girders, were carried down along the hollow of the line and of the drains to the spot overlying the mines, and sinking through the porous rock, deluged the mines, and stopped the works:—Held, that the owner of the mines had a right of action against the company for the injuries arising from both the overflow from the brook and the fall of rainwater on the spot, and the overflows of springs laid open in the cutting, and that he had no remedy for this by compensation under the act. *Bignall v. London and North-Western Railway Company*, 7 H. & K. 423; 8 Jur., N. S. 16; 31 L. J., Exch. 121; 10 W. R. 232; affirmed on appeal, 1 H. & C. 544; 9 Jur., N. S. 254; 9 L. T., N. S. 419; 31 L. J., Exch. 480; 10 W. R. 802—Exch. Cham.

H. became the lessee of minerals partly underlying the line of a railway. He was to pay as the value of the minerals a sum of about 10,000*l.*, by yearly installments, subject to a right of re-entry on non-payment of rent or failure to work the minerals according to the covenants. When the lease had thirteen years to run, he gave the railway company notice, under the Railways Clauses Consolidation Act, 1845, s. 78, of his intention to work the minerals underlying their railway, and it was afterwards agreed that they should pay him 688*l.* 2*s.* 6*d.* in consideration of his not working so much of the coal and ironstone lying under and near the railway as they considered necessary for its support, with 100*l.* for expenses. On payment of these sums he abstained from working the minerals so paid for, but he died before the expiration of the lease; his executors then discontinued the mining operations, and the lessors re-entered. The mines were afterwards purchased by S., who served the company with a fresh notice of his intention to work the minerals underlying the railway:—Held, that the railway company on paying compensation obtained the right of permanently stopping the mining operations, and that they were entitled to a perpetual injunction restraining S. from working the subjacent minerals, but without prejudice to the question of the right of S., as claiming under the reversioners, to compensation for his interest in the mines. *Great Western Railway Company v. Smith*

**W. R. 180**—II. L.; affirming the judgment of the Court of Appeal, 2 L. R., Ch. Div. 35; 45 L. J., Chanc. Div. 235; 34 L. T., N. 237; 24 W. R. 443.

As to remedies for improper workings,—see his title, V., 4.

#### **1. Under Grants or Reservations of Mines and Minerals.**

**Right of support.**—The principle of law to be deduced from the authorities is, that a grant or a reservation of mines in general terms confers a right to work the mines, subject to the obligation of leaving a reasonable support to the surface as it exists at the time of such grant or reservation; and, in the absence of any express stipulation enlarging or diminishing the right, the surface owner is entitled to such reasonable support from the subjacent strata for the surface in the state in which it existed at the time when the titles to the mines and to the surface came into different hands. *Richards v. Jenkins*, 18 L. T., N. S. 437; 17 W. R. 30—Exch.

The reservation of mines to A. in a lease of the surface to B., giving A. the right of seeking for and carrying away the minerals, making compensation for any injury thereby done to the surface or otherwise, applies only to acts done upon the surface, such as sinking pits, or other measures in order to obtain access to the minerals, and not to underground workings. *Id.*

A deed on the 9th December, 1671, which severed the surface from the minerals, contained a reservation of the mines to the grantor, with free and full power and liberty to work, sink, dig for or win the same, and to drive drifts, make water-courses, or do any other act necessary or convenient for the working, winning or getting the same, with a covenant by the grantor to pay to the grantee treble the damages, loss or prejudice which the grantee should sustain by reason of such digging or working:—Held, that the reservation was subject to the implied right of the grantee of the surface to support from the minerals, and did not empower the grantor to remove the whole of the minerals without leaving a support for the surface. *Smart v. Morton*, 1 Jur., N. S. 825; 5 El. & Bl. 30; 3 C. L. R. 1004; 24 L. J., Q. B. 260.

Where an owner of land has granted the surface, reserving the coal mines and seams of coal, and a right of entry for the purpose of working and winning the same, making compensation for the damage caused in so doing, he is not entitled to work out all the coal so as to cause the surface to sink, unless the established course and practice of good mining, at the time of the reservation, justifies him in so doing. *Id.*

The conveyances of an estate in a mining district, sold in lots, contained an exception of all mines and minerals under the land included in the lot conveyed, with full power for the grantor to work, get, and dispose of

them, without entering upon the land sold, and without being answerable for any injury to the land, or any buildings on it, by reason of working or getting the excepted mines or minerals, and without being liable to any action or suit for any such injury:—Held, that a purchaser of two of the lots was not entitled against the grantor to either vertical or lateral support for the surface of his land. *Williams v. Bagnall*, 12 Jur., N. S. 987; 15 W. R. 273—V. C. W.

A piece of land on which a cotton mill was to be built was conveyed, the grantor reserving to himself a chief rent, and reserving all mines and minerals under the piece of land, and power to take the same at pleasure, making compensation for damages to be done to the cotton mill. The grantee covenanted to build and keep in repair the cotton mill:—Held, that the grantor would not be restrained from working and taking the minerals under the piece of land, though the buildings on the piece of land would necessarily be thereby injured. *Aspden v. Seddon*, 10 L. R., Ch. 394; 44 L. J., Chanc. 359; 23 W. R. 589; 32 L. T., N. S. 415; affirming the decision of the Master of the Rolls, 31 L. T., N. S. 626.

S., being the owner in fee of lands, by deed, dated December 31st, 1861, granted the surface of a portion of such land to the predecessor in title of the plaintiff A., reserving to himself, his appointees, heirs and assigns, the minerals lying under the portion so granted, with liberty to get and win the minerals, "so that compensation be made by him or them for all damage that shall be done to the erections on such" portion, by the exercise of such liberty. S. subsequently granted to the predecessors in title of the defendants the adjacent portion of the lands, and also the minerals lying under the portion so granted to the predecessors of the plaintiff A. by the deed of December 31st, 1861. The defendants, on becoming the grantees of such adjacent portion, and of the minerals lying under the plaintiff A.'s portion, proceeded to work mines under such adjacent portion, and to get and win the minerals so lying under the plaintiff A.'s portion. In consequence of these operations, a mill upon the plaintiff A.'s portion (of which mill the plaintiff P. was mortgagee) was let down:—Held, that whether the subsiding of the mill was due to the removal of minerals under the plaintiff A.'s portion, or to the removal of minerals under the adjacent portion, or to both these causes combined, and whether such operations were skillfully or unskillfully conducted, the plaintiffs were entitled to compensation for the letting down of the mill. For the causing of the subsidence was either a trespass, or justifiable only under the deed of December 31st, 1861, and the stipulation "so that compensation be made" was not an independent agreement personal to the original grantor, but a condition annexed to the reservation, and binding upon any person exercising the right reserved. *Aspden v. Seddon*, and *Preston v. Seddon*, 46 L. J., Exch. Div. 353; 25 W. R. 277; 36 L.



T., N. S. 45—C. A. See also *Aspen v. Seddon*, *Preston v. Seddon*, 1 L. R., Exch. Div. 496; 24 W. R. 828; 34 L. T., N. S. 906—C. A.

The defendants, having power under a reservation in a lease to get minerals under the lands of the plaintiffs, commenced workings under their own lands, of such a character, and in such a direction as they would have had to make under the reservation in the lease if they had chosen to exercise it, and by such workings caused the plaintiffs' land to sink. The plaintiffs having sued the defendants:—Held, that judgment ought to be for the plaintiffs. *Whitehouse v. Bayley*, 34 L. T., N. S. 93—Q. B. Div.

The vendor of land adjoining other land of his own, under which are mines and minerals, and who knows at the time of the sale that the vendee is about to erect upon the land so purchased substantial buildings, impliedly covenants that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant. *Siddons v. Short, Harley and Company*, 2 L. R., C. P. Div. 572; 37 L. T., N. S. 230.

A. sold land to B. for the purpose of an iron foundry. Adjoining the land so sold to B.; A. had other land under which was coal. A. afterwards leased the minerals to C., who commenced working the coal within such a distance from the land of B. as to be reasonably calculated to endanger its stability:—Held, ground for an injunction against A. and C., although no actual damage had been sustained by B. *Id.*

**Right to water-courses.]**—Where mines were altogether excepted out of a demise of the surface:—Held, that the rights of the owner of the surface and the owner of the mines did not in any way differ from those of the owners of adjoining closes, who are strangers in title, each of whom is entitled to the water found upon his land, but neither of whom is entitled to complain of the loss of that water by natural percolation set in motion by his neighbor's excavations; for it makes no difference whether the respective closes are adjacent vertically or laterally, and the grant of the surface cannot carry with it more than the ownership of the entire soil would. *Ballacorkish Silver, Lead and Copper Mining Company v. Dumbell*, 20 L. T., N. S. 658—P. C.

As to recovery of compensation for workings under grants or reservations,—see this title, V., 4.

### 3. Under Demises of Mines.

**Time and extent of working.]**—A defendant agreed to grant to the plaintiff a coal lease for twenty-one years; the only rent reserved was dependent on the quantity raised, and was made payable quarterly:—Held, that the plaintiff was bound to commence working immediately, and to proceed continuously. *Sharp v. Wright*, 28 Beav. 150.

As a lease of land with the mines, where there are open mines, does not justify the lessee in working unopened mines, so a power to lease such land with the mines does not authorize a lease of unopened mines. *Clegg v. Rowland*, 2 L. R., Eq. 160; 33 L. J., Chanc. 396; 14 W. R. 530; 14 L. T., N. S. 217—V. C. K.

Where lessees of land and of coal mines found or to be found therein, covenanted "forthwith to proceed to sink for coal, as far as could and ought to be accomplished by persons acquainted with the nature of collieries," and, as in such cases was usual and customary, to erect fire-engines for the purpose, by the 24th of June, 1806, or in default to pay so much to the lessor as arbitrators should award; and after the day past, without any new pits sunk, &c., the parties named arbitrators to award concerning the damage, loss, and delay to the lessor, if any, and whether any rent or other satisfaction should be made to him on that account; and the lessors gave a bond to the lessor, conditioned to perform the award, and afterwards the arbitrators awarded that the lessees had not performed their covenant, by not having proceeded to sink for the said coal "as far as could and ought to be accomplished," &c. (in the words of the covenant), on or before the 24th of June, 1806, for which they awarded to the lessor 150*l.* on account of all damages and losses then incurred on account of such breach; and further, "that the lessees should sink coal mines and erect fire-engines, for getting the coals demised on or before the 24th of June, 1807, and in default, and until the same should be done, they should pay a yearly rent of 200*l.* to the lessor," as a compensation for the lord's share reserved under the lease:—Held, that, to an action on the bond, it was a sufficient answer by the lessees, to save the condition, that they had paid the 150*l.* awarded for the breach of the covenant up to the 24th of June, 1806, and as to the subsequent period, thence till the 24th of June, 1807, that "they did well and truly sink for coal in the lands demised, as far as could and ought to be accomplished," &c. (in the words of the covenant), and were ready and willing to have sunk and completed the pits, and to have erected the necessary fire-engines, within the time limited by the award; but that at the time of making the lease, and thenceforth, there were no mines of coal under the lands that could or ought to be worked by any person acquainted with the nature of collieries, or that in such cases it was usual or customary to work, or that would have defrayed the necessary expenses of working and getting the same, all which premises the lessees ascertained and proved by due and sufficient experiments and trials then and there made. *Hanson v. Boothman*, 13 East, 23.

A tenant agreed to work a coal mine so long as it was "fairly workable." There were coals in the mine, but of such a description that it would not pay to work it:—Held, that the tenant was not bound to work the mine, and

that under the words "fairly workable," a tenant was not bound to work at a dead loss. *ones v. Shears*, 7 C. & P. 940—Coleridge. See *Phillips v. Jones*, 9 Sim. 519; 3 Jur. 242.

A lessee of furnaces, iron-works and ironstone mines covenanted to work the furnaces effectually, unless prevented by inevitable accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not, by itself, or with a proper mixture or process, make good common pig-iron:—Held, that the mixture intended was not necessarily of ingredients procurable on the demised premises. *Foley v. Asidenbrooke*, 13 M. & W. 174; 14 L. J., Exch. 169.

The lease also contained a covenant to raise a quantity of ironstone in each quarter of a year, and pay royalties upon it, or else to pay a fixed quarterly rent to the landlords:—Held, that the landlords, having declared in respect of breaches of both these covenants, and money having been paid into court and accepted in satisfaction of the latter, were entitled to nominal damages only in respect of the former. *Id.*

A declaration stated, that the plaintiff let to defendants a mine of rock salt for twenty-one years from the 25th of June, 1851, and they covenanted with the plaintiff that they would, in every year during the term, get and raise from the mine 2,000 tons of rock salt; and in case of default would, at the expiration of the year, pay the plaintiff 6d. a ton for every ton by which the quantity was less than 2,000; and also that they would, with all reasonable diligence, sink a shaft to the salt rock, in order to get at the salt; and would also, during the continuance of the term, work the mine in a proper and workmanlike manner. First breach, that although the defendants did not raise or get out of the mine the annual quantity of 2,000 tons of salt, yet they have not paid for the quantity short of 2,000. Second breach, that they did not, in every year of the term, get and raise 2,000 tons, and did not pay for the quantity short of 2,000 tons, but, on the contrary, got and raised no salt whatever, and refused to pay the plaintiff any sum whatever. Third breach, that they did not use all reasonable diligence to sink a shaft to the salt work in order to get at the salt, but wholly omitted and neglected so to do. Fourth breach, that they did not, during the continuance of the term, work the mine in a proper and workmanlike manner, but permitted the same to be unworked. The defendants pleaded, first, that the deed provided, that in case the rock salt should, during the continuance of the term, fail by any inevitable accident, that on payment of all rent due, and performance of all covenants on the part of the defendants, the term should cease and determine to all intents and purposes whatsoever; that the salt, during the continuance of the term, failed by inevitable accident; that all rent due was paid and covenants performed, and therefore the term ceased and determined; and secondly, to the third breach,

that the defendants did with all reasonable diligence sink a shaft to the salt rock. Thirdly, to the fourth breach, that they did, at all times during the continuance of the term, work the mine in a proper and workmanlike manner. At the trial, it appeared that in a writing, dated the 20th of August, 1851, the plaintiff agreed, before the 25th of March then next, to demise to the defendants the salt mine in question for twenty-one years from the 25th of June, 1851. When the agreement was executed, the defendants thereupon began to sink a shaft for the purpose of getting the salt. This sinking was, in September, 1851, discontinued in consequence of an influx of brine. The defendants thereupon began to sink another shaft, which was in the same month discontinued, from the like cause. On the 16th of November, 1852, a lease, pursuant to the agreement, was executed, being the deed declared on, and which contained the proviso for cesser stated in the first plea. In consequence of the influx of brine before mentioned, the defendants never in any manner worked the mine, nor paid any of the rents. The jury found that the defendants could not have worked the mine by any reasonable application of labor, diligence, and skill, money or other means, and that they were prevented from working it by the influx of brine:—Held, first, that as the term commenced, in point of interest, on the 16th of November, 1852, though its duration as to computation of time was to be reckoned from the 25th of June, 1851, the proviso for cesser, which referred to a failure by inevitable accident during the continuance of the term, never came into operation; and that as the defendants had entered into an absolute unqualified covenant to get 2,000 tons of rock salt in each year, or pay for the deficiency, they were liable, for whether the salt could be got easily or with difficulty, or whether it existed at all, was immaterial. *Jerois v. Tomkinson*, 1 H. & N. 195.

Held, secondly, that the plaintiff was entitled to the verdict on the issue raised by the second plea; for the defendants having, after their inability to reach the salt by reason of the influx of brine, covenanted with all reasonable diligence to sink the shafts down to the salt, they were bound to do so, although it might be an unreasonable application of time and labor. *Id.*

Held, thirdly, that the plaintiff was also entitled to the verdict on the last plea, since the defendants must be taken to have covenanted to work the mine in some way, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether. *Id.*

Seemingly, that if the lease had been executed before the interruption of the works by the influx of brine, that would have been "a failure by inevitable accident" within the proviso for cesser. *Id.*

A demise of coal mines for thirty years,

yielding 400*l.* for every acre of coal, by annual payment of not less than 200*l.*, provided that in case the whole of the coals, so far as the same could be fairly wrought, should have been worked out and gotten at any time prior to the expiration of the term, and that the coal so fairly wrought should have been wholly paid for, then that the annual payment of 200*l.* should cease and be no longer payable:—Held, that the question whether the coal could be fairly wrought, did not depend upon whether it could be worked at a profit or not, or whether any such coal as that demised was worth working; but assuming that coal of the same description as that demised could be properly worked, whether, according to the usage of miners, the coal in question could be worked without extraordinary difficulty or expense. *Griffiths v. Rigby*, 1 H. & N. 237; 25 L. J., Exch. 284.

The judge at the trial told the jury that he would not give them any explanation as to what was meant by "fairly" wrought, and that they were better judges of the meaning of the phrase than he was. He told them what he thought it meant:—Held, that this direction was insufficient. *Id.*

Where an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where the lessee of a coal mine covenanted to get the whole of the mines "not deeper than or below the level of the bottom of the mine at a particular point:"—Held, that parol evidence of the understanding among miners was admissible to show that the word "level" had a peculiar technical meaning, different from its ordinary signification of "horizontal line." *Clayton v. Greyson*, 4 N. & M. 602; 5 A. & E. 302; 6 N. & M. 694; 1 H. & W. 159. See *Brain v. Harris*, 10 Exch. 908; 24 L. J., Exch. 177.

The defendant demised to the plaintiff a coal mine for a term of twenty-one years, subject to the payment of a sleeping rent and of royalties according to the amount of coal worked. The lease contained a covenant by the lessees to work and get the coal "in a fair, honest and workmanlike manner, in as large quantities as the same can be got and disposed of by due and reasonable diligence and exertions, according to the best and most improved mode of working collieries in that part of the country . . . delays or stoppages arising from accidents, turn-outs, or other unavoidable cause only excepted." It also contained a proviso for re-entry in case of any material breach of the lessee's covenants. The lessee proceeded to work the mine under the lease, and continued working until stopped by water, which flowed into and drowned the mine, and although he made every effort to pump out the water, he was at length forced to discontinue the workings. Notwithstanding his offer to continue paying the sleeping rent, the lessor refused to accept it, and commenced an eject-

ment against the lessee for an alleged breach of covenant in having ceased to work the mine. The lessee filed a bill to restrain the action, and the lessor demurred:—Held, that the question in the action was a purely legal one, that there was no equitable ground for restraining the action, and that the demurrer must, therefore, be allowed. *Simpson v. Ingleby*, 21 L. T., N. S. 695; 20 W. R. 993. See *S. C.*, 20 L. T., N. S. 543; 20 W. R. 587—V. C. M.—L. J.

**Mode of working.]**—In the absence of express contract, a lessee of a mine is entitled to work the minerals by "instroke." *Whalley v. Ramage*, 10 W. R. 815—V. C. W.

A lease of alum mines gave the lessee the right to obtain alum from coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:—Held, that the coal pillars could not be removed. *Glasgow v. Hurlst Alum Company*, 3 H. L. Cas. 25.

By an indenture, the plaintiff demised to the defendant all mines and beds of coal which had been, or during the demise should be, discovered or opened under the lands belonging to Dyffryn House, at a yearly rent of 20*l.*, to be paid whether any coal should be worked or not, together with 7*d.* per ton for every ton of coal raised; and the defendant covenanted that he would at all times during the demise work the mines in a proper and workmanlike manner. Breach, that he did not work the mines in a proper and workmanlike manner, but, on the contrary, permitted the mines to lie, and the same were wholly ungotten. Plea, that the mines were never at any time before the demise worked or gotten, nor did he, at any time since or during the demise, work or get the mines:—Held, that inasmuch as it appeared by the pleadings that the mines had not been worked at all, he was not liable on this covenant for not working them in a workmanlike manner, the subject-matter of demise being not all the mines under the lands specified, but only such as either had been, or should be, discovered or opened. *Quarrington v. Arthur*, 10 M. & W. 335.

In a lease of a coal mine, the lessees covenanted to leave unworked a barrier of coal between the mine and the adjoining mines, except where the lease gave them liberty to break through it. The liberty was to make outstrokes or other communication through the barrier, for the purpose of conveying underground coals gotten in any of the adjoining collieries in the occupation of the lessees from such colliery into the mine, and by such outstrokes and communications to convey underground the coals from such adjoining collieries into the mine, and from

thence to convey and carry away all such coals, and also draw to bank at any of the pits or shafts sunk or to be sunk by the lessees in any of the lands and grounds demised, the coals from such adjoining colliery:—Held, that this liberty extended to authorize the lessees to break through the barrier for winning the coal of the mine, and for winning coal of such adjoining mines, though the coal of such demised or adjoining mines when won was not to be nor was brought to the surface through a pit or shaft in the demised land, and although no such pit or shaft in fact existed. *James v. Cochrane*, 8 Exch. 556; 22 L. J., Exch. 201—Exch. Cham.

There were various provisos in the lease which spoke of pits or shafts in the demised lands, but there was no express covenant to make any such pit or shaft. There was also a covenant that the lessees would draw to bank at some of the pits or shafts of the said colliery, provided that the same should be pits or shafts from which the coals of the demised colliery should not be worked by an outstroke, and lay in some convenient place on the lands of the lessors, all the manure made by the horses employed underground in working the demised mine:—Held, that there was no express or implied engagement by the lessees that bound them to sink a pit in the demised land. *Ib.*

By a mining lease, the lessees covenanted that they would "from time to time, and at all times during the term, work the pits, mines and shafts in a workmanlike manner, and leave pillars of the stone of sufficient strength to support the roofs of the mines, and get and clear the stone in the usual and best way in which the same is done in other works of a like character in Clayton." It also contained covenants to pay for surface damage, and, at the expiration of the term, to fill up the pits and shafts, and to restore the surface to a state fit for agricultural purposes:—Held, that the lessees were liable to the reversioner for damage done to the surface of the land by its cracking and subsiding in consequence of the want of sufficient pillars of stone being left to support the roofs of the mines, notwithstanding they might have worked the mines in a usual and a workmanlike manner. *Hodgson v. Moulson*, 18 C. L., N. S. 332.

There is a *prima facie* inference at common law upon every demise of minerals, or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words, showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma* and with the natural support which it possessed before the demise. *Dugdale v. Robertson*, 3 Kay & J. 695; 3 Jur., N. S. 687. But compare *Taylor v. Shafto*, 8 B. & S. 228; and see *Radon v. Jeffcock*, 42 L. J., Exch. 36, 45; 7 L. R., Exch. 379; 29 L. T., N. S. 273.

A lessor demised for sixty years, at certain rents and royalties, the following parcels, viz., first and secondly, certain cottages and an engine house; thirdly, all the mines which then were or thereafter during the term might be discovered within all the lands, about 514 acres, described in the map; and also liberty for the lessees to dig and carry and sell all iron and coal, in, from, over, upon or under the lands, and to open and dig any pits or levels into, upon, about or under the mines and lands, except in or upon the demesne lands colored red in the plan (being a piece of four acres), on which a capital mansion-house and buildings were erected:—Held, that this was a demise of the whole mines under the whole 514 acres, but with a restricted right of enjoyment in the lessees, so that the lessor could not demise the red part to any other persons, but the lessees had no right to work the mines under the red. *Ib.*

The land was at the date of the lease (in 1842) mortgaged in fee; the mortgagor and mortgagee joined in the mining lease. In 1850 the mortgage was transferred to the plaintiffs, with a restriction against their calling in the mortgage-money until 1863:—Held, that they might sue to restrain damage to the mansion-house from the working of the mines. *Ib.*

By a deed in 1857, reciting the will of S., under which the defendant became tenant for life of the W. estate, the trustees of the defendant conveyed lands at S., part of that estate, to R. in fee, reserving the coal thereunder, with power to work and carry away the same, the defendant or the person or persons for the time being entitled thereto, and his and their assigns, paying to R., his heirs and assigns, compensation for damage sustained thereby; and the defendant covenanted that notwithstanding any act done by him or S. to the contrary, the trustees had power to grant and release the lands, and that free from incumbrances created by the defendant or any of his ancestors or testators, or any person rightfully claiming under him or them. In 1859, the plaintiff became the owner of a portion of the lands. In 1844, S. granted a lease of mines under the lands at S., whereby the lessees covenanted that they would work and carry on the colliery, coal mines and seams of coal thereby demised in a fair, proper and orderly manner, and according to the best and most approved method of working collieries of a like nature on the rivers Tyne and Wear, and so as to produce with safety the greatest quantity of merchantable coals from and out of each and every the workable seams; and would not knowingly do or suffer to be done any willful or negligent act, matter or thing whatsoever, which might hazard or endanger the colliery, coal mines or seams of coal, or which might bring any creep or thrust upon them, or occasion any loss, damage or detriment thereto, or which might tend to hinder, stop or obstruct any of the water-courses, air-courses, passages or drifts which should be in or belonging to the same. The

lessees also covenanted not to sink pits within 200 yards of any dwelling-house, building or farm yard erected, or to be erected, upon the lands, without consent in writing, and to leave unwrought the coal under the mansion-house and park, and other parts of the superincumbent lands, but not including the lands at S. The lease contained other covenants for the security or benefit of portions of the surface, not including the lands at S., and for making compensation for damage. Dwelling-houses had been built upon the lands at S. after the purchase by R., and the lessees so worked the mines as to cause portions of the lands to subside and sink, and the dwelling-houses and their foundations to be weakened, cracked, injured, &c. In an action by the plaintiff, upon the covenant to pay compensation and the covenant for title contained in the deed of 1857, the jury having found that the lessees had worked the mines according to the best and most approved method of working collieries of the like nature on the Tyne and Wear, and that the sinking of the land was not caused by the weight of the houses:—Held, that the plaintiff was not entitled to recover on the covenant for compensation. *Taylor v. Shafto*, 8 B. & S. 228.

Held, also, that the lessees were not only authorized but bound so to work the mines as to obtain therefrom the largest quantity of coals that could be gotten consistently with the safety of the mines, and without regard to the safety of any dwelling house which might be erected after the date of the lease upon any portion of the surface not specially protected by any of its provisions, and therefore the covenant for title was broken by the grant of the prior lease. *S. C.*, 8 B. & S. 247; 16 L. T., N. S. 205—Exch. Cham.

When the owner of surface and minerals beneath grants a mining lease of the minerals for a term, there is not, outside the contract, an implied reservation of any right to have the surface supported by the minerals. The contract itself must be looked at, and construed with regard to the subject-matter, in order to arrive at the extent to which the owner authorizes the minerals to be removed. *Eaton v. Jeffcock*, 7 L. R., Exch. 379; 42 L. J., Exch. 36; 28 L. T., N. S. 273; 20 W. R. 1033.

In 1840, a bed of coal, called the High Hazle bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of 200*l.* as for 2*a.* 1*r.* 16*p.*, and a further yearly rent at the rate of 85*l.* per acre for coal actually got beyond the 2*a.* 1*r.* 16*p.* "including all ribs and pillars left in working the coal, except the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the home-stead and farm buildings." These pillars, of specified dimensions, the lessees bound themselves to leave during the whole of the term, and they also covenanted to work the mines according to the best of their judgment, skill

and discretion, in a good and workmanlike manner. In 1857, the assignee of the lease conveyed part of the land with which the mine lay to persons from whom the plaintiff took with notice, reserving to the grantor the High Hazle bed, except a small portion specified, and "the mines, veins, and bed of coal, fire clay, and other clay, stone and other minerals lying under the bed called the High Hazle bed," with powers to the grantor, his heirs and assigns, and his and their tenants and lessees, to be exercised "from and after the expiration of the term" for carrying on the works of the mine, and getting and carrying away the fire-clay, &c., so reserved; and also reserving to the grantor the coals under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone and other minerals hereby excepted and removed." The pillars specified in the lease of 1840 were left; and the defendants worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1857. The land would have subsided without the buildings:—Held (by Martin and Clensby, B.; Bramwell, B. dissentiente), that, it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury. By Bramwell, B., that so far as concerned the houses the proviso in the conveyance of 1857 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed. *Id.*

The owner of a piece of land agreed to demise the seams of coal under the land to the owners of an adjoining colliery, at a royalty on each ton of coal worked, and at a dead rent of 500*l.* if the royalties did not amount to so much; the dead rent not to be charged for the first three years if the necessary steps were bona fide taken with ordinary dispatch to win and work the coal. The lease was to contain a covenant by the lessees for working the coal in a proper and workmanlike manner. The lessees proceeded to work the coal by instroke or headings from their adjoining colliery, which was situated to the rise of the seams agreed to be demised; the lessor alleged that the lessees ought to sink a pit and work the coal from the deep, and filed a bill to restrain them from working from the adjoining colliery, and to compel payment of the dead rent, on the ground that they had



**taken** the necessary steps to win and work a coal:—Held, that, under the circumstances, working the coal by instroke was working in proper and workmanlike manner, and that the lessor had intended to compel the lessees to sink a pit it should have been provided for in the agreement. *Lewis v. Fotherhill*, 5 L. R., Ch. 103.

Held, also, that as the lessees were actually working the coal, irremediable damage would not be presumed. *Id.*

A covenant in a coal mining lease to work and carry on the mines in a proper and workmanlike manner, is not to be construed as a covenant to continue working. Nor under such a covenant is the lessee bound to sink a pit if he can carry on the works by headings from an adjoining colliery. *Jegon v. Vician*, 40 L. J., Chanc. 389; 6 L. R., Ch. 742; 19 W. R. 365.

The lessees of a colliery, being in possession of other mines adjoining, and to the rise of a particular mine, worked the mine by drivings from their own mine, and in exercise of powers contained in their lease made a channel through which the water flowed from their own to the mine by gravitation:—Held, that they were not liable to make compensation for damage caused by the water so flowing. *Id.*

By a lease of collieries in Cheshire, certain pits or mines, comprising the T. mine, which was uppermost, the B. mine, which was the next, and the C. mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works or collieries with effect. On a bill by the lessor, alleging that the defendants, after having for some time worked the three mines, had ceased working the T. mine, and also that they were working the C. mine in advance of the B. mine, and praying injunctions accordingly:—Held, that, under the terms of the covenant, the defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the defendants were committing a breach of the covenant; and the bill was dismissed with costs. *Lord Abinger v. Ashton*, 17 L. R., Eq. 358; 22 W. R. 582—R.

As to rights of working mines under particular customs, and rights acquired by prescription,—see this title, II.

As to covenants for compensation for working, and recovery of damages for improper working,—see this title, V., 4.

#### 4. Remedies for Injurious or Wrongful Working of Mines, or for Abstraction of Minerals.

**Right of action for injury or upon covenant or agreement to make compensation.]—**A lessor of a mine may maintain an action against his lessee for an injury to the reversion by improperly working the mine, notwithstanding that the injury is also a breach of the lessee's covenant upon which the lessor might have sued. *Marker v. Kenrick*, 18 C. B. 188; 17 Jur. 44; 22 L. J., C. P. 129.

By a deed of 1857, A., who was tenant for life under the will of S., conveyed (under a power) land to B. in fee, with a reservation out of the grant of "all and every the seam or seams of coal and other minerals under the hereditaments granted, with power to win, work and carry away the same under or over any part of the hereditaments and premises, A., or the person or persons for the time being entitled thereto, and his or their assigns, paying to B., his heirs and assigns, compensation for any damage which he or they may sustain," and a covenant by A. that he had not done or permitted any act or thing whereby the premises or the like should or might be incumbered or prejudicially affected. And B. covenanted, for himself, his heirs and assigns, "that the hereditaments and premises conveyed, or any buildings now or hereafter to be erected thereon, shall not at any time hereafter be used for the manufacture, sale, or storing of any combustible matter, or for the purpose of any offensive trade or business, the side walls to be not less than eighteen feet high, and to be in uniformity with the street." In 1844, S., A.'s testator, demised to C. and D. "a colliery and coal mines and seams of coal, as well opened as not opened" (including and comprising all seams of coal under the land conveyed by the deed of 1857), with full power to the lessees, their executors, administrators and assigns, to win, work and carry away the seams of coal for a term of years not yet expired. The plaintiff became possessed of the land comprised in the deed of 1857, and built four houses thereon; and, while he was so possessed, the houses were injured by the working and carrying away by the assignees under the lease of 1844 of the seams of coal thereunder. He thereupon brought an action against A., claiming compensation under the reservation contained in the deed of 1857. A. pleaded as to the damages and injury done to the part of the piece of ground on which the houses were built, and to the houses, and to the compensation claimed, that such damage and injury were occasioned by reason of the houses having been erected thereon:—Held, that the compensation clause in the deed of 1857 extended to houses thereafter built upon the land, and consequently that the plea was no answer. *Berkley v. Shafto*, 15 C. B., N. S. 79.

S. being seized in fee of land, with mineral deposits beneath the surface, demised for thirty eight years, from the 25th March, 1839, all the veins of minerals to D. and his assigns, with full power for him and his assigns to

work the mines and get the minerals from the old pits, and sink fresh pits, making reasonable satisfaction to the lessor and his tenants for the damage done to the lands or caused to the houses thereon or adjacent thereto of the lessor, in getting such minerals, according to a scale of compensation specified in the lease, and which the lessee thereby covenanted to pay. Injury having been occasioned to the superincumbent land, and the houses and tenements of the lessor or his representatives, erected thereon and adjacent thereto:—Held, that the remedy at common law and the remedy afforded by the covenant were not cumulative, and that the latter had been by the agreement of the parties substituted for the former; for that the terms of the lease were sufficient to show by implication that it was intended that the lessees of the mines should have the right to work the mine so as to undermine the surface, subject only to paying damages according to the covenants. *Smith v. Darby*, 7 L. R., Q. B. 716; 42 L. J., Q. B. 140; 20 W. R. 982; 26 L. T., N. S. 762.

By an act a company was empowered to take lands for the purpose of its navigation, with provision for a jury to ascertain the sums to be paid as purchase-money, and for damage in carrying the act into effect. By s. 170, no mine-owner should work any mines in or under any lands within forty yards of certain tunnels (by which the canal passed under a hill), without the leave of the company; and, by s. 171, if the company, instead of insisting upon having the full forty yards left unworked, should require less than thirty yards to be left, then the mine-owner might insist on having a greater quantity, not exceeding thirty yards, left unworked for his security; and the question in dispute as to such last-mentioned quantity was to be tried, settled and determined by an issue at law. By s. 172, whenever any mine in due course should become workable within forty yards of the tunnels, the mine-owner should give notice to the company, who thereupon should pay him (as the case might be) for so much of the forty yards as they should require to be left unworked for their security, or as might be ascertained by the issue to be necessary to be left unworked for his, provided that no mines should in any case be worked under the tunnels. But whenever any such last-mentioned mines should become workable, satisfaction should be made by the company for the same, such satisfaction to be settled by an issue at law. Section 173 gave the mode of trying any feigned issue, and enacted that, after trial and verdict, the court should give judgment for the sum of money awarded by the jury:—Held, that where a mine had become workable within forty yards of the tunnels, and the company had required the whole forty yards to be left unworked for their security, the owner of the mine was entitled to compensation for the forty yards; but that the only remedy to enforce it was by a feigned issue, and not by an ac-

tion. *Fenton v. Trent and Mersey Navigation Company*, 2 Railw. Cas. 837; 9 M. & W. 292.

A lease of a coal mine was granted, reserving a minimum rent of 720*l.*, to be increased to 1,000*l.* in case there should be pits sunk upon the estate, with a royalty upon all coal gotten beyond a certain quantity; and the lessees covenanted to work the mine uninterruptedly, efficiently, and regularly, according to the usual or most improved practice. The lessees paid the minimum rent, but only raised a small quantity of coal by working through an adjoining mine without sinking pits to the lessors' property. They being desirous of enforcing a larger amount of working, whereby an increased rent would be payable, filed a bill against the lessees for specific performance of the covenant in the lease:—Held, that there was no obligation upon the lessees to sink pits, although that might be the most efficient mode of working; and that, so long as the minimum rent was paid, the lessors could not be compelled to work the mine at all; that the lessees had committed no breach of contract; but if they had done so the remedy was at law and not in equity; and that the Court of Chancery could not, by a reference to chambers, give effect to the covenant by directions as to the management of a coal mine. *Wheatley v. Westminster Brynbo Coal and Coke Company*, 9 L. R., Eq. 538; 39 L. J., Chanc. 175; 22 L. T., N. S. 7—V. C. M.

An owner of a house standing in an open common within the hundred, but adjoining on one side a yard of the plaintiff inclosed by a wall, the defendant, a free miner, in working his gale, got the coal from under the house, in consequence of which a subsidence took place, the foundation of the house sank, and the walls cracked:—Held, that the defendant was liable to an action for causing a subsidence of the surface, but that the damage so done to the owner's house was not surface damage within the meaning of 1 & 2 Vict. c. 43, s. 63, and that the deputy gaveler had no jurisdiction to award compensation. *Allaway v. Wagstaff*, 4 H. & N. 681.

The plaintiffs and defendant possessed adjoining collieries in the Forest of Dean, which were gales subject to 1 & 2 Vict. c. 43, and the rules made thereunder. The defendant's gale being drained by a steam engine, he was bound by rule 19 to work the engine, so as to prevent the water of his gale from falling into plaintiffs' gale. The defendant stopped his engine, whereby the plaintiffs' gale was flooded and damaged. Section 29 provides that a person working his gale contrary to the rules shall be liable to forfeit it, and may be evicted by her Majesty; and in addition thereto "the compliance with such rules may be enforced by and on behalf of her Majesty, or by any other person, by injunction of her Majesty's Court of Exchequer, or otherwise, in such manner as the court shall on application think fit:"—Held, that the plaintiffs had a statutory private right which had been violated by non-compliance with the rules on the part of the defendant; that s. 29 gave no

the remedy for such breach of duty, and the plaintiffs were therefore entitled to maintain an action at common law to recover damages. *Ross v. Price*, 45 L. J., Exch. Div. 1; 1 L. R., Exch. Div. 209; 24 W. R. 786; L. T., N. S. 535.

**When cause of action first accrues; limitations and prescriptions.**—A. was the owner of houses standing on land which was surrounded by the lands of B., C. and D. E. as the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B., C. and D. sank in; and after more than six years' interval the sinking occasioned an injury to the houses of A.—Held, that a right of action accrued to A. when this injury actually occurred, and that his right was not barred by the Statute of Limitations. *Backhouse v. Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; 7 Jur., N. S. 809; 9 W. R. 769; 4 L. T., N. S. 754; affirming the judgment of Wightman, J., in the Queen's Bench, as against the contrary judgments of Lord Campbell, C. J., Coleridge, J., and Erie, J., 27 Q. B. 878; 4 Jur., N. S. 1182; El., Bl. & El. 622; and Exchequer Chamber, 5 Jur., N. S. 1345; 28 L. J., Q. B. 878; El., Bl. & El. 622.

The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. And, therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. *Nicklin v. Williams*, 10 Exch. 259; 23 L. J., Exch. 335.

When by underground working a party had taken the coal of his neighbor, a court of equity limited the account to six years, but intimated that the amount wrongfully abstracted being proved, the onus of proof would lie on the wrongdoer to show that it was not taken within six years. *Dean v. Thwaites*, 21 Beav. 621.

To a declaration by a reversioner of land, alleging that the defendant dug and excavated stone and sand, and converted the same to his own use, and made holes and excavations in the land, and erected mounds of earth and rubbish, so as permanently to alter, damage, injure, and spoil the surface of the land, he pleaded that R. was seized in fee of the mines and stone within certain parts of a lordship, and that R. and all whose estate he had, and his and their tenants, from time immemorial had been used and accustomed of right, as often as it might be necessary for the purpose of effectually working the quarries, to enter upon the waste lands within the part of the lordship within which the quarries were situate, and to dig through the same to the quarries, and to raise the stone and carry away the same, doing

no more than necessary for the purpose aforesaid. The plea alleged a demise by R. to the defendant of a quarry of stone under the lands, justifying the acts complained of in exercise of the right. The defendant also pleaded statutory prescriptive pleas, under the 2 & 3 Will. 4, c. 71, alleging the enjoyment of the right for forty and twenty years:—Held, that the pleas were good, for the right was not unreasonable, and might have originated in grant. *Rogers v. Taylor*, 1 H. & N. 706; 26 L. J., Exch. 203.

The plaintiffs, who were owners of a coal mine, claimed damages against the owners of an adjoining mine for having broken their barriers and worked their coal. The wrongful acts were committed in 1863, while the adjoining mine was being worked by the Hartlepool Railway Company. The boundaries of the two mines were settled by mutual agreement in 1862, and after negotiations a release was executed in 1864, by which all previous wrongful acts were condoned and released on both sides. An act of Parliament was passed in 1863, by which the Hartlepool Railway Company were to sell their mines within five years; and in 1865 the railway company was amalgamated with the North-Eastern Railway Company, and all their assets and liabilities were transferred to them:—Held, first, that although it was ultra vires of the railroad company to work mines, the act of 1863 implied that the company was to have power to work their mines until the mines were sold, and that upon the amalgamation with the North-Eastern Railway Company the latter became liable for the wrongful acts of their predecessors. *Ecclesiastical Commissioners for England v. North-Eastern Railway Company*, 4 L. R., Ch. Div. 845; 36 L. T., N. S. 174—V. C. M.

Held, secondly, that the wrongful acts committed in 1863 were not condoned by the release of 1864, the plaintiffs having had no ground for suspecting that while the release was in negotiation the previous settlement of boundaries had been broken. *Id.*

Held, thirdly, that the Statute of Limitations only commenced to run from the time of the discovery of the wrongful acts, there being no laches attributable to the plaintiffs for not having discovered the damage prior to 1870, two years before the filing of the bill. *Id.*

**Inspection of workings.**—An owner of a mine will, on making out a prima facie case, be allowed to inspect the workings of an adjoining mine, to ascertain whether they are being carried on in such a way as to encroach upon or injure his own mine. *Bennett v. Whitehouse*, 6 Jur., N. S. 523; 29 L. J., Chanc. 326; 28 Beav. 119.

An order having been made on motion in a cause in equity before the hearing, giving the plaintiff liberty to enter the defendant's ground for the purpose of inspection, and for the same purpose to break up the soil in the manner therein specified:—Held, that the latter part of the order ought to be discharged,

it not being according to the course of the court that such liberty should be given on an interlocutory application before the hearing. *Ennor v. Barrell*, 1 De G., F. & J. 520; 7 Jur., N. S. 788.

When the plaintiff and the defendants had mines adjoining one another, and the plaintiff had reason to suspect that the defendants had encroached upon his mines, he obtained leave from them to go underground and examine their mines, and found that, at the boundary line between the two properties, a wall had been recently erected, which prevented him from seeing whether anything had been done on the other side, which belonged to him. The inspector of mines for the district reported that an inspection could safely be made by removing a portion of the wall, and that no practical difficulty existed calculated to endanger the lives of the workmen. An order was then made by a judge that the plaintiff should be at liberty to inspect the mines of the defendants, and, so far as was necessary for the inspection, to make a way through the wall. The plaintiff was directed to give security to the satisfaction of the master, or to deposit 500*l.*, to abide any order the court might make as to indemnifying the defendants for any loss they might sustain in consequence of the inspection:—Held, that the order was good, as the courts of common law and the judges thereof have, as ancillary to the power of granting inspection, a power to remove obstructions, with a view to the inspection. *Bennett v. Griffiths*, 30 L. J., Q. B. 98; 7 Jur., N. S. 284; 3 L. T., N. S. 785; 9 W. R. 332.

As to inspection of real property, generally, —see INSPECTION.

**Statement of grounds of action in declaration.**—A declaration stated, that the plaintiffs and defendants were in possession of coal mines abutting upon each other; that the defendants, before the committing of the grievances, had trespassed upon the plaintiffs' mines, and carried away quantities of coals; that after the trespasses quantities of water accumulated in the defendants' mine, and would have inundated the plaintiffs' mine, unless a sufficient barrier existed; that the defendants, by their trespasses, carried away quantities of coal, which, but for those trespasses, would have been suffered to remain and would have constituted a barrier, preventing the water in the defendants' mine from inundating the plaintiffs' mine; that, as the defendants had by their trespasses deprived the plaintiffs of their barrier, it became the defendants' duty to make such provision that none of the water accumulated in their mine should flood the plaintiffs' mine. Breach, that the defendants neglected to make such provision, whereby the water accumulated in their mine, flooded the plaintiffs' mine, and prevented them from working the same:—Held, that an action on the case would lie for the injury; and semble, that the defendants' duty was properly described in the declaration. *Firm-*

*stone v. Wheoley*, 2 D. & L. 203; 13 L. J., Exch. 361.

A declaration alleged that the plaintiff lawfully possessed of messuages, belonging to and supporting which were foundations which, by reason of his possession of the messuages, he of right had enjoyed and was enjoying, and still of right ought to enjoy, for the support of the messuages, which foundations he was of right entitled to have supported by land in which quarries were worked; and that the defendant negligently worked the quarries near to the messuages, whereby the foundations were weakened and the messuages fell. On motion in arrest of judgment:—Held, that the declaration was sufficient. *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J., Exch. 173.

In a declaration, each count alleged that the plaintiff was possessed of a dwelling house, and the defendant of coal mines lying near to and under it; and that the dwelling-house was supported in part by land between the same and the mines; and that the plaintiff "of right was entitled to, and of right ought to have his dwelling-house so supported in part by the land, without the hindrance or disturbance of any person." The first count alleged that the defendant "wrongfully and injuriously, in so unskillful, careless, negligent, and improper a manner, worked and excavated" the mines, that the land by which the house was in part supported was disturbed and withdrawn, and the support of the house injured and destroyed, and the foundation of the house gave way. The second count alleged that the defendant "wrongfully and injuriously made holes, excavations, and cuttings in, and loosened and disturbed and removed a great part of the land," by which the dwelling-house was in part supported, whereby the support of the house was injured:—Held, after verdict, a bad declaration, for not stating the grounds on which the plaintiff was entitled to have his house supported by the land above the mines. *Hilton v. Whitehead*, 12 Q. B. 734.

A declaration alleged that defendant, without leaving proper or sufficient pillars or supports in that behalf, and contrary to the custom of the country, worked certain coal mines under and contiguous to the close of the plaintiff, and dug for and got and moved the coals, minerals, earth and soil of and in the mines, and that by reason thereof the soil and surface of the close sank in:—Held, sufficient, without an allegation that the plaintiff was entitled to have his close supported by the subjacent strata. *Humphreys v. Brogden*, 15 Q. B. 739; 15 Jur. 124; 20 L. J., Q. B. 10.

A declaration stated that certain messuages and closes were in the occupation of the tenants of the plaintiffs, the reversion thereof belonging to them, and that the defendant so wrongfully, carelessly, negligently, improperly, and without leaving any proper or sufficient support, worked certain mines, and dug and got the minerals out of the mines

near to the messuages and closes, that thereby the foundations of the messuages were injured, and in consequence large portions of the buildings fell down, and the ground on which the buildings stood swagged and gave way:—Held, first, on motion in arrest of judgment, that the declaration was good, although it contained no averment that the plaintiffs had a right to have the messuages supported by the soil under which the defendant got the mines; for as it neither alleged nor could be inferred that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the defendant was *prima facie* a wrong-doer, and therefore as against him the declaration disclosed a sufficient title. *Jeffries v. Williams*, 5 Exch. 793; 30 L. J., Exch. 14.

Held, secondly, that as the defendant did work the mines without leaving sufficient support to the plaintiffs' buildings, they were entitled to a verdict on the plea of not guilty; for if any circumstances justified the defendant in getting the minerals without leaving sufficient support, that should have been pleaded by way of confession and avoidance. *Id.*

**Damages recoverable in actions at law for wrongful working or abstraction.**—In an action for taking coals from a mine, where the defendant is a mere wrong-doer, the measure of damages is the value of the coals at the time when they first existed as chattels, and the defendant is not entitled to any deduction for the expense of getting them, or for a rent payable to the mine-owner on coals from the mine. *Will v. Holt*, 9 M. & W. 672; 1 D., N. S. 876.

So in an action for getting and taking coal from a coal-mine, the proper measure of damages is the value of the coal as soon as it is severed from the freehold, which may be ascertained by deducting from the salable value of the coal at the pit's mouth, the expense of carrying it there from the mine. *Morgan v. Powell*, 2 G. & D. 721; 3 Q. B. 278; 6 Jur. 1100; 11 L. J., Q. B. 263. S. P., *Martin v. Porter*, 5 M. & W. 852; 3 H. & H. 70.

The defendant covenanted with the plaintiff, that he would sink upon the demised premises a pit to a certain depth in search of coal, and in case a marketable vein of coal should be reached, pay to the plaintiff a certain sum. The plaintiff sued the defendant for a breach of this covenant, and gave evidence to show that if the defendant had sunk the pit, marketable coal might have been found:—Held, that the plaintiff was entitled to more than nominal damages, and that the true measure of damage was the amount which he had lost by being deprived of the opportunity of finding marketable coal. *Pell v. Shearman*, 10 Exch. 766.

When the working of mines, in however careful a manner, has occasioned the subsidence of the land of another, although not immediately adjoining, damages may be re-

covered in respect of the injury to buildings thereon erected or enlarged within twenty years, provided their weight did not occasion or contribute to the subsidence. *Hamer v. Knowles*, 30 L. J., Exch. 102; 3 H. & N. 434; 9 W. R. 615; 3 L. T., N. S. 746.

In 1833 a manufactory was erected on a close, and in 1841, and between that time and 1849, the building was enlarged. In 1843 the close and buildings, which were leased for a term, which expired in 1851, were conveyed in fee by S., the owner, to C. C died in 1849, and in 1851 the devisees under his will conveyed the close and buildings to the plaintiff in fee, who before 1849 was assignee of the term and occupied the buildings. In 1849 and 1850 the defendants, in getting coal from their mines, near but not immediately adjoining the close, caused the surface to subside, by which the buildings were injured. The devisees of C. did not thereby, in fact, sustain any damage, inasmuch as they incurred no expense, and continued to receive the full rent from the premises, and upon the sale thereof obtained the full value, without reference to any injury thereto (of which they were ignorant) by the mining operations. Subsequently to the sale to the plaintiff, the working of the mines under lands near to, but not adjoining the close on which the building stood, occasioned a further subsidence. No damage was done by the working of the mines subsequently to 1853, but the subsidence of the ground continued, the consequence of the previous mining operations. The mining was skillfully conducted, and the buildings did not contribute to the subsidence. In 1855 the plaintiff brought an action against the defendant:—Held, that he was entitled to recover damages in respect of the deterioration in value of the manufactory, the machinery broken, the increased expense of keeping it in repair and working order, and the diminished profits both in respect of his occupation before and after the purchase. *Id.*

Held, also, that the devisees of C. might maintain an action for the injury to their reversion during the subsidence of the lease as trustees, and for the benefit of the vendee. *Id.*

The plaintiff company, colliery owners, contracted to supply, and the defendant company, dealers in coal, in London, contracted to purchase, 3,250 tons of old Silkstone coal, at 19s. a ton, to be delivered to and taken by the defendants at the pit's mouth in equal monthly quantities, extending over a period of nine months. During several of the months the defendants failed to send wagons forward to accept the full quantity they were bound to accept, and which the plaintiffs were ready and willing to supply in such months, and the defendants therein made default. The coal of the plaintiffs' colliery was a perishable coal, deteriorating rapidly in quality if stacked or stored above ground, and it was not the ordinary course of business, nor a reasonable course for the colliery owner, to raise such coal, except to supply contracts previously entered into, and it was raised as far



as possible from day to day to supply the wagons arriving to receive it, into which it was delivered direct from the pit's mouth. Such coal already raised could be, and frequently was, sold in small quantities in the London coal exchange by colliery owners, when a truck of coal had been refused by a customer, or had been sent astray, or when from any other reason coals ready raised were left on their hands, but not otherwise. An action was brought by the plaintiffs to recover damages from the defendants for breach of contract in failing to take the full monthly quantity of coals:—Held, that the amount of damages the plaintiffs were entitled to recover was the difference between the cost of raising the coal, added to the value of the coal itself remaining unraised in the mine (whatever those two heads of calculation might amount to) and the contract price of 10s. a ton, and that such amount could be accurately calculated and ascertained by persons familiar with the subject, without actually raising and selling the coal, which, being of a perishable nature, was not readily or profitably to be so disposed of, and that the plaintiffs were not bound to have so raised and sold it. *Silkstone and Dodsworth Coal and Iron Company v. Joint Stock Coal Company*, 85 L. T., N. S. 668—Exch. Div.

The lord of a manor, in which there was no custom authorizing him so to do, entered without permission on the land of a copyhold tenant, which was in the occupation of the tenant, and dug for and carried away coprolites. A large trench was dug, which, at the time when the copyhold tenant commenced a suit against the lord to restrain the trespass, was not filled up, though it was filled up and the surface restored before the suit came to a hearing. The digging was continued after the filing of the bill, and until the coprolites were exhausted:—Held, that, under the circumstances, the copyholder, though only a reversioner, could maintain a suit against the lord for an injunction and damages; and that the proper measure of damage was the gross amount produced by the sale of the coprolites, less the expenses of the working, and such a sum by way of profit as would have induced a stranger to undertake the working. *Att. Gen. v. Tomline*, 5 L. R., Ch. Div. 750; 40 L. J., Chanc. Div. 654; 36 L. T., N. S. 684; 25 W. R. 802.

**Accounting in equity.**—In a suit in equity for an account of coal wrongfully worked by the defendant, where the working was inadvertent and without fraud, the court, in assessing the compensation for the coal got by him, directed him to be charged only with the fair market value of the coal, as if the coal-field had been purchased by him of the plaintiff. *Hilton v. Woods*, 86 L. J., Chanc. 941; 4 L. R., Eq. 482; 15 W. R. 1105; 16 L. T., N. S. 786—V. C. M.

A mine-owner who passes his boundary, and takes coals from his neighbor's mine, is liable to account for the value of the coals at the

pit's mouth, with just allowances for the cost of raising, but not of getting or severing. *Dynei Company v. Brogden*, 11 L. R., Eq. 188; 40 L. J., Chanc. 46—V. C. B.

When a coal mine has been worked by a trespasser, but under a bona fide claim of title, in taking an account of the coal wrongfully worked, he will be allowed to deduct the cost of getting and severing the coals as well as the cost of bringing it to the pit's mouth. *Jagon v. Vivian*, 40 L. J., Chanc. 389; 6 L. R., Ch. 742; 19 W. R. 365.

The owners of a colliery entered into a contract with an adjoining land-owner for the purchase of his estate, without disclosing the fact, of which he was ignorant, that they had, without authority, gotten a considerable quantity of coal from under it:—Held, that the land-owner was entitled to the value of the coals gotten under his land, with an allowance for raising, but none for getting, and to compensation in the way of way-leave and royalty for all minerals gotten by the defendants from their own mines and carried under his land. *Fothergill v. Phillips*, 6 L. R., Ch. 770.

When coal has been wrongfully taken by working into the mine of an adjoining owner, the trespasser, in the absence of any suggestion of fraud, will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements, not including any profit or trade allowances, for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal. *United Merthyr Collieries Company, In re*, 15 L. R., Eq. 46; 21 W. R. 117—V. C. B.

A conveyance of land in fee was made subject to a reservation to the grantors of mines and minerals, and extensive powers of occupying and using the surface for the purpose of working the same. It was provided that it should not be lawful for the grantee to do or suffer anything to be done whereby the grantors should be prevented, hindered, or obstructed in the exercise of the powers reserved; and also that the grantor should make to the grantee annually reasonable compensation for damage or spoil of ground to be occasioned by the exercise of the reserved powers. Previously to the date of the deed of conveyance the premises were leased to the grantee, subject to similar reservations to those in the conveyance, and workings already existed which had taken place under such reservations:—Held, that no restriction was placed by the words of the conveyance on the use by the grantee of the land for any purpose to which it was applicable, so long as he did not touch or interfere with the minerals, and the compensation for damage or spoil of ground occasioned by the exercise of the powers reserved must be estimated with reference to the value of the land for any purpose to which an ordinary owner might put it; and that compensation was due in respect of damage arising from the use sub-

quently to the conveyance of land included therein that had been previously occupied and used for mining purposes, but not in respect of the mere existence of workings in being at the time of the deed, or their subsequent user without any fresh damage. *Morue v. Durham (Dean and Chapter)*, 8 L. R., C. 336; 42 L. J., C. P. 114; 28 L. T., N. S. 93.

When a vendor of a coal mine, against whom a suit for specific performance was brought, had, during his delay of completion, worked the mine for his own benefit:—Held, that the purchaser was entitled to compensation on an estimate of the market value of the coal in situ, i. e., the value at the place where it was to be sold, less the cost of severing and taking it from the mine to that place. *Brown v. Dibbs*, 25 W. R. 776; 87 L. T., N. S. 171—P. C.

A defendant wrongfully worked the plaintiff's coal so that some coal left in large pillars was rendered, partly by the effect of crushing, less valuable to work:—Held, that, inasmuch as the physical constitution of the unworked coal was changed, damages would be given for the injury to the unworked coal. *Williams v. Raggett*, 25 W. R. 874; 87 L. T., N. S. 96; 46 L. J., Chanc. Div. 849—Fry, J.

## VI. Cost-Book Mines.

**Nature and characteristics of the cost-book system.**—The court does not, without evidence, take judicial cognizance of the meaning of the term cost-book principle. *Bodmin United Mines Company, In re*, 23 Beav. 370; 3 Jur., N. S. 350; 26 L. J., Chanc. 570.

A contract for the sale of shares in a mining company managed on the cost-book principle is not a contract for the sale of land or an interest in land under the 4th section of the Statute of Frauds, 3 Car. 2, c. 29. Nor is it a contract for the sale of goods, wares or merchandise within s. 17. *Watson v. Spratley*, 10 Exch. 222; 2 O. L. R. 1434; 24 L. J., Exch. 53.

Shares in a mine, worked on the cost-book principle, do not necessarily constitute an interest in land within the 4th section of the Statute of Frauds, in the absence of evidence that the shareholders take a direct interest in the freehold. *Powell v. Jessopp*, 18 C. B. 836; 25 L. J., C. P. 199. S. P., *Walker v. Bartlett*, 18 C. B. 845; 2 Jur., N. S. 648; 25 L. J., C. P. 263.

An agreement between A., a lessee of a mine, and B., to become partners in the mine, paying the reserved rent, subletting the mine, at a royalty, and dividing the profits, is within the Statute of Frauds, 29 Car. 2, c. 3, and not sufficiently proved by a receipt signed by A., and given to B., for a sum as B.'s share of the headrent of the mine, the sum being exactly half of that rent. *Caddick v. Skidmore*, 2 De G. & J. 52; 3 Jur., N. S. 1185; 27 L. J., Chanc. 153.

But shares in a mine, carried on on the cost-book principle, are not within the Statute of Mortmain, 9 Geo. 2, c. 36, when it appears that the mines and other real estates were not vested in the pursuer or any person on a direct trust for the shareholders as tenants in common, in proportion to the number of their shares, but upon trust to work the same for the benefit of all the shareholders. *Hayter v. Tucker*, 4 Kay & J. 248; 4 Jur., N. S. 257.

A single shareholder cannot constitute a meeting of a company under the Stannaries Act, 1869, s. 4. *Sharp v. Dawes*, 2 L. R., Q. B. Div. 26—C. A.

**Allotment of shares; and recovering back price of shares on discovery of fraud of directors.**—The general rule that an allottee of shares in a company may recover back the price of his shares on his deposit, if all the shares have not been subscribed for, applies to a company carried on upon the cost-book principle. *Johnson v. Goslett*, 18 C. B. 728; 25 L. J., C. P. 274; affirmed on appeal, 3 C. B., N. S. 69; 4 Jur., N. S. 50; 27 L. J., C. P. 122—Exch. Cham.

Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus, describing the company as having a capital of 12,000l., in 12,000 shares of 1l. each, to be paid up on allotment, and stating that the money was to be paid to the bankers of the company. A. applied for, and obtained an allotment of fifty shares, and paid 50l. to the bankers, who gave him a receipt, describing that sum as having been received by them for the company. A. afterwards discovering that only 4,720 shares had been allotted, and that the deposits had been paid upon 685 shares only, brought an action against the directors of the company to recover back his deposit on the ground of a failure of consideration:—Held, that, although the account in the books of the bankers was kept in the names of five of the directors only, the seven were liable. *Id.*

In 1854 the plaintiff took shares in a mining company formed in 1853 for working a mine upon the cost-book principle. In 1854, 1855, and 1856 the mine was worked, and dividends were declared, which were paid in additional shares. In 1857, with the consent of the plaintiff, the company was registered under the Limited Liability Act. In July it was determined to wind up its affairs, and the mine was sold under an order of the Court of Chancery. The plaintiff then discovered that false representations had been made by the directors of the state of the company, which had induced him to become a shareholder, and he brought an action to recover the money which he had paid on his shares:—Held, that the action was not maintainable, inasmuch as he was not in a position to return the shares in the same state as when he took them. *Clarke v. Dickson*, 4 Jur., N. S. 832; 27 L. J., Q. B. 223; El., Bl. & El. 148.

**Recovery of calls from shareholders.]—**Shareholders in an unincorporated cost-book mining company cannot, by agreement among themselves, "that calls in arrear shall be considered to be debts due from defaulting shareholders to the pursuer," empower him to recover such calls from such shareholders in an action. *Hybart v. Parker*, 4 C. B., N. S. 200; 4 Jur., N. S. 265; 27 L. J., C. P. 120.

An owner of 500 shares in a cost-book mine, according to the rules of which the person registered as owner in the cost-book was subject to the payment of calls in respect of the shares so long as he continued registered as the owner, sold his shares to the defendant, and delivered to him a document addressed to the secretary of the mine, by which the owner requested the secretary to enter a transfer of the shares from his name to that of the transferee, subject to the rules, but leaving a blank for the name of the transferee, to be filled up by the holder of the document, which also contained at the foot an agreement on the part of the transferee to accept the shares subject to the rules, with a blank also left for the name of the party so agreeing. The defendant did not cause the shares to be registered in his name, and the plaintiff, in consequence of his name being continued in the cost-book as the owner, was compelled to pay some subsequent calls:—Held, that there was no legal obligation on the defendant to cause the shares to be registered in his name as the owner, but that there was an implied obligation on him to indemnify the plaintiff against calls made during the time when he was virtually and potentially the owner of the shares. *Walker v. Bartlett (in error)*, 18 C. B. 845; 2 Jur., N. S. 643; 25 L. J., C. P. 263—Exch. Cham.; reversing judgment of the Common Pleas on latter point, 17 C. B. 446; 2 Jur. 261; 25 L. J., C. P. 151.

**Forfeiture of shares on non-payment of calls.]—**A power in co-adventurers to forfeit the shares of one of their number for non-payment of calls is not necessarily incident to a mining adventure conducted on the cost-book principle. *Clarke v. Hart*, 6 H. L. Cas. 683; 5 Jur., N. S. 447; 27 L. J., Chanc. 615.

Where such a power exists by agreement between the parties, it is to be treated as strictissimi juris, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed. *Id.*

Where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement) that his shares are liable to forfeiture on non-payment of calls, will not affect his rights under the agreement. *Id.*

A., B. and C. joined in a mining adventure on the cost-book principle, as recognized in Devonshire and Cornwall. A. fell into arrear with his calls. Notice was given him of a meeting to declare his shares forfeited. The

meeting was held, but instead of his shares being declared forfeited, a resolution was passed, granting him an extension of time; no payment was made, and no further notice was given; but a fortnight after the extended time had expired the shares were declared forfeited:—Held, that such declaration of forfeiture was invalid. *Id.*

**Transfer and relinquishment of shares.]—**A shareholder in a mining company, on the cost-book principle, gave notice, according to the rules of the company, of his coming to be a member; afterwards the company was registered as a limited company, and was subsequently wound up:—Held, that the shareholder was not liable to be placed on the list of contributories of the company ordered to be wound up. *Leffhouse's Case*, 2 De G. & J. 69; 27 L. J., Bank. 1.

A shareholder in a company, carried on upon the cost-book principle, relinquished his shares upon paying his pro rata portion of the liabilities of the company. All the formalities required for the relinquishment of such shares were regularly complied with, and entered in the books of the company, and the correspondence was conducted with the pursuer, who fixed the amount to be paid by the shareholder, without the sanction of the managing committee:—Held, that the pursuer, being the authorized officer of the company to conduct such transactions, the shareholder was exempted from the liability in respect of any excess of power on the part of the pursuer, and upon the winding up of the company such shareholder should not be placed upon the list of contributories. *Wrygan Sales Company, In re, Ex parte Birch*, 28 L. J., Chanc. 894—V. C. K.

A mining company by its prospectus and certificates professed to be a company in 80,000 shares, of 1l. each, to be conducted upon the cost-book principle. The directors passed rules, by one of which the company was to be considered as constituted, and the directors to be at liberty to commence business, so soon as one-third of the shares should have been subscribed, and by another, that no person should be recognized as an adventurer in or entitled to any benefit from the company until he should have signed the rules, and be duly registered in the cost-book as an adventurer. H. having seen the prospectus, but not the rules, applied verbally, and paid for and received certificates of shares in the company. The certificates stated that the shares were to be held subject to the rules of the company. The company failed. H., a year after he received the certificates, brought an action to recover his money, as upon a failure of consideration, and the action was compromised:—Held, first, that the certificates were notice of the rules, and although H., assuming him not to have had previous notice, would have been allowed, perhaps, a reasonable locus penitentis to return the certificates, still, having retained them, and not having brought his action for a year, he

to be taken to have acquiesced in and been bound by the rules. *Hawkins' Case*, 2 Kay & 53; 2 Jur., N. S. 85; 25 L. J., Chanc.

**Held**, secondly, that although H. had not read the rules, still, having applied and done for, and accepted the certificates of shares, he had authorized the company to register his name in the cost-book, without signing the rules, the contract was complete, and he was a contributory. *Ib.*

In a company on the cost-book principle the regulations were, that any person who as the holder of share certificates could use himself to be registered as a shareholder, and could not receive any dividends unless he was the registered holder, and on registration the former holder was freed from all liability:—**Held**, that a registered share-holder, who had disposed of his shares and handed over the certificates, no other person having registered himself in respect of those shares, remained liable to be a contributory. *Humby's Case*, 5 Jur., N. S. 215—V. C. K.

The rules of a mining company, carried on upon the cost-book principle, provided that no shareholder should dispose of his shares without giving notice in writing to the purser of the intended transfer, and that every transfer should be according to a particular form provided for that purpose. The form was printed, and contained a notice that no transfer was valid or complete unless entered in the cost-book, and acknowledged by the purser. A shareholder agreed to transfer his shares, and the proposed transferee stipulated that the transferor should pay the calls then due. They went together to the office of the company, and deposited with the purser a transfer of the shares, executed by them both in the required form, and the transferor paid the calls, but no notice in writing was given of the transfer, nor was there any formal acknowledgment on the part of the purser:—**Held**, that the transferee was properly placed upon the list of contributories. *Mayhew's Case*, 5 De G., M. & G. 837; 24 L. J., Chanc. 858.

A shareholder in a Cornish mine, worked on the cost-book system, relinquished his shares in July, 1868, and paid his share of the expenses up to his retirement. In August, 1869, an order for winding up the company was made, and the retired shareholder claimed to prove as a creditor for the value of his share of the stock and plant. The assets were insufficient to pay the creditors of the mine. It having been found by a jury that, according to the custom of Cornwall, an adventurer in a cost-book mine, upon relinquishing his shares and discharging his proportion of the liabilities of the company at that date, was entitled to be paid his share of the then value of the stock and plant, and that such share was due to him immediately, and payable within two years; the proof was admitted. *Prosper United Mining Company, In re, Palmer, Ex parte*, 7 L. R., Ch. 296; 20 W. R. 328; 26 L. T., N. S. 374.

**Stamping.**—Before the enactment of 23 Vict. c. 15, transfers of shares of mines, conducted on the cost-book principle, were exempt from stamp duty. *Tall v. Lee*, 4 Exch. 230; 13 Jur. 614; 18 L. J., Exch. 361.

[By 33 & 34 Vict. c. 97, Schedule, any request or authority to the purser or other officer of any mining company, conducted on the cost-book system, to enter or register any transfer of any share, or part of a share, in any mine, or any notice to such purser or officer of any such transfer, is chargeable with a stamp duty of 6d.

By s. 128 (1.), the duty upon a request or authority to the purser or other officer of a mining company, conducted on the cost book system, to enter or register the transfer of any share, or part of a share, of the mine, and the duty upon a notice to such purser or officer of any such transfer, may be denoted by an adhesive stamp, which is to be canceled by the person by whom the request, authority, or notice is written or executed.

(2.) Every person who writes or executes any such request, authority, or notice, not being duly stamped, and every purser or other officer of any such company who in any manner obeys, complies with, or gives effect to any such request, authority, or notice, not being duly stamped, shall forfeit 20l.]

**Liability of members for debts.**—The defendant and others met for the purpose of forming a company for working a mine on the cost-book principle, the concern to consist of 60,000 shares, of which 15,000 were to be appropriated to the owner of the mine, 38,750 to A., B. and C., and the remainder allotted to other parties in proportion to capital subscribed by them; 1,125 being allotted to the defendant, for which he paid 100l.; and it was at that meeting resolved, that the requisite capital to work the mine for the first six months should be found by A., B. and C. The same resolution also stated that the mine had been purchased of the owner for 1,000l. in cash, and 15,000l. to be paid in cash or shares at the end of six months, should it be deemed desirable by the adventurers to continue operations; such payment of 15,000l. or surrender of the mine to the owner, being optional by the adventurers:—**Held**, that by this arrangement each adventurer being a partner in the concern from the commencement, was liable as such for goods supplied for the working of the mine. *Peel v. Thomas*, 15 C. B. 714; 3 C. L. R. 397; 24 L. J., C. P. 86.

A transferee of shares in a cost-book mine, the rules of which require transfers to be registered, in order to convey an interest in the mine, is not liable for debts of the concern contracted before his transfer is registered. *Thomas v. Clark*, 18 C. B. 662; 25 L. J., C. P. 309.

A. agreed to accept a transfer of shares (in trust) from B., with an understanding that the transfer was to take effect only in the event of B. going abroad. B. never went abroad, but without (as the jury found) A.'s

authority registered the transfer:—Held, that this unauthorized registration did not render A. liable as a partner for debts of the company. *Id.*

In an action against a shareholder, also the secretary of a mine conducted on the cost-book principle, under which the mine agents made monthly or quarterly estimates of the money required to carry on the business, and raised the amount by calls on the shareholders, it being also the practice, when sufficient funds were not forthcoming, to obtain goods on credit, and the defendant having, as secretary, entered the order for the goods, the question was left to the jury whether the captain had authority to pledge the credit of the shareholders for goods which were necessary. *Newton v. Daly*, 1 F. & F. 26—Watson.

In an action against a shareholder for coals sold and delivered to a cost-book mining company there was general evidence that coals had been delivered:—Held, that the monthly cost-sheets sent in by the creditor to the pursuer of the mine, and by him laid before the managing committee and passed by them, were evidence as against the shareholders of the quality and value of the coals so delivered. *Greake v. Jackson*, 15 W. R. 338; 15 L. T., N. S. 509; 36 L. J., C. P. 108.

**Charging shares with judgment debts.]—**Quære, whether a mining company on the cost-book principle is a public company within 1 & 2 Vict. c. 110, s. 14, so as to make shares therein liable to be charged with a judgment debt. *Nicholls v. Rosewarne*, 6 C. B., N. S. 480; 5 Jur., N. S. 1266; 28 L. J., C. P. 273; 7 W. R. 612.

An order having been made by a judge at chambers, the court confirmed it, on the ground that by setting it aside the court would preclude the judgment creditor from taking the opinion of a court of appeal. *Id.*

**Jurisdiction of the stannaries.]—**[See 6 & 7 Will. 4, c. 106, amended by 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 83, s. 7; 18 & 19 Vict. c. 32, and 32 & 33 Vict. c. 19.]

In an action against a shareholder in a company working a mine on the cost-book system, for goods supplied to the company, it appeared that after he had parted with his shares in it, the remaining members of the company caused it to be registered under 21 & 22 Vict. c. 60, and an order was made by the court of the vice-warden of the stannaries to wind up the company and stay all actions by creditors against it; and a list of contributories was drawn up, in which the name of the defendant was included. On an application to stay the action:—Held, that the plaintiff had a right to proceed, and that the court of the vice-warden had no power to make that order, as the defendant was not a member of the registered company, and the debt sued for was not a debt of that company. *Lanyon v. Smith*, 3 B. & S. 938; 9 Jur., N. S. 1228; 32 L. J., Q. B. 212; 11 W. R. 665; 8 L. T., N. S. 312.

A shareholder in an unregistered mining company, carried on upon the cost-book principle, who has disposed of his shares previously to the company being registered in 1861, under the acts of 1856, 1857, is not protected by 21 & 22 Vict. c. 60, s. 6, from being sued for the price of goods furnished to the company before registration, and during the time that he was such share holder. *Harvey v. Clough*, 8 L. T., N. S. 324—Exch.

A company, established for working mines in Cornwall, was registered in the Stannaries Court, but had its registered office in London. It never commenced business, and never possessed or worked any mine:—Held, under 21 & 26 Vict. c. 89, s. 81, that it was a company "engaged" in working a mine in the stannaries, and that the Stannaries Court, and not the Court of Chancery, was the proper jurisdiction for winding it up. *East Bolelack Consolidated Mining Company, In re*, 34 Beav. 82; 34 L. J., Chanc. 81; 10 Jur., N. S. 1193; 13 W. R. 197.

The first section of 12 & 13 Vict. c. 106, excepting companies, formed for working mines on the cost-book principle from the operation of the winding-up acts, except on the petition of one-tenth in value of the share-holders, did not apply to a mine in Devonshire, notwithstanding 18 & 19 Vict. c. 32, extending the jurisdiction of the Stannaries Court to the latter county. *South Lady Bertha Copper Mining Company, In re*, 9 Jur., N. S. 170; 32 L. J., Chanc. 92; 2 Johns. & H. 376; 10 W. R. 687; 7 L. T., N. S. 20.

Under the Companies Act, 1862, s. 35, the vice-warden of the stannaries has not exclusive, but concurrent, jurisdiction to entertain an application to rectify the register of members. *In re Penhale and Lomar Consolidated Silver Lead Mining Company, Ex parte Atter*, 36 L. J., Chanc. 515; 2 L. R., Ch. 398—L. J.

A company established for the purpose of acquiring and working mines in Cornwall, and carrying on the business of a smelting and refining company, and, as auxiliary thereto, the purchase and erection of buildings, jetties, piers, railways, &c., and the freighting of vessels, is subject to the jurisdiction of the court of the stannaries. *Id.*

## VII. MINING COMPANIES.

**Purchase, transfer and registration of shares.]—**Before taking shares in a mine a purchaser availed himself of the means, by inspection and otherwise, of obtaining information respecting it, and afterwards embarked in the speculation. On a bill filed to set aside the contract, on the ground of false representations of the character and value of the mine:—Held, that as he acted upon his own opinion, and not upon the representations of the directors of the mining company, he was not entitled to any relief. *Jennings v. Broughton*, 17 Jur. 905; 23 L. J., Chanc. 585; 17 Beav. 234.

The purchaser of shares in a mining com-



pany is not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked; but he is entitled to such evidence of the constitution of the company and of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer to him will give him a valid title to the shares. *Curling v. Flight*, 2 Ph. 613; 12 Jur. 423; 17 L. J., Chanc. 359.

The sale, in one transaction, of several kinds of mining shares will not be set aside in equity for misrepresentation, if the person seeking relief is unable to restore all the shares he has taken. *Maturin v. Tredenick*, 12 W. R. 740; 10 L. T., N. S. 331—V. C. W.

*Secus*, when the sale is of shares of one kind only. *Id.*

The plaintiff agreed to sell the defendant a share in a mining sett for 250*l.*, and the defendant agreed to purchase at that price, and the parties agreed to form a company, and as soon as the company was registered the defendant agreed to pay the 250*l.*, as before stated:—Held, that the readiness and willingness of the plaintiff to convey, and the payment of the purchase-money, were concurrent acts, and that, therefore, to an action for non-payment of the 250*l.*, a plea that the plaintiff was not ready and willing to convey was a good answer to the action. *Marsden v. Moore*, 4 H. & N. 500; 28 L. J., Exch. 288.

Held, also, that a plea that the plaintiff had not at any time any title to the share in the mining sett, nor any right or title to convey the same, was good, as the plea must be construed as involving a denial, not only of a title in the plaintiff himself, but also of a title to procure a title by any grantor. *Id.*

Upon a sale by one broker to another, of shares in a mine, they respectively signed bought and sold notes, the former of which was as follows: "Bought, T. F. 250-5120ths shares in Wheal Charlotte, at 2*l.* 5*s.* per share, 562*l.* 10*s.* for payment, half in two months, and half in four months." In an action for not accepting the shares:—Held, that evidence was admissible of a custom among brokers in mining shares, that, in contracts relating to the sale and purchase of such shares, the delivery takes place at the time appointed for payment. *Field v. Lolean*, 6 H. & N. 617; 7 Jur., N. S. 918; 30 L. J., Exch. 163; 9 W. R. 387; 4 L. T., N. S. 121—Exch. Cham.

If the proprietor of shares in a mining company has them entered in the name of a third person, the legal interest is not in the proprietor, but in the third person. *Dawson v. Riskworth*, 1 B. & Ad. 574.

The true measure of damages for not redelivering mining shares lent to the defendant, upon a contract to return them on a given day, is not the market price at the time of the breach, but the market price at

the time of the trial. *Owen v. Routh*, 14 C. B. 327; 2 C. L. R. 363; 18 Jur. 356; 23 L. J., C. P. 105.

**Powers of company.**—By a charter of William & Mary, a company was incorporated by the name of "The Governor and Company of Copper Miners in England," and for the purpose of managing and carrying on the business of melting down, refining and purifying copper ore; they entered into a written contract, not under seal, by which, in consideration that they would sell to the defendant iron rails, he agreed to furnish to them sections of the rails; some of the sections were delivered by the defendant. In an action for not delivering the residue:—Held, first, that the company was only authorized by the charter to manage and carry on the business and affairs belonging to copper miners, and that the court could not assume that any other charter existed. *Governor and Company of Copper Miners in England v. Fox*, 16 Q. B. 229; 15 Jur. 703; 20 L. J., Q. B. 174.

Held, secondly, that iron rails not being shown to have any connection with the business of copper miners, the contract, being by parol, was not good: and as the company could not be sued, they could not sue upon it. *Id.*

Held, thirdly, that the objection might be taken under the general issue. *Id.*

**Validity of agreements between members.]**

—A shareholder in a gold-mining company in Victoria took proceedings to obtain possession of a claim belonging to the company, for a forfeiture under the mining act of the colony. By an agreement with a majority of the shareholders of the company, in consideration of their not opposing his proceedings to enforce a forfeiture, guaranteed them in the event of his success the full benefit of their shares:—Held, that such an arrangement was one that a court of equity could not allow to stand. *Smith v. Harrison or Bank of Australia*, 27 L. T., N. S. 183; 41 L. J., P. C. 34; 20 W. R. 594.

**Liability of members, for goods.]**—A. paid money for shares in a mine, to B., describing himself as the treasurer of the mine, and received from persons calling themselves directors a memorandum purporting that A. was a proprietor of shares, and that his name was entered in the cost-book. A., in writing and in conversation, acknowledged himself to be a shareholder, and received money from B., as treasurer, on account of supposed profits, but no deed was executed, nor was there an assignment of any interest in the mine from the lessee:—Held, that A. was not liable for supplies furnished to the mine, unless they were furnished on his credit. *Vice v. Anson*, 1 M. & It. 113; 7 B. & C. 409; M. & M. 97; 3 C. P. & 19.

Where a part owner of a mine told a creditor, who had supplied the mine on the credit of the firm, that he had sold his share to others, who for the future would be the pay-

masters, and that he would no longer be responsible:—Held, that the operation of the notice was a question for the jury. *Vice v. Fleming*, 1 Y. & J. 227.

The appropriation of shares in a mining association to a party at his request, the payment of installments on those shares, attendance at the counting-house of the association, and there signing some deed (not produced at the trial), and subsequent attendance at a general meeting of the shareholders (his conduct at which he is not allowed to show), do not prove a party to be a partner. *Dickinson v. Valpy*, 5 M. & R. 126; 10 B. & C. 128.

The members of a mining company have authority by law (in the absence of any proof of a more limited authority) to bind each other by dealing on credit for the purpose of working the mines, if that appears to be necessary or usual in the management of mines. *Tredwin v. Bourne*, 6 M. & W. 461; 4 Jur. 747.

Where a mining company was formed, the capital to be 80,000*l.*, in 800 shares of 10*l.* each, and 200 shares only were actually subscribed for, of which the defendant took 100:—Held, that letters subsequently written by a member to the directors, requiring them to call a meeting for the purpose of changing a director, were evidence to go to the jury, to show that he authorized the directors to proceed in the management of the concern with the smaller amount of capital, so as to render him liable for the price of articles supplied for the use of the mines, on the order of the directors. *Id.*

A company was formed for the working of mines in the Brazils. The prospectus stated that the capital was to consist of 100,000*l.*, in 5,000 shares of 20*l.* each; and the first annual report announced to the share-holders, among other things, that the whole number of shares had been appropriated, which announcement was contrary to the fact, the number of shares really disposed of being only 2,000, the unappropriated 3,000 having been colorably divided among the directors themselves, the deposit thereon not having been paid by some of them, and others giving their acceptances for the amount. The defendant was a shareholder, and was proved to have called several times at the office of the company for information, and to have attended a meeting of the shareholders:—Held, that notwithstanding the non-fulfillment by the directors of the contract upon which the defendant agreed to become a partner in the undertaking, he having knowledge or means of knowledge of all the facts, and not objecting, the jury was warranted in inferring that he assented to the course pursued by the directors, and, consequently, that he was liable in respect of contracts necessarily entered into by them for the working of the mines. *Steigenberger v. Carr*, 8 Scott, N. R. 460; 8 M. & G. 191.

Held, also, that in the absence of evidence to the contrary, the court must assume that the interest in the mines was duly conveyed to

the company according to the Brazilian law. *Id.*

A company was formed to work a mine in which the defendant became a shareholder, and took part in its proceedings. The prospectuses issued on the formation of the company stated that all supplies for the mine were to be purchased at cash prices, and no debt was to be incurred; and the scrip certificates bore an indorsement to the same effect. The plaintiff supplied goods for the necessary working of the mine, on the order of a resident agent, appointed by the directors to manage the mine, which was the customary course in such concerns:—Held, that the defendant was liable to the plaintiff for the price of such goods, notwithstanding the statements in the prospectus and certificate, unless it was shown that the agent had in fact no authority from the defendant, and that the plaintiff had notice thereof. *Hawken v. Bourne*, 8 M. & W. 703.

Certain persons formed themselves into a company to raise a fund for working mines in America, and 6,000*l.* was subscribed in shares of 100*l.* each. The deed by which the company was formed was dated November 1, 1833, and provided that the directors should have the power of creating and issuing new shares from time to time, and that the shares should be assignable. Bills of exchange having been drawn on the company by their agent in America, which they required funds to meet, an agreement, dated December 21, 1835, was entered into by three of the directors with the plaintiffs, for borrowing 5,800*l.* from them, which sum was accordingly advanced by the plaintiffs. In an action by them against A., a shareholder, to recover the sum so advanced:—Held, that the fact of A. having, on the 17th December, 1835, attended a special general meeting of the company, at which resolutions were passed relating to the sale of certain of the company's mines, in order to provide for the payment of the bills, was sufficient evidence to go to the jury to fix him with liability as a share-holder, though A. did not sign the deed, nor was he proved to be the proprietor of any shares, or to have attended any other meeting, or to have done any other act in connection with the company. *Harrison v. Heathorn*, 5 M. & G. 322; 6 Scott, N. R. 785; 12 L. J., C. P. 282.

Held, also, that his attendance at that meeting, together with the nature of the business transacted at it, showed sufficient authority in the directors to enter into the contract declared upon on behalf of A. and the other shareholders. *Id.*

Where a party is charged with a debt, as a partner in a mining company, but is not shown to have either contracted such debt personally, or represented himself to the creditor as a partner, the fact of his having been partner may nevertheless be shown by evidence short of strict proof that he had executed a deed of copartnership, or was legally interested in the mine. Admissions made by him before or after the debt was in-

curred may be evidence for this purpose. *Ralph v. Harrey*, 1 Q. B. 845.

— for moneys borrowed.]—When a mining concern was carried on by an agent in Cornwall, and distress warrants were issued by the justices of the peace, in consequence of the wages of the workmen not having been paid:—Held, that the agent had no power to borrow money, and pledge the credit of his principals, in order to prevent the warrants being put in force. *Hawtayne v. Bourne*, 7 M. & W. 595; 5 Jur. 118.

One of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for money borrowed for the purposes of the concern. And the fact that he has the general management of the mine makes no difference in the absence of circumstances from which an implied authority for that purpose can be inferred. *Ricketts v. Bennett*, 4 C. B. 686; 11 Jur. 1002; 17 L. J., C. P. 17.

The directors of a mining company have no implied authority to borrow money on the credit of the company, for the purpose of carrying on the mines, or for any other purpose, however useful or necessary to the objects for which the company is formed. *Burmester v. Norris*, 6 Exch. 796; 21 L. J., Exch. 43.

By a deed of settlement under which a company was carried on, a capital of 50,000*l.* was provided; and there were powers to create new shares, and to alter the provisions of the deed by the vote of a special general meeting. There was also a clause, "that the affairs and business of the company shall be under the sole and entire control of the directors, of whom there shall not be less than five, or more than nine; and three of them shall at all meetings of directors, and for all purposes, be competent to act:"—Held, that under this deed the directors had no express authority to borrow money for the necessary purposes of the mines. *Id.*

The plaintiff and the defendant were shareholders in a mining company. Money being required to work the mine, T., who was also a shareholder, applied to a bank for an advance of 500*l.*, which the bank consented to make on the security of the joint promissory note of the plaintiff, the defendant, and S. The note was given, and the money advanced, and applied to the purposes of the mine. The plaintiff having been compelled to pay more than his share of the note, sued the defendant for contribution:—Held, that this was not a partnership transaction, and therefore that the action was maintainable. *Sedgwick v. Daniell*, 2 H. & N. 319; 27 L. J., Exch. 116.

— on bills and notes.]—By a deed dated 7th May, 1839, a company was formed called the West Mining Association, of which the defendants were directors. The plaintiff, 10th July, 1839, agreed to sell to this company 1,000 shares in the Penzance Mills Mining Company, to be paid for by 1,885*l.*, and by the delivering to him of 200 scrip

certificates of shares in the West Mining Association. The money was to be paid on the 1st August, 1841. Immediately upon the execution of the agreement, 200 scrip certificates were obtained by the plaintiff's agent, and entered in the register book of the West Mining Association in the plaintiff's name. The defendants afterwards gave the plaintiff the following note, dated August 17, 1839: "We jointly promise to pay to J. F. (the plaintiff) 1,885*l.*, on the 1st August, 1841, for value received in Penzance shares, pursuant to annexed contract." This note was signed by all the defendants in their individual names. The deed of settlement of the West Mining Company provided that holders of scrip certificates should not be considered as qualified proprietors; and that a proportion of the net profits of the year should be divided among the shareholders and scrip certificate holders, in proportion to their several shares and interests. The plaintiff had not paid any installments nor signed the deed of settlement, but continued to be the holder of the scrip certificates:—Held, in an action brought upon the note, that a plea that the defendants made the note as directors and on behalf of the mining copartnership, and that the plaintiff was a partner with the defendants, was not supported by proof of these facts. *Fox v. Frith*, 10 M. & W. 131; Car. & M. 502.

The defendants agreed to form themselves into a mining company; that B. should be the resident director or manager of the mine; that he should employ workmen, provide all needful implements, materials and machinery, and so direct the mine as most effectually to promote the interests of the company; that he should transmit to the secretary his accounts monthly of the sums paid for wages, salaries, materials and otherwise, together with a statement of all debts and liabilities due from the company; provided always, that he should not expend or engage the credit of the company for any sum exceeding 50*l.* in any one month, without the express authority in writing of the managing directors:—Held, that under this deed B. had no authority to bind the company by the acceptance of bills of exchange. *Brown v. Byers*, 16 M. & W. 252; 16 L. J., Exch. 112.

Held, also, that a managing director who was represented at a meeting of directors by proxy, was not bound by a resolution of the directors present at such meeting, authorizing the resident director to accept bills of exchange. *Id.*

Where a bill of exchange was addressed to a mining company, and accepted by the defendant as manager, and it was shown that he and three others had agreed to form the company, and that the mine had been worked on the footing of that agreement:—Held, that the defendant was individually liable on the bill as a member of the company. *Owen v. Van Uster*, 10 C. B. 318; 20 L. J., C. P. 61.

A bill of exchange, purporting to be "for value received in machinery supplied to the

Hayter & Holme Moor Mines," was directed to the defendant as an individual. He wrote across the bill the words "accepted for the company, W. Charles, purser." He was the purser of the mine, but was not a member of the company:—Held, that he was personally liable as acceptor. *Mare v. Charles*, 5 El. & Bl. 798; 2 Jur., N. S. 234; 25 L. J., Q. B. 119.

#### VIII. REGULATION AND INSPECTION OF MINES.

**Statutes.**—[5 & 6 Vict. c. 99 (amended and extended by 23 & 24 Vict. c. 151), prohibited the employment of females, and regulated that of boys, in mines and collieries, and made provisions relating to persons working therein.

23 & 24 Vict. c. 151 (amended by 25 & 26 Vict. c. 79, s. 7, et seq.) regulated the inspection of coal mines in Great Britain, and mines of iron-stone of the coal measures.

18 & 19 Vict. c. 108, repealed 18 & 14 Vict. c. 100, the former statute on this subject; and 23 & 24 Vict. c. 151, s. 6, repealed 18 & 19 Vict. c. 108.

35 & 36 Vict. c. 76, consolidates and amends the acts relating to the regulation of coal mines, and certain other mines. Section 76 repeals the whole of the 5 & 6 Vict. c. 99, so far as it relates to mines to which the act applies; sections one to five of the 23 & 24 Vict. c. 151, so far as they relate to mines to which the act applies, and the residue of the act entirely, and the whole of the 25 & 26 Vict. c. 79.

35 & 36 Vict. c. 77, consolidates and amends the law relating to metalliferous mines. Section 45 repeals 5 & 6 Vict. c. 99, and 23 & 24 Vict. c. 151.

38 & 39 Vict. c. 16, amends the provisions of the Metalliferous Mines Regulation Act, 1872, 35 & 36 Vict. c. 77, with respect to the annual returns from the mines.]

A slate quarry, worked by means of underground workings by levels, is a mine within the intention of 35 & 36 Vict. c. 77. *Sim v. Evans*, 23 W. R. 730—Q. B.

**Employment of females.**—To make a contractor for working a mine liable to a conviction for allowing females to have charge of the machinery or tackle by means of which persons are brought up or passed down a vertical shaft of a mine, contrary to 5 & 6 Vict. c. 99, ss. 8 & 13, knowledge of or acquiescence in their being so employed must be brought home to him. *Reg. v. Handley*, 9 L. T., N. S. 827—Q. B.

Evidence of females being found in charge of such machinery and tackle on one occasion only is not sufficient. *Ib.*

The court has power to entertain a special case sent by the quarter sessions for their opinion, they having confirmed a conviction appealed against, under 5 & 6 Vict. c. 99, s. 21, subject to the opinion of the court. *Ib.*

**Descending and ascending.**—By a special rule for the regulation of coal mines, under 23 & 24 Vict. c. 151, the banksman is directed to

take care that the persons descending the pit shall in no case exceed the number of eight men and boys; a breach of these rules is punishable on summary conviction by fine and imprisonment. The chartermaster of a pit (who by the rules was declared to be the responsible manager of the pit under his charge), was close to the pit, and was cognizant that more than eight men were being lowered down at one time, and had power to prevent the banksman (who was his servant) from so doing, and did not interfere:—Held, that he was properly convicted of a breach of the regulations, as being a person aiding, abetting, or procuring the commission of the offense, within 11 & 12 Vict. c. 43, s. 5. *Howells v. Wynne*, 15 C. B., N. S. 3; 9 Jur., N. S. 1041; 32 L. J., M. C. 241.

The Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76, s. 52, gives power to frame special rules for the conduct and guidance of persons acting in the management of a coal mine or employed in or about the same. By a special rule in force in a mine no person employed in or about the works was to ascend the pit contrary to the direction of the hooker-on. In this mine the workmen had power to dismiss themselves at a moment's notice. The workmen employed in the mine being dissatisfied with their working place discharged themselves. They asked the hooker-on to allow them to ascend the pit, but he refused to do so until the ordinary time came for workmen to quit the mine; the workmen, however, ascended, contrary to his direction:—Held, that they had been guilty of a breach of the special rule above mentioned. *Higham v. Wright*, 2 L. R., C. P. Div. 897; 40 L. J., M. C. 223; 37 L. T., N. S. 187.

**Ventilation.**—The 18 & 19 Vict. c. 108, s. 4, required certain rules to be observed in every coal mine and colliery by the owner and agent thereof. By Rule 1, an adequate amount of ventilation is to be constantly produced at all collieries, in order that the working places of the pits and levels of such collieries may, under ordinary circumstances, be in a fit state for working. Section 11 imposed a penalty upon the owner and agent if any colliery be worked and the aforesaid rules are neglected or willfully violated:—Held, the agent of a colliery which was actually that worked only on week days incurred a penalty under s. 11 for a breach of Rule 1, by neglecting to keep up adequate ventilation in the colliery during the suspension of actual work there between Saturday night and Monday morning; for that, notwithstanding such suspension, the colliery was worked during that time within the meaning of that section. *Knowles v. Dickinson*, 2 El. & El. 705; 6 Jur., N. S. 673; 29 L. J., M. C. 135; 8 W. R. 411.

By 23 & 24 Vict. c. 151, s. 10, Rule 1, an adequate amount of ventilation shall be constantly produced in all coal mines or collieries and iron-stone mines to dilute and render

harmless noxious gases to such an extent that the working places of the pits, levels, and workings of every such colliery and mine, and the traveling roads to and from such working places, shall, under ordinary circumstances, be in a fit state for working and passing therein:—Held, that Rule 1 was not confined to the ventilation of the working places and traveling roads, but required that so much of the mine must be kept ventilated as to render the working places and traveling roads safe. *Brough v. Homfray*, 9 B. & S. 492; 37 L. J., M. C. 177; 3 L. R., Q. B. 771; 16 W. R. 1123.

**Fencing.]**—The 23 & 24 Vict. c. 151, s. 21, which imposes on the owner of an abandoned mine the duty of securely fencing it, does not apply to a mine abandoned before the passing of the statute. *Reg. v. Gratrex*, 12 Cox C. C. 157—Cleansby.

In 1860, S. proposed in writing to take from the landlord certain coal mines for fourteen years, from Michaelmas of that year, at a certain rent, a lease to be granted and accepted, with provisions contained in a then existing lease of other mines. The landlord accepted this proposal in writing, but no lease was executed. One of the provisions mentioned was, that when and so soon as the pits, shafts, roads, &c., should be discontinued or become useless, the lessee would fill up or remove the same, unless the lessor should signify his wish that the same should be kept open or continued. In 1871, S. discontinued working these mines. In December, 1875, he was convicted by justices under the Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76, s. 41, upon a charge of not causing the tops of the shafts of these mines to be kept securely fenced for the prevention of accidents on the 29th November previously:—Held, that he was not at the date charged an owner of the shafts within the interpretation of that term in s. 72. *Stott v. Dickinson*, 34 L. T., N. S. 291—D. C. A.

Sect. 41 applies to a mine abandoned or discontinued at any time before or after the time when the act comes into operation. *Ib.*

The lords of Mold were freeholders of a mine, an old unused shaft of which was unfenced, and they had certain rights over the surface. They leased the mine to a company, reserving a lien on the minerals gotten for their rent and dues, with powers of distress and re-entry. The company went into liquidation:—Held, that the lords were "persons interested" in the minerals of the mine within the meaning of the Metalliferous Mines Regulation Act, 1872, 35 & 36 Vict. c. 77, s. 41, and therefore liable to fence under s. 13. *Evans v. Mostyn*, 36 L. T., N. S. 856; 6 L. R., C. P. Div. 547—D. C. A.

**Removal of workmen.]**—A check-weigher, stationed by the persons employed in H.'s mine to take an account of the weighing of the mineral gotten by them under s. 18 of the Coal Mines Regulation Act, 1872, had been convicted and imprisoned for intimidating

one of the workmen with a view to compel him to abstain from working as a wagon-rider in H.'s employment. He applied to justices for a summary order for the check-weigher's removal under the provisions of that section, and the justices, although it did not so appear on the face of the conviction, admitted evidence to show, and found as a fact, that the intimidation took place on H.'s premises, where the appellant had no right to be, except in his capacity of check-weigher. It did not appear that this intimidation caused any impediment or interruption of the working of the mine, but the justices made the order of removal:—Held, that the check-weigher had misconducted himself within the meaning of the section, and that the justices were justified in making the order. *Prentice v. Hall*, 37 L. T., N. S. 605—Q. B. Div.

**Reporting loss of life.]**—By 18 & 19 Vict. c. 108, s. 9, if loss of life to any person employed in a coal mine occurs by reason of any accident within such coal mine, or if any serious personal injury arises from explosion therein, the owner shall, "within twenty-four hours next after such loss of life," send notice of such accident to the inspector of the district:—Held, that where serious personal injury arose, not attended with loss of life, the owner could not be convicted for not sending notice to the inspector. *Underhill v. Longridge*, 6 Jur., N. S. 221; 29 L. J., M. C. 65—Q. B.

**Limitation of time for recovering penalties.]**—Mandamus tested the 14th of May, 1857, to justices, to hear and determine the merits of an information, which they had dismissed without hearing and determining the merits, on the 20th of January. Return, that the justices, in obedience to the writ, on the 22d of December, 1857, heard and determined the information, which was for penalties incurred by a contravention of the 18 & 19 Vict. c. 108, and dismissed it, on the ground that the offense having been committed on the 17th of December, 1856, more than three months had elapsed, and the defendant was therefore protected, and could not be convicted. Section 14 enacts, that all penalties imposed by the act may be recovered within three months of the commission of the offense:—Held, that whether the justices were right or wrong in their construction of the act, the return showed that they had obeyed the writ, and was therefore good. *Reg. v. Mainwaring*, 4 Jur., N. S. 928; 27 L. J., M. C. 278; El., Bl. & El. 474.

Semble, per Lord Campbell, C. J., and Crompton, J., that the justices' construction of the act was right; Coleridge, J., and Erle, J., inclining to a contrary opinion. *Ib.*

**Liability of joint owners.]**—A party was summoned before justices, upon an information under 18 & 19 Vict. c. 108, s. 11, charging that he, "being one of the owners and managers" of a colliery, had worked the colliery without providing the



boiler with a proper steam gauge. In defense he contended that, as there were other owners, they ought to be charged with him; but he did not deny that he was resident owner, and took an active part in the management. The justices, upon this objection alone, dismissed the complaint, considering the information to be bad on the face of it, because it showed that there were other owners. A mandamus was granted, commanding them to hear and determine the information; for that, first, the objection was invalid; and, secondly, the justices had not exercised jurisdiction, but had declined it, the objection being preliminary, though taken in defense, and not at the outset. *Reg. v. Brown*, 7 El. & Bl. 757; 8 Jur., N. S. 745; 20 L. J., M. C. 183.

**Immunity of mine-owners from liability for negligence of servants.**—By the Mines Regulation Act, 23 & 24 Vict. c. 151, s. 10, it was provided that certain general rules should be observed in every coal mine by the owner and agent thereof; and among those rules was one providing that, whenever safety lamps were required to be used, they should be first examined and safely locked by a person or persons duly authorized for that purpose. By s. 22, a penalty was imposed on the owner or agent if, through the default of such owner or agent, any of the general rules, the provisions of which ought to be observed by them, were neglected or willfully violated. The owner of a mine appointed a competent person to examine and lock the safety lamps required for use in the mine, but such person delivered out certain safety lamps to miners for use in the mine, unlocked:—Held, that, in the absence of any personal default on the part of the owner, he was not liable to a penalty in respect of the act of the person so employed by him. *Dickenson v. Fletcher*, 9 L. R., C. P. 1; 43 L. J., M. C. 25; 29 L. T., N. S. 540.

The owners of a colliery who have appointed a certificated manager under the Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76, s. 26, are not liable for an injury to a workman in the colliery, caused by the negligence of the manager, as there is nothing in the statute to make him other than a fellow-workman of the person injured. *Howells v. Landore Steel Company*, 44 L. J., Q. B. 25; 23 W. R. 335; 32 L. T., N. S. 19; 10 L. R., Q. B. 62; affirming *S. C.*, 81 L. T., N. S. 483—Q. B.

## Minor.

See INFANT.

## Mint.

**Statute.**—[33 & 34 Vict. c. 10, consolidates the mint and coinage laws.]

## Misdemeanors.

See CRIMINAL LAW.

## Misdirection.

See NEW TRIAL.

## Misfeasance.

See NEGLIGENCE; TRESPASS.

## Misjoinder.

- I. OF PARTIES. See AMENDMENT.  
II. OF COUNTS, AND CAUSES OF ACTION. See PLEADING.

## Misnomer.

- I. NAME AND ADDITION, IN GENERAL, 9122  
II. EFFECT, IN PROCESS AND PLEADINGS; AND HOW WAIVED OR CORRECTED, 9124.  
III. IN BAILABLE PROCEEDINGS. See BAIL.  
VI. AMENDMENT. See AMENDMENT.

### I. NAME AND ADDITION, IN GENERAL.

**What sufficient description or signature.**—

It is no objection to an order of removal, that the justices making it, and stated in it to be justices of the county, sign it with the initials of their christian names only. *Reg. v. Worthenbury*, 2 New Sess. Cas. 13; 7 Q. B. 555; 9 Jur. 510.

A recognizance to keep the peace, recited that the recognizance had been acknowledged before "Lee B. Townshend, Esq., and J. H. Harper, Esq., two of our keepers," &c.:—Held, no objection, that the justices were described by initial letters. *Reg. v. Dale*, 15 Jur. 657; 20 L. J., M. C. 240; 17 Q. B. 64.

The addition of the christian names of the partners to the style of a partnership, consisting of the surnames of the partners only, does not prevent the signature to a promissory note by one partner from binding the firm. *Norton v. Seymour*, 3 C. B. 793; 11 Jur. 312; 16 L. J., C. P. 100.

A coroner's inquisition found "death by misfortune," and that certain chattels moving to the death were "the goods and chattels of and in the possession of the proprietors of the Hull and Selby Railway, and of the proprietors of the Leeds and Selby Railway." The inquisition was quashed, for not showing the deadland to be the property of parties named,

it not appearing that there existed any corporations or corporation entitled as above. *Reg. v. West*, 1 Q. B. 826; 2 Railw. Cas. 613; 1 G. & D. 481; 5 Jur. 484.

A trader assigned all his property and effects to a trustee for the benefit of creditors, the trustee being described throughout as "James James, of, &c., tailor;" but executing the deed by his true name of "James James:"—Held, that the misdescription did not prevent the property from passing to him. *James v. Whitbread*, 11 C. B. 406; 20 L. J., C. P. 217.

Where an arbitrator, in making his award, described the defendant by a wrong christian name, the court sent the award back to be amended. *Davies v. Pratt*, 16 C. B. 586.

A judgment was recovered by B. against Alfred, Lord H., described in the writ of summons, and in the judgment, as Edward, Lord H. Alfred, Lord H. appeared, and the judgment was registered, and complied with the requisites of the 1 & 2 Vict. c. 110, ss. 13, 19:—Held, the registration being correct, that sufficient notice was given to creditors and purchasers, and that the judgment was valid. *Beavan v. Oxford*, 3 Eq. R. 445; 1 Jur., N. S. 154; 24 L. J., Chanc. 811; 3 Sm. & G. 11.

Under 5 & 6 Will. 4, c. 76, s. 32, which requires the voting paper at an election of borough councilors to be signed with the name of the burgess voting, the party's usual signature is sufficient; and it is no valid objection that the christian name is denoted only by an initial. *Reg. v. Avery*, 18 Q. B. 576; 17 Jur. 272; 21 L. J., Q. B. 429.

By 7 Will. 4 & 1 Vict. c. 78, s. 14, at an election of aldermen every member of council entitled to vote may vote by delivering to the mayor or chairman of the meeting a voting paper, containing the christian and surname of the person for whom he votes, with their respective places of abode. A candidate's christian name was William, and in two of the voting papers it was written Wm. and in one Willm.:—Held, that his christian name was written sufficiently to satisfy the statute. *Reg. v. Bradley*, 7 Jur., N. S. 757; 9 W. R. 372; 3 L. T., N. S. 853; 3 El. & El. 634.

It is required by 6 & 7 Vict. c. 18, s. 17, that every notice of objection shall be signed by the person objecting; and it is sufficient if the usual signature of the objector is engraved in fac-simile on a stamp, and the objector himself by his own hand impresses this stamp upon the notice of objection. *Bennett, app., Brumfit*, resp., 17 L. T., N. S. 218; 16 W. R. 131; 37 L. J., C. P. 25; 3 L. R., C. P. 28; 1 H. & P. 407.

No addition having been given to the defendant, either in the recital of the writ, or in the subsequent part of the declaration, the defendant pleaded the Statute of Additions (1 Hen. 5), in abatement, and prayed judgment of the declaration; the court held the plea a nullity, and gave leave to the plaintiff to sign judgment. *Gray v. Sidneff*, 3 B. & P. 395.

**Right to name; and how protected.]**—In England the assumption of a name, the patronymic of a family, by a stranger, who has never before been called by that name, is not the subject of a civil action, as by the English law there is no right of property in a person to the use of a particular name, to the extent of enabling him to prevent the assumption of his name by another. *Du Boulay v. Du Boulay*, 2 L. R., P. C. 480; 17 W. R. 594; 6 Moore P. C. C., N. S. 31; 38 L. J., P. C. 35.

Aliter, as to the exclusive use of a name in connection with a trade or a business, which right is recognized, and a party assuming it, colorably or otherwise, being an invasion of another's rights, is a fraud, for which a remedy lies either at law or equity. *Id.*

Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby, a court of equity refused to grant an injunction, leaving the plaintiffs to bring their action. *London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Insurance Company*, 11 Jur. 938—V. C. E.

But a company cannot acquire the right to the exclusive user of a name which is merely descriptive of the class of business carried on by it. *Colonial Life Insurance Company v. Home and Colonial Insurance Company*, 10 Jur., N. S. 967; 33 L. J., Chanc. 741; 12 W. R. 783; 10 L. T., N. S. 443; 33 Beav. 548.

As to use of name as trade-mark,—see **TRADE AND TRADE-MARK.**

**Change of name.]**—A person taking a name by act of parliament does not lose his original name; the effect of the crown's license is only permission to use a name, not imposing it. *Leigh v. Leigh*, 15 Ves. 100.

Semble, that the christian name of a party cannot be changed or added to at confirmation. *Williams v. Bryant*, 5 M. & W. 447; 7 D. P. C. 502.

When an estate is devised on condition of the devisee changing his name, it is sufficient if he changes it within a reasonable time, and it is not necessary that he should apply for the royal sign manual. *Davis v. Lowndes*, 1 Bing., N. C. 618; 2 Scott, 103.

## II. EFFECT, IN PROCESS AND PLEADINGS; AND HOW WAIVED OR CORRECTED.

**Statute.]**—[By 3 & 4 Will. 4, c. 43, s. 12, in all actions on bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names, in full.]

What misnomer is material, and its effect, in process.]—A variance in the name of a defendant in a writ, where it is idem sonans with the real name, is not material. *Webb v. Lawrence*, 2 D. P. C. 81; 1 C. & M. 806.

Where a defendant was arrested by a wrong name, the affidavit to ground a motion that the bail-bond be delivered up to be canceled must be entitled in the defendant's right name, "sued by the name of." *Finch v. Cocken*, 2 C. & M. 412; 2 D. P. C. 888; 4 Tyr. 285.

Where a writ was to take Christopher Hooper, and the English notice was directed to Christopher Wood, the court set aside the service for irregularity, with costs. *Wright v. Hooper*, 2 C. & J. 236.

If a plaintiff sues a defendant by a wrong christian name, and the defendant appears by his right name, the plaintiff may declare against him by such right name. *Doe v. Butcher*, 3 T. R. 611.

Where a copy of a writ of summons is served on a person by a wrong name, he is not bound to apply to set it aside. *Hinton v. Stevens*, 1 H. & W. 621.

Where a writ of summons issued against Thomas Gray, and was served on William Gray, the court refused to set aside the proceedings. *Griffin v. Gray*, 5 D. P. C. 331; 2 Gale, 201.

A variation in the spelling of a plaintiff's name in a single letter between the writ and the subsequent proceedings is immaterial. *Leatherbarrow v. Ward*, 5 Jur. 388—B. C.

— in pleadings and other proceedings.]—

A defendant was baptized Richard James, and was called in the declaration James Richard:—Held, that this was a misnomer, and might have been pleaded in abatement before 3 & 4 Will. 4, c. 42, s. 11. *Jones v. Macquillin*, 5 T. R. 195.

A person was sued by the name of "Jonathan, otherwise John Soans:"—Held, no cause of demurrer to the declaration: for, non constat, that it was not all one christian name. *Scott v. Soans*, 3 East, 111.

A plaintiff having declared as Henry H. Lindsay, instead of setting forth his second name in full, the court refused to set aside the declaration as irregular. *Lindsey v. Wells*, 3 Bing. N. C. 777; 4 Scott, 471; Hodges, 97; 5 D. P. C. 618.

No advantage can be taken at the trial of a misnomer of the plaintiff, though there is a person of the name erroneously used. *Moody v. Aslatt*, 1 C., M. & R. 771; 5 Tyr. 492; 1 Gale, 47.

It is a question of fact who is the real plaintiff. *Ib.*

A mis-statement of a defendant's christian name, in the commencement of his plea, does not entitle the plaintiff to treat it as a nullity, and to sign judgment as for want of a plea. *Anon.*, 7 D. & R. 511.

A defendant, whose name was Cocken, was arrested upon a capias against him by the name of Cocker; he gave a bail-bond to the sheriff in the name of Cocken sued as Cocker; and

the bail-bond being afterwards assigned to the plaintiff, he declared thereon against the defendant, as Cocken sued by the name of Cocker. The defendant pleaded that no such writ as that stated in the declaration was issued against him. It was admitted that he was the real defendant. The plaintiff was nonsuited, but the court set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, because, in point of fact, there was a writ against the defendant by the name of Cocker. *Finch v. Cocken*, 3 D. P. C. 678; 3 C., M. & R. 196; 1 Gale, 130; 5 Tyr. 774.

Held, also, upon motion in arrest of judgment, that the declaration was bad, because a writ against Cocker did not authorize an arrest of Cocken, unless he was known as well by one name as the other, and there was no averment of that fact in the declaration. *Ib.*

In a writ and notice of declaration, the defendant was named Richard—in the declaration Joseph; judgment by default was signed in the latter name:—Held, that the judgment was regular, and that though the declaration might have been objected to as varying from the writ, yet the application should have been made within four days from the service of the notice of declaration, or at least before the time for pleading had expired. *Kitchin v. Roots*, 5 M. & W. 522; 8 D. P. C. 233.

Information for offering a bribe to Thomas Dabbs, a custom-house officer. Evidence that his name of baptism was Thomas Tyrrel Dabbs, in which name his commission was made out, but that he was as well or better known at the custom-house and in the trade by the name of Thomas Dabbs, which name he himself generally used:—Held, no variance, as it could not have been pleaded in abatement. *Att. Gen. v. Hawkes*, 1 C. & J. 121; 1 Tyr. 3.

The omission of the christian names of persons in pleading a written instrument or facts (unless it is excused by averment), was a ground of special demurrer. *Loey v. Webb*, 10 Jur. 980; 15 L. J., Q. B. 407. S. P., *Gatty v. Field*, 10 Jur. 980; 15 L. J., Q. B. 408. S. P., *Applemans v. Blanche*, 14 M. & W. 134; *Sturges v. Rahn*, 4 Exch. 60; 19 L. J., Exch. 119.

The describing a defendant in a declaration by his surname and the initials only of his christian name, is not a misnomer amendable under 3 & 4 Will. 4, c. 42, s. 11; but an insufficient designation, of which advantage must have been taken by special demurrer. *Miller v. Hay*, 3 Exch. 141; 13 Jur. 935; 18 L. J., Exch. 487.

Where a single vowel immediately precedes a surname, the court will understand such vowel to be the christian name of the party. *Kinnersley v. Knott*, 7 D. & L. 128; 7 C. B. 980; 13 Jur. 658; 18 L. J., C. P. 281.

A declaration described the defendants as "The City Steamboat Company:"—Held, a sufficient description. *Woolf v. City Steamboat Company*, 7 C. B. 103; 13 Jur. 456; 18 L. J., C. P. 125.

**A description of the prosecutor in an information or an indictment, as Charles Frederick Augustus William, Duke of Brunswick and Luneburg, though he had ceased to be reigning duke, omitting his surname, is sufficient.** *Reg. v. Gregory*, 2 New Sess. Cas. 229; 8 Q. B. 508; 10 Jur. 387; 15 L. J., M. C. 88.

**Where a bill was filed against three persons by name, and on entering the finding of the jury on the postea, part of the christian name of one of them was omitted:—Held, to be no ground of error.** *May v. Pige*, 8 Moore, 297; 1 Bing. 314; 12 Price, 362.

**Where a defendant moves to set aside a ca. sa. on the ground of misnomer, the affidavits in support of the motion must be entitled in the right name.** *Thorpe v. Hook*, 1 D. P. C. 494.

**As to misnomer in bailable proceedings,—see BAIL.**

**Operation as to sheriff.]—Where a sheriff knowingly arrests a person sued by a wrong name, he becomes a trespasser; and if he has taken a bail-bond, he is liable to an attachment, if bail above is not perfected.** *Rev v. Middlesex (Sheriff)*, 2 Chit. 357.

**So, he is liable to an action for arresting a man by a wrong name, notwithstanding the defendant is discharged on motion, and it is therefore necessary to impose terms of not bringing an action.** *Anon.*, 1 Chit. 282, n. S. P., *Cole v. Hindson*, 6 T. R. 234; *Rev v. Surrey (Sheriff)*, 1 Marsh. 75.

**A defendant could not justify an assault and false imprisonment of A. B., by showing that a latitat issued against C. B., and averring that it was issued against A. B. by the name of C. B., and that they are one and the same person; there being no averment that A. B. was known as well by the name of C. B.** *Shadgett v. Clipson*, 8 East, 328.

**A sheriff having a writ against G. B., arrested M. B., who was the real debtor, and at the time of contracting the debt had represented himself as G. B.:—Held, that the sheriff, having been informed of these circumstances while he had the real debtor in his custody, was not bound to detain him, and therefore that an action would not lie against him for an escape.** *Morgans v. Bridges*, 1 B. & A. 647; 2 Stark. 314.

**A mistake in the sheriff's warrant will not invalidate an arrest.** *Williams v. Lewis*, 1 Chit. 611.

**If father and son have the same name of baptism and surname, and a writ of execution issues against the son, without the addition of "the younger," primâ facie the father is intended.** *Jurmain v. Hooper*, 6 M. & G. 827; 1 D. & L. 769; 7 Scott, N. R. 603; 8 Jur. 127; 13 L. J., C. P. 63.

**But this is only a primâ facie intendment: and if the sheriff takes the father's goods under the writ, and, to an action by the father, pleads that the fl. fa. was issued against him, the primâ facie intendment may be rebutted by proof that the writ issued against the son.** *Id.*

**A writ of summons issued by A. against his**

**debtor, J. W. K., was by mistake served on M. K., who stated that he was not J. W. K. M. K. did not appear to the writ, and took no notice of it, but judgment was entered up in the action against J. W. K., and a ca. sa. issued on the judgment, commanding the sheriff to take J. W. K. The sheriff thereupon arrested M. K.:—Held, that the sheriff was liable to an action for false imprisonment at the suit of M. K., and that the facts did not warrant the sheriff in alleging by way of justification that the ca. sa. directed him to arrest M. K. by the name of J. W. K.** *Kelly v. Lawrence*, 33 L. J., Exch. 197; 8 H. & C. 1; 10 Jur., N. S. 637.

**How defect is waived or cured; and what prevents a party from taking advantage.]—Where a wrong name of a defendant is inserted in the process, it is cured by his attorney's undertaking to appear.** *Loves v. Clarke*, 2 Chit. 240.

**A defendant waives an objection of misnomer by taking out a judge's order, wherein he uses the name by which he was arrested.** *Nathan v. Cohen*, 3 D. P. C. 870.

**A defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself is no party to the recognizance.** *Meredith v. Hodges*, 2 N. R. 453. S. P., *Anon.*, Loft, 82.

**If a person whose real name is William is asked, before process issues against him, whether his name is not John, and he says it is, he cannot maintain trespass for what is done in execution of the process against him by the wrong name.** *Price v. Harwood*, 3 Camp. 103—Ellenborough.

**So, where a different name is written over a shop door.** *Id.*

**Where A., having two christian names, has omitted one of them in his dealings with B., he cannot, in an action by B., make the same omission a ground for setting aside the proceedings.** *Walker v. Willoughby*, 2 Marsh. 230; 6 Taunt. 580.

**A warrant of attorney, executed by J. S. L., was filled up J. Stone L., and a fl. fa. issued against the party by that name. It appeared that the second name was Stowe. The sheriff seized goods which he afterwards relinquished, on a wrong supposition that they belonged to some trustees, and returned nulla bona. In an action for the false return:—Held, that as the party by executing the warrant of attorney was estopped from objecting to the incorrectness of the names, the sheriff could not make it a defense.** *Reeves v. Slater*, 7 B. & C. 486; 1 M. & R. 265.

**Where a party is sued by a wrong name, and suffers judgment to go against him, without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name.** *Fisher v. Magnay*, 6 Scott, N. R. 588; 1 D. & L. 40; 5 M. & G. 778.

**How defect may be corrected.]—[By 8 &**

4 Will. 4, c. 42, s. 11, no plea in abatement for a misnomer shall be allowed in any personal action, but in all cases in which a misnomer would, but for the act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.]

Since this provision, a plaintiff who sues out a writ against a person by a wrong christian name, is himself at liberty to correct the misnomer, and is not bound to enter the appearance and declare against the defendant, by the name in which he originally sued him in the writ. *Hobson v. Wadsworth*, 8 D. P. C. 601; 4 Jur. 745—B. C.

Semble, that the act applies only to the case of a misnomer of a defendant. *Lindsey v. Wells*, 4 Scott, 471; 8 Bing. N. C. 77; 8 Hodges, 97; 5 D. P. C. 618.

The describing in the writ and declaration a party to the suit by the initials only of his christian name must be treated as a misnomer. *Rust v. Kennedy*, 4 M. & W. 586; 7 D. P. C. 199; 8 Jur. 198.

Where, in the writ and declaration in an action not upon a written instrument, the defendant is so described, the only remedy is by summons to amend, and the court will not set aside the proceedings for irregularity. *1b*.

Where a party has been sued by a wrong name, the title of the cause cannot be changed until his appearance has been entered in his true name. *Borthwick v. Ravenscroft*, 5 M. & W. 31; 7 D. P. C. 393; 8 Jur. 703.

As to amending defects,—see AMENDMENT.

## Misrepresentation.

See FRAUD AND MISREPRESENTATION.

## Mistake.

- I. IN CONTRACTS AND CONVEYANCES. See CONTRACT OR AGREEMENT; DEED.
- II. IN PLEADINGS AND OTHER LEGAL PROCEEDINGS. See AMENDMENT.
- III. PAYMENT OF MONEY UNDER MISTAKE. See MONEY COUNTS.

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  - 1. *In General*. See DAMAGES.
  - 2. *Slander and Libel*. See DEFAMATION.
  - 3. *Assault, False Imprisonment, and other Trespases*. See TRESPASS.
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## Models.

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VI. FOR INTEREST. See INTEREST OF MONEY.

I. FOR MONEY LENT.

*When the Action Lies; and between what Parties.*

**Grounds of action, and against whom maintainable, generally.**—An action will lie for a loan to the wife at the request of the husband. *Stevenson v. Hardie*, 2 W. Bl. 872.

But a husband is not liable for money lent to his wife, though the money is afterwards applied by her in procuring necessaries, for the supply of which he would have been liable. *Knox v. Bushell*, 3 C. B., N. S. 384.

The action will not lie against a defendant for money lent to a third person. *Marriott v. Lister*, 2 Wils. 141.

Where the defendant, a commercial traveler, was authorized by the plaintiff to deduct certain sums from the amount he might receive on his account, to be repaid out of the commission the defendant was to be paid by other employers:—Held, that the sums might be recovered as money lent. *Shepherd v. Phillips*, 2 C. & K. 722—Wilde.

Where A. lent money to B. on a guaranty of H., and afterwards B., the principal debtor, and H. signed a paper, promising jointly and severally to repay the money borrowed by B. from A.:—Held, that there was evidence to charge B. and H. jointly, and that they were liable to be sued jointly. *Buck v. Hurst*, 1 L. R., C. P. 297; 12 Jur., N. S. 704.

**Illegal purposes or objects.**—Whenever money is lent for the express purpose of enabling the borrower to do some act prohibited by law, the lender cannot recover it back. *McKennell v. Robinson*, 3 M. & W. 434. S. P., *Cannan v. Bryces*, 3 B. & A. 170. See *Peares v. Brooks*, 1 L. R., Exch. 213; *Bagot v. Arnott*, 3 Ir. R., O. L. 1.

But money lent for the purpose of gambling in a country where the game is not illegal may be recovered in England. *Quarrier v. Colston*, 1 Ph. 147; 6 Jur. 959; 12 L. J., Chanc. 57. S. P., *King v. Kemp*, 8 L. T., N. S. 255—Willes.

**Repayment secured by deed.**—Money advanced upon a contract to repay it on demand, or to execute a mortgage, may, after refusal to execute a mortgage, be recovered as money lent. *Bristowe v. Needham*, 9 M. & W. 729.

A. borrowed money from B., and conveyed land in trust for him, with a power of sale, in trust to pay him principal and interest, and pay over the residue to A. He, A., afterwards borrowed other money of B., and charged that also on the land, but without any power of sale. Afterwards, C., paying both sums to B., and advancing an additional sum to A. by deed between C., A., B. and B.'s trustee, the former securities were assigned to C. (B. giving C. a power of attorney to sue in his

name as to the first sum borrowed), and the lands were conveyed to C. to hold them to the same trusts, but for his own benefit, as were mentioned in the other deeds with respect to B. None of the deeds contained a covenant to pay. C. sued A. for money paid, money lent, interest, and on an account stated:—Held, that he was entitled to recover the whole sum, on proof that he had paid it as above, and that he was not bound to declare on the deed. *Yates v. Aston*, 3 G. & D. 351; 4 Q. B. 182.

L. devised lands to the defendant on trust to sell and apply the proceeds in payment of debts. The defendant mortgaged the lands to the plaintiff as a security for money lent to him. The deed contained a covenant by the defendant that he would, out of the moneys which should come to his hands as such trustee, from the lands comprised in the mortgaged security and the personal estate (if any) of L., pay to the plaintiff the principal and interest:—Held, that as there was an express covenant by the defendant to pay in a qualified manner, no contract by parol could be implied for the repayment, and consequently an action for money lent would not lie. *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J., Exch. 150.

—or by deposit of collateral security.—A person who lends money to another, and receives a gun as a security for the repayment, may recover the amount without first returning the gun. *Luxton v. Newland*, 2 Stark. 72—Ellenborough.

A. lent B. money, and received from B. shares in a company as a security, and agreed to give twenty-one days' notice to B. before proceeding to compel the repayment of the loan, or of any part thereof; and, upon repayment of any part of the loan, to give back a proportionate amount of shares:—Held, that, after twenty-one days, A. was not bound to declare specially, averring a tender of the shares, but that he might declare for money lent. *Scott v. Parker*, 1 G. & D. 258; 1 Q. B. 809.

Where a party advances money on exchequer bills, which are afterwards repudiated at the exchequer office, on the ground that the comptroller's signature to them is forged, he is entitled to recover it back as money lent. *Bank of England v. Tomkins*, 6 Jur. 348—Exch.

The defendant instructed his attorney, S., to borrow 100*l.* upon the security of a freehold estate, and gave him his title-deeds to enable him to do so. S. professedly on behalf of the defendant, applied to the plaintiff for a loan on mortgage, the amount of which was fixed at 420*l.* Thereupon, having forged a mortgage from the defendant to the plaintiff, S. delivered it to the plaintiff and received the 420*l.* He then represented to the defendant that he could not obtain the proposed advance, and afterwards lent him certain sums as his own money, taking a promissory note as security for part, and a mort-

page for the whole of the advances:—Held, that on these facts there was no evidence, as to any part of the 420*l.*, of an implied promise by the plaintiff to the defendant so as to support an action for money lent. *Peister v. Abel or Abel*, 2 H. & C. 113; 33 L. J., Exch. 60; 9 Jur., N. S. 549; 11 W. R. 651; 8 L. T., N. S. 257.

**Deposits with bankers.**—Money deposited by a customer in a banker's hands is money lent, with the superadded obligation, that it is to be repaid when called for. *Pott v. Clog*, 16 M. & W. 321; 11 Jur. 290; 16 L. J., Exch. 201.

A. deposited with a banking company 90*l.*, consisting partly of the notes of a country bank, payable either at that bank or in London, and representing 65*l.* The company gave a receipt as follows: "Received of A. 60*l.*, for which we are accountable; 80*l.*, at 2*l.* per cent. interest, with fourteen days' notice." The company sent the notes, on the same day, to their agents in London, who presented them on the following day, when they were dishonored. The agents sent them back by that evening's post to the company, who, on the following day, gave notice of dishonor to A., and, on A.'s giving fourteen days' notice of withdrawal, tendered the notes back, which he refused. The company refused to pay the amount of the notes. The country bank, which was about five miles from the office of the company, had stopped payment from the close of the day on which the notes were deposited:—Held, that A. could not recover the amount of the notes from the company, either as money lent or as money had and received. *Timmins or Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J., Q. B. 403.

As to actions against bankers by their customers, generally,—see **BANKER AND BANKING COMPANY**.

**When right of action accrues.**—The plaintiff lent the defendant 50*l.* under an agreement: "The defendant agrees to borrow from the plaintiff 50*l.* at the rate of 6*l.* per annum, and the plaintiff agrees to lend the defendant the above sum for the term of nine or six months":—Held, that the option of making it a loan for six or nine months was in the borrower. *Reed v. Kilburn Co-operative Society*, 10 L. R., Q. B. 264; 44 L. J., Q. B. 126; 32 L. T., N. S. 600; 23 W. R. 828.

## 2. Evidence of Loan.

**Proof of the fact, generally.**—In an action for money lent, the only evidence was, that the defendant, having asked the plaintiff for some money, the latter handed him a note which was believed to be a bank-note, but the amount of which did not appear:—Held, that the jury was rightly directed to presume it to have been a note for 5*l.*, as being the smallest note in circulation in England. *Lawton v. Sweeney*, 8 Jur. 904—Exch.

**Evidence of the genuineness of the stamp** lender is admissible upon the issue, whether or not the money was lent. *Lawton v. Sweeney*, 10 L. C. L. R. 236—Exch.

If it appears that the money was actually advanced, on the understanding that it would be repaid, and the only plea is non est, the verdict must be for the plaintiff. *Reed v. Stock*, 3 P. & F. 128—Maurice.

The payment of certain notes having been made to the defendant's credit, and in fact that he had been told the balance afterwards, is sufficient proof that the notes were paid, and had therefore been recovered by an. *Gill v. Gillingham*, 1 P. & F. 354—Kenwell.

It is not evidence of itself to establish a loan of money by the plaintiff to the defendant, to prove that the defendant received cash for a draft or a check drawn by the plaintiff on his bankers, and payable to him by name, out of money of the plaintiff then in the bank. *Carey v. Gerrish*, 4 L. J. 9—Kenyon.

If there is a loan of money by A. to B., it is not to be inferred from the bare fact that A. delivered a sum of money to B., which B. had borrowed from another. *Walch v. Ordor*, 1 Stark. 474—Ellenborough.

**I O U.**—An I O U is sufficient prima facie evidence in an action for money lent, though it is not addressed, and no proof be given that U means the plaintiff, except his producing the document. *Douglas v. Holmes*, 12 L. & E. 641; 4 P. & D. 685.

But in a subsequent case it was decided that an I O U, though evidence of an account stated between the holder and the party signing it, is not of money lent to him by the holder. *Fessenden v. Adcock*, 16 M. & W. 449.

As to when an I O U constitutes an account stated,—see this title, IV., 1.

**Other documentary evidence.**—An instrument in the following terms, "Nine years after the date hereof, I promise to pay to, &c., with lawful interest, provided D. M. shall not return to England, or his death be duly certified, in the meantime," is no evidence of money lent. *Morgan v. Jones*, 1 C. & J. 162; 1 Tyr. 21.

A. transferred 1,000*l.* in the 4*l.* per cent. to B., who possessed other stock of the same description. B., after some years, sold out all his stock, including the 1,000*l.*: B. made payments to A., equal to interest at 5*l.* per cent. upon that sum, until A.'s death. After the death of A. her executor wrote to B., referring to the transaction as a loan of money. B., in reply, asserted that he was employed by A. to purchase an annuity for her, and that he had done so. No purchase of an annuity was proved:—Held, that there was evidence to go to the jury in support of a count for money lent. *Howard v. Danbury*, 2 C. B. 803.

The plaintiff lent money upon the promissory notes or debentures, in the following

form:—"The Governor and Company of Copper Miners in England. Incorporated by royal charter. Capital One million. No. 5,252. 500*l*. London. On the 15th July, 1850, the Governor and Company of Copper Miners in England promise to pay to H. J. Enthoven, Esq., or order, at the banking-house of Messrs. D., H., K. & Co., 500*l*. value received, and further to pay to the holder of the warrants annexed, on presentment as they fall due, interest on the 500*l*., at the rate of 5*l*. per cent. per annum. Given under the common seal of the corporation, this 15th day of July, 1845. By order, J. M'Donnell. W. Inglis, secretary." When the seal of the corporation was affixed to these documents, there was a blank left for the name of the payee. At the time of depositing them with the plaintiff, the defendant filled up the blanks with the words "Enthoven or order," and indorsed them "H. J. Enthoven." Annexed to each note or debenture were warrants or coupons for the interest due half-yearly in respect of each. As each half-yearly amount of interest was paid the corresponding warrant or coupon was detached, and given up to the company. The company having failed in payment of a half yearly installment of the interest, the plaintiff gave the defendant notice of the default, and demanded payment of him, and afterwards brought an action upon the debentures. At the trial, he produced the debentures, with the warrants or coupons annexed, and also one of the warrants or coupons detached. The former were respectively stamped with a 12*s*. 6*d*. note stamp, the latter was unstamped:—Held, that the instruments were not promissory notes, and consequently were not properly stamped; but that inasmuch as they were void instruments, by reason of the blank therein at the time of sealing, they were admissible on the counts for money lent and interest, for the purpose of showing that they were worthless. *Enthoven v. Hoyle*, 13 C. B. 373; 16 Jur. 272; 21 L. J., C. P. 100—Exch. Cham.

## II. FOR MONEY PAID.

### 1. When the Action lies, in General.

**Request or use of defendant.**—An action lies to recover money paid for another at his request. *Alcintbrook v. Hall*, 2 Wils. 809.

But the plaintiff must prove some authority, either express or implied, from the defendant, to make the payment on his account. *Tappin v. Broster*, 1 C. & P. 112—Hullock.

The action will not lie, when the money has been paid against the express consent of the party for whose use it is supposed to have been paid. *Stokes v. Lewis*, 1 T. R. 20.

An action for money paid is maintainable in every case in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, with an undertaking, express or implied, to repay the amount, and it is immaterial whether the defendant is relieved from a liability by the

payment or not. *Brittain v. Lloyd*, 14 M. & W. 762; 15 L. J., Exch. 43.

In order to maintain an action for money paid, it is not necessary that the defendant should be relieved, by the payment, from a liability to a third person. *Lewis v. Campbell*, 8 C. B. 541; 14 Jur. 396; 19 L. J., C. P. 180.

The plaintiff, a stock broker, at the defendant's request entered into a contract for the purchase of foreign stock, the price of which he was ultimately, according to the usage of the stock exchange, compelled to pay; before the settling day the defendant informed the plaintiff that he was unable to meet his engagements, but afterwards promised to pay the amount:—Held, that the jury was warranted in finding that the payment was made at the defendant's request. *Paule v. Gun*, 6 Scott, 286; 4 Bing. N. C. 445; 1 Arn. 200.

The plaintiff demised a house to the defendant, who agreed to pay a yearly rent, clear of all deductions for taxes and parochial rates; after occupying the premises for some time, the defendant quitted them, leaving claims for poor's rate and land tax unpaid, which the plaintiff, as landlord, was obliged to pay:—Held, that he could not recover the amount from the defendant, because, as there was no original liability on the defendant to pay, it could not be said to be money paid to his use. *Spencer v. Parry*, 4 N. & M. 771; 3 A. & E. 331; 1 H. & W. 179. S. P., *Thurnell v. Symonds*, 1 C. & K. 44.

A., being in want of some harness, went to B., accompanied by C., and ordered some, C. saying in A.'s presence that he would pay the money if A. did not:—Held, that C. thereby acquired an authority to pay the money on the default of A., and that having paid it he was entitled to recover it back from A., the authority not being shown to have been countermanded. *Alexander v. Vane*, 1 M. & W. 511; 2 Gale, 57.

The drawer of an accommodation bill cannot sue the acceptor for money paid to his use, to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. *Sleigh v. Sleigh*, 5 Exch. 514; 19 L. J., Exch. 345.

The plaintiff accepted a bill for 25*l*. for the accommodation of F., who was pressed at the time by the defendant, a sheriff's officer, for seven guineas, claimed as being due for possession money; F. was to get the bill discounted by the defendant or elsewhere, and to give the plaintiff the surplus above the seven guineas. He deposited it with the defendant as a security for that sum, the defendant knowing the circumstances, and that the plaintiff had no value for his acceptance; the defendant indorsed it over and kept the proceeds; the holder sued the plaintiff, who thereupon paid him the whole amount of the bill:—Held, that the plaintiff had no right of action against the defendant as for money

paid to his use on a request implied by law; but that his remedy was against F. on an implied contract to indemnify the plaintiff for lending him his, the plaintiff's, acceptance. *Apprey v. Levy*, 16 M. & W. 851.

The plaintiff purchased stock which the defendant agreed to transfer on a given day. In consequence of a rise, the loss on the sale amounted to 45*l.*, which the defendant refused to pay. The plaintiff afterwards paid that sum to another broker, by whom the transfer was made:—Held, that the plaintiff could not recover in an action for money paid, but that he should have declared on the contract with the defendant, as his claim was in the nature of unliquidated damages. *Lightfoot v. Creel*, 2 Moore, 255; 8 Taunt. 268.

A., having accepted a bill drawn upon him by B., for money lent by B. to A., compounded with B. and his other creditors, and paid the composition. An indorsee of the bill afterwards sued A., and compelled him to pay the amount with interest and costs:—Held, that A. might recover the amount from B. as money paid to B.'s use. *Hawley v. Beverley*, 6 M. & G. 221.

If the indorser of a bill is compelled by the holder to pay him part of the amount, he may recover it back from the acceptor in an action for money paid to his use. *Pownal v. Ferrand*, 9 D. & R. 603; 6 B. & C. 439.

A. & Co. agreed with a company to build for them two steamships within a stated time, the price to be paid by installments; provided that if A. & Co. should make default in any of the conditions of the agreement, it should be lawful for the company to take possession of the ships, and cause the works to be completed by any persons they chose, and pay those persons such reasonable sums as agreed upon, and that A. & Co. should, forthwith on demand, pay the company all sums so advanced. Afterwards F. became a partner in the firm of A. & Co.; and four installments having been paid, and A. & Co. not being able to complete the ships, another agreement was made with the firm of A. & Co., including F., whereby the company, in terms of the first contract, agreed to take possession of the ships and complete them, and for that purpose to take into their employ the workmen of A. & Co.; and as a security to the company for any advances they might make beyond the balance receivable by A. & Co., it was agreed that the company should have a lien for such balance upon certain shares of A. & Co. in the company. The company having proceeded with the works, and for that purpose made large advances:—Held, that they could not forthwith recover such advances by action against the firm of A. & Co., including F., for money paid, there being no liability to repay until the ultimate balance was ascertained, and then only after demand. *Royal Mail Steam Packet Company v. Acraman*, 2 Exch. 569.

A defendant became surety for the due payment by one M. of "all such sums of money as he, M., should from time to time

become indebted to the plaintiffs for goods which should be supplied to him by them in the course of their business, when and as such sum or sums of money should respectively become due and payable, at the expiration of the credit given for the same goods, according to the usual course of business of the plaintiffs." The course of business proved was for the plaintiffs to draw upon M. at two months from the first of each month, for the amount of goods delivered during the preceding month. One of these bills becoming due in the hands of third persons, and being dishonored, M. went to the plaintiffs, and telling them that he had no funds enough by 80*l.* to take up the bill, asked them for a loan of that sum to enable him to do so, and obtained from them a check for 80*l.*, with which and his own moneys he paid the bill:—Held, that this was in substance a failure by M. duly to pay for the goods, and not a mere loan to him; and consequently that the plaintiffs were entitled to recover the 80*l.* from the defendant. *Dancy v. Phelps*, 2 Scott, N. R. 564; 2 M. & G. 300.

Leasehold property was bequeathed to the testator's wife for life, and afterwards to the defendant for the residue of the term. The wife entered with the assent of the executor, and after her death the defendant entered, and continued in possession for fifteen years when the leaseholds were sold. No duty was ever paid on the legacy till after the sale, when ten per cent. on the value of the leaseholds, and ten per cent. on the amount of profits received by the defendant, were paid by the executor:—Held, that the executor was entitled to recover from the defendant, as money paid, the whole duty paid. *Dale v. Pyne*, 13 Q. B. 900; 13 Jur. 609; 18 L. J. Q. B. 273.

B., requiring an advance of 50*l.* to pay the stamp duty on a patent, and S. being willing to lend him that sum if A. would become surety for it, A. wrote as follows:—"If B. will get his friend S. to advance the 50*l.* for the completion of the patent, I will give him or S. the 50*l.* on the patent being handed over to me." The 50*l.* was accordingly advanced by S., and the patent was afterwards tendered to A., but he declined to accept it; and S. having sued him for and recovered the 50*l.*, he brought an action against B. for money paid to his use:—Held, that A. was entitled to recover the 50*l.*, and that the refusal of the judge to put it to the jury, whether the money was advanced by S. for the joint purpose of A. and B., did not amount to a misdirection, inasmuch as it was a payment for the use of the defendant solely. *Pelly v. Sidney*, 5 C. B. N. S. 679; 5 Jur. N. S. 793; 28 L. J. C. P. 183.

**Payment by plaintiff, in general.**—One of the makers of a joint and several note, after it had become due, gave his bond to the holder for the amount, but before the commencement of the action no money had been paid upon the bond:—Held, that until he had

id money upon the bond, he could not maintain an action for money paid, in order to recover contribution against any of the makers of the note. *Mazwell v. Jameson, B. & A. 51.*

If a party gives a promissory note for the debt of another, which the creditor accepts in payment, it is a payment of money to the debtor's use, and may be recovered as such. *Barclay v. Gooch, 2 Esp. 571—Kenyon.*

The plaintiff, an occupier of lands, having been sued by the vicar for tithes, gave up the occupation, and quitted the parish during the progress of the suit; upon which the defendant undertook to indemnify him from all costs of the suit, if he would suffer the defendant to defend in his, the plaintiff's, name. The vicar having succeeded in the suit, the plaintiff's attorney paid him the costs incurred before as well as after the defendant's promise of indemnity. The plaintiff afterwards gave his attorney a promissory note for the amount of the costs so paid, but which was not paid at maturity, when he sued the defendant on his promise:—Held, that the payment of such costs by the plaintiff's attorney was equivalent to a payment by the plaintiff himself, as the attorney might be considered his agent for the purpose of making such payment. *Adams v. Dansey, 4 M. & P. 245; 6 Bing. 506.*

As to payments made by agents or brokers, —see PRINCIPAL AND AGENT; by partners, —see PARTNERSHIP.

**Payments made on distresses.]**—Where a man by compulsion of law is obliged to pay a debt, he has a remedy against those who by law were bound to pay, but did not. *Esall v. Partridge, 8 T. R. 808; 3 Esp. 8.*

The goods of a stranger on the premises of another were distrained by the landlord for the rent in arrear, and the stranger was obliged to pay the rent to redeem them:—Held, that the stranger might maintain an action for money paid to the use of the original lessees, who were bound by their covenant to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Id.*

An under-tenant, whose goods are distrained and sold by the original landlord for rent due from his immediate tenant, cannot immediately maintain an action against him for money paid; for, on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant. *Moore v. Pyrke, 11 East, 53.*

A tenant under a lease cannot maintain an action on an implied promise for money paid under a distress by a superior landlord, being excluded by the express contract. The remedy is on the covenant. *Schlenker v. Mozey, 5 D. & R. 747; 3 B. & C. 789; 1 C. & P. 178.*

A tenant, shortly after he had paid half-a-year's rent to his landlord, due on Lady-day preceding, was called upon by the agent of the ground landlord for ground rent due previously to Lady-day, and which the landlord had refused to pay:—Held, that the payment of such ground-rent by the tenant was not a voluntary payment, although the agent of the ground landlord gave him time for that purpose. *Carter v. Carter, 2 M. & P. 723; 5 Bing. 406.*

By an act for draining lands in Lincoln, it was declared, that the taxes to be charged and assessed by virtue of the same should be paid by the tenants of the lands charged with the same, who might deduct and retain the same out of the rents payable to their respective landlords; and also, that, in case of neglect to pay, the tax might be levied by distress on the goods and chattels which should be found on the lands charged with the tax in arrear; and that, if the same should be untenanted, or no sufficient distress could be found, the lands and grounds chargeable should remain as a security for the payment, and might be taken possession of, and let in discharge of the tax. Where, therefore, a tenant had quitted lands liable to a drainage tax under this act, and, after he had left, the collector levied the tax in arrear upon property which he had left in the possession of the succeeding tenant:—Held, that the tenants to be charged with the tax were those in whose time the tax accrued due, and not the tenant for the time being; and, therefore, that the plaintiff might maintain an action against the landlord for money paid to his use. *Dawson v. Linton, 1 D. & R. 117; 5 B. & A. 521.*

A. and B. were under-lessees, at distinct rents, of separate portions of premises, the whole of which was held under one original lease at an entire rent. A., having paid the whole rent under a threat of distress, brought an action against B. to recover the proportion of rent due from him, as for money paid to his use:—Held, that the action was not maintainable. *Hunter v. Hunt, 1 C. B. 300; 9 Jur. 375.*

The plaintiff under a bill of sale seized goods on the defendant's premises, and with his knowledge, but without any express request, allowed them to remain there until rent became due. The landlord having distrained them, the plaintiff paid the rent and expenses:—Held, that this was not a compulsory payment by the plaintiff of a debt of the defendant, for his benefit or at his implied request. *England v. Marsden, 1 L. R., C. P. 529; 12 Jur., N. S. 703; 35 L. J., C. P. 259; 14 W. R. 630; 14 L. T., N. S. 403.*

As to recovering back money paid on distress,—see this title, III., 2.

**Payments by sheriffs.]**—No cause of action can arise out of a breach of duty; therefore, if an officer permits a prisoner to go at large on his promise to pay the debt, and in consequence he is himself obliged to pay it, he cannot recover the money from the debtor. *Pitcher v. Bailey, 8 East, 171.*



If a sheriff voluntarily permits an escape, and is afterwards obliged to pay the debt, he may maintain an action for money paid against the debtor. *Morris v. Berkeley*, 8 East, 173, n.; Peake, 144, n.

A sheriff's officer, who discharges a debtor on payment of the sum sworn to, and is afterwards obliged to pay the residue of the debt, may recover it from the debtor as money paid to his use. *Cordon v. Massarene*, Peake, 143—Buller.

An action will not lie upon an implied promise to repay a sheriff the expenses incurred in seizing and keeping possession of goods under a fi. fa. at the request of the party suing out the writ, although they were not sold on account of his refusing to give an indemnity against the claims of third persons. *Bilke v. Haselock*, 3 Camp. 374—Ellenborough.

**Payment of expenses of bail.**—Where a person becomes bail above for another, he is entitled to recover all the expenses to which he has been put by reason of it, and may, therefore, recover his expenses in sending after the principal to take him, in order to render him; but not the expenses of a suit improperly defended. *Fisher v. Fallows*, 5 Esp. 171—Ellenborough.

And not for trouble and loss of time in going to a place to become bail. *Reason v. Wirdnam*, 1 C. & P. 434—Parke.

And, *prima facie*, the charges of the bail for putting in bail above are due from the bail to the sheriff. *Hector v. Carpenter*, 1 Stark. 190—Ellenborough.

A. entered into a recognizance of bail, for B., on the removal by certiorari of an indictment for conspiracy from the Central Criminal Court to the Queen's Bench. B. was convicted, and the recognizance was estreated for the non-payment of the prosecutor's costs:—Held, that A. might maintain an action against B. as upon an implied indemnity. *Jones v. Orchard*, 16 C. B. 614; 1 Jur., N. S. 986; 24 L. J., C. P. 239.

The court will not interfere in a summary way, upon the breach of a parol promise to save bail harmless. *Beal v. Langstaff*, 2 Wils. 371.

An action will not lie on a promise to bail to render a defendant, according to the course of practice, made by a third person, when the bail are proceeded against pending a writ of error. *Bayley v. Tucker*, 2 N. R. 458.

## 2. For Contribution.

**Between co-contractors.**—Generally, one joint contractor, who pays money for another under an equitable claim, may recover it from the other as money paid to his use. *Hutton v. Eyre*, 1 Marsh. 603; 6 Taunt. 289.

But in all cases of partnership in illegal transactions, one partner cannot recover back money paid for the other, unless he has received express directions for such payment. *Webb v. Brooke*, 3 Taunt. 11. And see *Simpson v. Bloss*, 2 Marsh. 542; 7 Taunt. 246.

Two of three persons who were jointly and severally bound in a bond of indemnity to the sheriff, in a matter in which they are severally interested, cannot, after having paid the whole, join in an action against the third for contribution. *Kilby v. Steel*, 5 Esp. 194—Ellenborough.

The plaintiff and defendant entered into a joint and written contract with the owner of a vessel to supply her with colonial produce at Jamaica by a given time. The contract not being complied with, the owner made a demand on the plaintiff alone, who agreed to refer the amount of the damage sustained by such owner to arbitration, without the knowledge or consent of the defendant. The arbitrator having awarded a certain sum to be due to the owner, the plaintiff paid the amount, and brought an action for money paid against the defendant for a moiety:—Held, that he was entitled to recover. *Barnell v. Minot*, 4 Moore, 340.

Where the plaintiff and the defendant were two of a committee, appointed at a vestry meeting, for the purpose of prosecuting nuisances on the waste lands and highways of the parish, which committee appointed an attorney, who prosecuted and obtained a verdict, and afterwards sued the plaintiff for his bill of costs, which was referred to arbitration, and 235*l.*, with costs of the action, were awarded against the plaintiff:—Held, that he might maintain an action against the defendant for contribution. *Holmes v. Williamson*, 6 M. & S. 153.

Four persons, who had acted as directors of a projected company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on personal responsibility:—Held, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. *Edger v. Knapp*, 6 Scott, N. R. 707; 1 D. & L. 73; 5 M. & G. 753.

A., B. and C., by an agreement in writing, hired premises of D.; the premises so hired were intended to be, and were used for the purposes of a company, of which A., B. and C. were, at the time of the contract, committee-men; rent was for some time paid by the company, but ultimately became in arrear; whereupon D. sued A., B. and C. upon the agreement; B. and C. suffered judgment by default, and D. recovered the amount of the rent and costs against A.:—Held, that A. was entitled to sue B. and C. for contribution; and that his remedy against B. was not affected by the circumstance of B.'s having ceased to be a member of the committee before the accruing of the rent in respect of which the action was brought. *Boulter v. Peploe*, 9 C. B. 493.

The right to enforce contribution between joint makers of a promissory note by an action is not affected by the fact that the makers were copartners together with others, and that the note was given to secure money raised for the purposes of the partnership.

*Selgwick v. Daniell*, 2 II. & N. 319; 27 L. J., Exch. 116.

**Joint tort feorsors.]**—If a plaintiff recovers in an action of tort against two, and levies the whole damages on one, that one cannot recover a moiety against the other for his contribution. *Merryweather v. Nizan*, 8 T. R. 186.

Otherwise, where the recovery against the two was in assumpsit. *Ib.*

But the rule that there is no contribution among joint tort feorsors, does not apply to a case where the party seeking contribution was a tort feorsor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. *Pearson v. Skelton*, 1 M. & W. 504.

Or the act is of an obviously illegal character. *Betts v. Gibbins*, 4 N. & M. 64; 2 A. & E. 57.

Nor does it extend to a case in which there is any bonâ fide doubt whatever, whether in point of law the act was authorized. *Ib.*

So also, the rule that a tort feorsor cannot recover upon a promise to indemnify, made by the person at whose request the tortious act is committed, must be similarly confined. *Ib.*

Contribution is indemnity, and the same consideration that will support a promise to indemnify, will also support a promise to contribute, et c. converso. *Ib.*

Where several persons were jointly interested in a stage-coach, and there was a partnership fund, out of which expenses were first to be paid, and the residue divided among them:—Held, that one of them, against whom damages and costs had been recovered in an action brought by a party to whom damage was done by the negligent driving of the coach, could not recover against another proprietor his proportion of such damages and costs. *Pearson v. Skelton*, 1 M. & W. 504.

Where a liability arises from the wrongful act of several parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. *Att. Gen. v. Wilson*, 1 Craig & Ph. 1.

**Other cases.]**—Where a lord of a manor, bound by tenure to repair, has repaired a bridge, he may recover contribution from a person who holds lands which were parcel of the demesnes at any time while the manor was so charged, in proportion to the value of the lands so held. *Dimes v. Arden*, 6 N. & M. 494.

Twenty parishioners joined at a vestry in signing an order for the repairs of the church, and one of them, a churchwarden, paid the artificers, but the rate for reimbursing him was quashed:—Held, that he could not sue for contribution from the persons who signed the order. *Lancaster v. Brewer*, 2 Bing. 361; 9 Moore, 688. See *Spott v. Powell*, 3 Bing. 478.

As to amount or proportion recoverable as contribution,—see this title, II., 3.

As to contribution between partners,—see PARTNERSHIP; between sureties,—see SURETY.

### 3. Amount Recoverable; Damages and Costs.

**Amount of compromise.]**—A plaintiff, as the agent of the defendant, ordered for him goods of a particular description and for a particular purpose, of W. and R., the defendant undertaking to save the plaintiff harmless from the consequences. The goods were of a different description from what were ordered, and unfit for the purpose required; but W. and R. contended that they had been misled by the misspelling contained in the order given by the plaintiff, who was a very illiterate person, and they refused to take the goods back. An action having been brought by W. and R. against the plaintiff for the price, and the defendant having had notice of the same, the plaintiff compromised such action by returning the goods, and paying a sum of money in discharge of debt and costs:—Held, that the plaintiff had an authority from the defendant to compromise such action, and that he could recover from the defendant the amount so paid. *Pettman v. Kelle*, 15 Jur. 38; 19 L. J., C. P. 325; 9 C. B. 701.

**Costs and expenses of defending suits.]**—If A. defends an action at the desire of B., in which action B. is concerned, and may be benefited by the event, and A. has a verdict against him, B. is liable to pay the expenses of the defense. *Houes v. Martin*, 1 Esp. 103—Kenyon.

A person indemnified cannot charge the person indemnifying with the costs of defending an action for a debt clearly due, unless authorized by him to defend. *Gillett v. Rippon*, M. & M. 406—Tenterden.

If money is paid after judgment signed, it cannot be considered as a voluntary payment. *Garratt v. Hooper*, 1 D. P. C. 23.

A declaration stated that the plaintiff, at the request of the defendant, and upon his undertaking to indemnify, defended an action for the recovery of money in which he claimed an interest; that judgment was given against the plaintiff for 42*l.*; and that he was imprisoned and paid the money under a ca. sa.:—Held, that he might recover against the defendant this sum under this count, upon proof of the judgment, without proof of the capias; or even on a count for money paid to the defendant's use: the defendant having taken out a summons to be permitted to pay such sum in discharge of the plaintiff's demand. *Williamson v. Henley*, 6 Bing. 299; 3 M. & P. 731.

In an action by A. against B., B. gave notice to C., against whom B. had a remedy over, to come in and defend the action. C. refused to do so, but did not prohibit B. from continuing the defense. B. suffered judgment by default, and watched the proceedings under

the writ of inquiry, putting A. to the proof of his claim. At the trial of the action over by B. against C., the jury included in their verdict the costs incurred by B. in the former action, no objection being then taken by C. to the right of B. to recover such costs. The court refused to disturb the verdict, being of opinion that there was evidence to go to the jury, that C. had sanctioned the incurring of these costs. *Blyth v. Smith*, 5 M. & G. 405; 6 Scott, N. R. 190.

If A. has accepted three bills for the accommodation of B., and is obliged to pay them, and also to pay the costs of two actions brought upon two of them:—Held, that A. cannot, in an action against B., recover the amount of the costs of the two actions, if his declaration contains only the common money counts; but that to recover these costs, he should declare specially. *Seaver v. Seaver*, 6 C. & P. 673—Denman.

A plaintiff having accepted a bill for the defendant's accommodation, defended an action brought by the indorsee, and finally paid the amount, with the costs of the action. The plaintiff brought an action for money paid; the jury was directed, that if the defendant requested the plaintiff to undertake the defense (as to which there was some evidence, but no express request proved) the costs were recoverable as money paid to the plaintiff's use:—Held, that the direction was right, and the costs recoverable under the count for money paid. *Ganard v. Cottrell*, 10 Q. B. 679.

— of prosecuting suits.]—Where a party has incurred and paid costs in bringing actions against committee-men to recover the amount of his claim, at the request of another committee-man, he may recover such costs from the committee-man at whose instance he sued, as for money paid. *Bailey v. Haines*, 13 Q. B. 816; 19 L. J., Q. B. 73.

Proportion recoverable as contribution.]—Where A. and B. had taken some pasturage jointly, and each had turned his cattle upon it, but how many each had turned was not shown; and A. having paid the whole rent:—Held, in an action for half the sum so paid by A., that the jury was not warranted in finding that the share of each was a moiety. *Sharpe v. Cummings*, 2 D. & L. 504; 9 Jur. 68; 18 L. J., Q. B. 10—B. C.—Patteson.

Differences and disputes having arisen between the trustees and managers of a chapel as to the conduct of B., one of the trustees, and an information having been filed in the Court of Chancery at the relation of all the trustees (except B.) against B. and another person, praying an account against B., in respect of such part of the trust funds as had come into his hands; and B. having by his answer charged the relators with a breach of trust in their management of the trust funds, an order was made, with the consent of all parties, that the cause and all matters in difference should be referred, the arbitrator to have full authority over the costs of the suit and reference. The order expressly provided, that

the death of any of the parties should not operate as a revocation of the arbitrator's authority; but that his award should be delivered to the personal representatives of the deceased party or parties. During the reference, one of the relators, being a party thereto, died, and afterwards the arbitrator made his award, and thereby directed that the costs of the reference should be borne and paid by the parties by whom they were incurred. The plaintiff, who was one of the relators, paid the solicitor, who had been retained for them in the conduct of the reference, his bill of costs, and brought an action for money paid against the executors of the deceased relator for his proportion of the costs incurred after his death, including the costs of the award:—Held, that the executors were liable in such action for their testator's proportion of the costs of the reference incurred after his death, and also the costs of the award. *Prior v. Hembrow*, 8 M. & W. 873.

Where two or more members of a provisional committee jointly enter into a contract with a third party, and one of them is compelled to pay more than his just share of a debt, he may maintain an action against his co-contractors to recover contribution in respect of the amount overpaid by him. *Bastard v. Hawes*, 2 El. & Bl. 287; 17 Jur. 1154; 23 L. J., Q. B. 443.

In order to determine the aliquot part of the whole amount which each co-contractor is to contribute in such a case, the number of the persons who originally entered into the contract must be looked to, and not the number of persons jointly liable to be sued as contractors at the time when the plaintiff in the action paid. *Id.*

By agreement between the plaintiff, of the one part, and the defendants, of the other part, differences between them were referred to arbitration; the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator, after finding a sum due from the defendants to the plaintiff, awarded that the costs of the reference and award, including compensation to the arbitrator, should be borne as follows; that is to say, one moiety by the plaintiff, and the other moiety by the defendants. The plaintiff took up the award, and paid the whole costs of it:—Held, that he could not recover a moiety of the costs as money paid for the use of the defendants. *Dates v. Townley*, 2 Exch. 152; 13 Jur. 606; 19 L. J., Exch. 399.

### III. FOR MONEY HAD AND RECEIVED.

#### 1. General Principles.

Nature of the action, generally.]—The action for money had and received is a liberal action, in which the party waives all torts, trespasses, and damages. *Anon.*, Loft, 320.

The doctrine that the action for money had and received is an equitable action, must be looked on as exploded. *Miller v. Allen*, 3 Exch. 799; 13 Jur. 431.

**Money paid by A. to B. upon a condition which has not been complied with, cannot be recovered as money received to A.'s use.** *Cardingham v. Allen*, 5 C. B. 708; 17 L. J., P. 198.

**An action for money had and received will not lie where the plaintiff upon the same transaction would be liable to a cross-action to recover damages to an equal amount.** *Simpson v. Swan*, 3 Camp. 291—Ellenborough.

**The action will lie for the assignee of a respondentia bond; the obligor having beforehand engaged, by an indorsement, to pay the same to any assignee.** *Fenner v. Meares*, 2 W. Bl. 1269.

**Privity of contract necessary to sustain action.]—An action for money had and received will not lie against a mere money bearer, to recover the money he has received and paid over.** *Coles v. Wright*, 4 Taunt. 213; 2 Rose, 110.

**A. paid a sum of money into a banker's hands, for a specific purpose, and the banker's clerk, by mistake, paid the money to B.:—Held, that A. could not maintain an action against B. to recover it back.** *Rogers v. Kelly*, 2 Camp. 123—Ellenborough.

**But if A. remits money to B. to pay C., and B. promises C. to pay it to him, C. can maintain an action against B. for money had and received.** *Lilly v. Hays*, 1 N. & P. 26; 5 A. & E. 548; 2 H. & W. 338.

**The defendant was an office-keeper of an Exeter and London coach, and servant to C., a proprietor at Exeter, where the office kept by the defendant was. The defendant from time to time made up accounts of the shares of profits due to the several proprietors, and sent them to those parties, taking the money from a balance of C.'s which he had in hand. On one occasion, the defendant sent to the plaintiff, a proprietor, a packet purporting to contain 23*l.* which was due to him, but in reality containing 20*l.* only. The plaintiff sued the defendant for 3*l.* had and received to his use:—Held, that he was not liable, there being no privity of contract between him and the plaintiff; and that he was not precluded from this defense by having told the plaintiff (after action brought), that he, the defendant, had had the 23*l.* of C., and sent it to the plaintiff and debited C. with it.** *Hovell v. Batt*, 2 N. & M. 381; 5 B. & Ad. 504. See *Stephens v. Badcock*, 3 B. & Ad. 354.

**The defendant chartered a ship, K., at a certain rate per week, to be paid every four weeks in advance. On the second payment becoming due, K. received from the plaintiff, through whom he had sub-chartered the ship to B., a check for half the amount due, payable to the order of the defendant, upon the terms that K. should inform the defendant that the advance was made in consideration that the ship should be allowed to perform the charter. K. paid the check to the defendant, but omitted to inform him of the terms on which it had been given, and he had**

**no notice of them, and, the remainder of the money being unpaid, the defendant, who had obtained cash for the check, stopped the ship:—Held, that an action for money had and received, to recover the amount of the check, was not maintainable by the plaintiff against the defendant, as there was no privity between them, and that the action, if any, ought to have been brought by K.** *Watson v. Russell*, 3 B. & S. 35; 9 Jur., N. S. 249; 31 L. J., Q. B. 301; 7 L. T., N. S. 528; affirmed on appeal, 5 B. & S. 968; 34 L. J., Q. B. 93; 13 W. R. 231—Exch. Cham.

**When a bill of exchange, payable at the house of A., had been presented there for payment, and dishonored, and the acceptor on the following day remitted a sum to A. for the purpose of paying that bill and another; and A. in answer stated that the bill had been dishonored, but added, that the money received should be carried to the acceptor's account, and afterwards paid the other bill:—Held, that the holder of the original dishonored bill could not maintain an action against A. for money had and received, unless some agreement had taken place between them.** *Yates v. Bell*, 3 B. & A. 343.

**The assignees of a bankrupt gave B., their solicitor, a check for the amount of the bill of costs of A., the petitioning creditor (who was his own solicitor); B. offered to pay A. the full amount of those costs, provided that he would engage in the receipts that the costs should be afterwards liable to taxation; A. refused to give such engagement, and requested B. to pay out of the same some commissioners' fees included in the bill:—Held, that no promise arose upon the offer, the terms of which were not acceded to; and without the promise there was no privity of contract to support an action for money had and received.** *Darvon v. Husband*, 1 N. & M. 728; 4 B. & Ad. 611.

**A legacy having been left to the plaintiff, the defendant, who acted as agent for the executor, stated, in a letter to a third party, that he would remit the plaintiff's legacy in any way the latter might suggest. He afterwards paid 24*l.* to the plaintiff, having deducted 6*l.* 17*s.* 6*d.* for his trouble and expenses, and afterwards sent him an account, stating the reason of the deduction:—Held, that the plaintiff was not entitled to recover this sum in an action for money had and received.** *Barlow v. Browne*, 16 M. & W. 120; 16 L. J., Exch. 63.

**As to recovery of money received from third persons to use of plaintiff,—see this title, III., 6.**

**When action lies for foreign money and securities.]—An action for money had and received will not lie to recover the value of foreign securities paid to the defendant, where it appears that he had no opportunity of converting such securities into British money.** *M'Lachlan v. Ecans*, 1 Y. & J. 380.

**But a debt incurred in foreign coin is**

recoverable as for lawful money of Great Britain. *Harington v. Macmorris*, 1 Marsh. 33; 5 Taunt. 228.

— to try title to land or profits.]—The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question. *Money-penny v. Bristol*, 2 R. & M. 117. S. P., *Newsome v. Graham*, 10 B. & C. 234.

An action for money had and received will not lie by one tenant against his co-tenant who has received more than his share of the profits. *Thomas v. Thomas*, 5 Exch. 28; 1 L. M. & P. 229; 14 Jur. 180; 19 L. J., Exch. 175.

— to try the right to offices.]—An action for money had and received, to recover fees, was introduced in lieu of an assize. *Boyter v. Dodsworth*, 6 T. R. 681.

Money given to A., and claimed by B., as perquisites of office, cannot be recovered by B. unless such perquisites are known and accustomed fees. *Id.*

It will not lie by the nominee of a perpetual curacy for the profits thereof, against one who was in possession, and claimed likewise to be curate. *Powell v. Millbank*, 1 T. R. 399, n.

But it does lie in the case of a donative, because the party is in full possession immediately on the nomination. *Rees v. Chester (Bishop)*, 1 T. R. 396, 403.

Where the plaintiff and defendant, both claiming to act as clerks to the justices of a division, agreed to leave the dispute to the determination of third parties, who directed that the defendant should act in the office, and divide his fees with the plaintiff:—Held, that an action might be maintained to recover the moiety of the fees received, and that the defendant could not allege that he was legally entitled to all the fees. *Roland or Rowland v. Hall*, 1 Scott, 539; 1 Hodges, 111.

Where a corporation, under a claim that a particular office was vacant, or that it had been abolished, had for some years wrongfully received the fees payable to the holder of such office:—Held, that an action for money had and received might be brought against the corporation; for, as it would be absurd to suppose that a corporation would contract under seal to refund money which they claimed to be their own, the necessity of the case required such a remedy. *Unll v. Swansea (Mayor, &c.)*, D. & M. 475; 5 Q. B. 520; 8 Jur. 213; 13 L. J., Q. B. 107. See *Showbridge v. Clark*, 12 C. B. 335.

## 2. Money Paid under Compulsion, Pressure, or Extortion; and other Payments not Voluntary.

Money paid under compulsion of law, in general.]—A voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (as to redeem or preserve his person or goods), is not the subject of an action for

money had and received. *Fulham v. Dees*, 6 Esp. 26, n.—Kenyon.

Where money has been paid under the compulsion of legal process, which is afterwards discovered not to have been due, the party cannot recover it back. *Marriott v. Hampten*, 7 T. R. 269; 2 Esp. 546.

But an action lies to recover back money which has been obtained by compulsion under color of process, by an excess of authority, although it has been paid over. *Snedden v. Davis*, 1 Taunt. 359.

Where money has been paid under compulsion of legal process, the party paying it knowing the cause of action for which the process was sued out before he paid the money, and there being no fraud on the part of the payee, the money so paid cannot be recovered back, although it may afterwards be discovered to have been not really due. *Hamlet v. Richardson*, 2 M. & Scott, 811; 9 Bing. 644.

Where a party, sued on a claim which he knows to be unfounded, pays it voluntarily and with notice, it is not recoverable; he cannot recover it back, though at the time he pays it, he declares he pays it without prejudice to his right to recover. *Brown v. M'Kinally*, 1 Esp. 279—Kenyon.

If one person obtains possession of goods intrusted to another, to be sold at a fixed price, and at the time when the goods are to be delivered, or the price accounted for refuses to do either, and the person to whom they were intrusted, being threatened with an action, pays the fixed price to the owner, such person may recover against him who took possession in an action for money had and received. *Longchamp v. Kenny*, 1 Doug. 137.

Money levied by a regular execution under a judgment, valid on the face of it, cannot be recovered back on the ground that judgment was signed or execution issued fraudulently for the whole sum named in the judgment, when part had been already paid. *De Medias v. Grove*, 10 Q. B. 152; 10 Jur. 423; 15 L. J., Q. B. 287.

When a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or a concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or by an action for money had and received. *Great Western Railway Company v. Sutton*, 4 L. R., II. L. Cas. 249—Willes, J.

Instances of money paid under compulsion of law.]—The plaintiff, being a foreigner, ignorant of the English language, was arrested at Fulmouth, soon after his first arrival there from abroad, by the defendant, for 10,000*l.* The defendant and plaintiff then signed an agreement, by which, in consideration of 500*l.* paid by the plaintiff to the defendant, the plaintiff was to be discharged, and not to be again arrested; and the plaintiff was to put in bail in twelve days; the sum of 500*l.* was to be



as a payment in part of the writ;" and both parties were to abide the event of the action, the agreement containing no provision for refunding the money if the action should fail. The plaintiff paid the 500*l.*, and was released. The writ was put in, and the writ was afterwards set aside for irregularity. The plaintiff then sued the defendant for the 500*l.*, as money paid and received; and the jury found that he knew that he had no claim upon the plaintiff:—Held, that the action lay, the payment having been made under compulsion of colorable legal process. *Duke de Cadaval v. Collins*, 4 A. & E. 858; 2 H. & W. 54; 6 N. & M. 324.

A certificated bankrupt, being arrested for a debt provable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the court to have the money paid back:—Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne v. Chapman*, 4 A. & E. 364.

An action may be maintained to recover back money paid under a compromise, after another action had been brought for it by the defendant against the plaintiff, and an interlocutory judgment had, and a writ of inquiry executed thereon; where it appeared that there was no real consideration for the payment, and the money had in fact been paid under a compromise, and not under the judgment of a court. *Cobden v. Kendrick*, 4 T. R. 432, n.—Kenyon.

A party paid the sheriff the amount of a forfeited recognizance, in order to prevent a sale of his goods; the sessions afterwards mitigated the recognizance to a small sum, for which alone the sheriff rendered an account to the Exchequer:—Held, that as the sessions were not authorized in mitigating the recognizance, the plaintiff could not recover against the sheriff for the surplus of the money, though he had made an express promise to repay it. *Haynes v. Hayton*, 7 B. & C. 293; 2 C. & P. 621.

Pending an ejectment by A. against B., A. was served with notice of B.'s intention to sue for certain statutable penalties incurred by A. An arrangement was made, under which the ejectment was discontinued, and B. received from A. 50*l.* towards the costs of B.'s defense in that action:—Held, that A. might recover back the 50*l.* as money received by B. to A.'s use, if the jury found that sum was paid with reference to and by coercion of the threatened penal actions, and not to have been paid voluntarily, and with reference to the ejectment only. *Unwin v. Leaper*, 1 M. & G. 747; 4 Jur. 1037; 1 Drink. 3.

Guardians of a poor-law union indicted the plaintiff for disobeying an order of sessions for maintenance of a bastard. Before trial, he offered a compromise, and the clerk to the guardians on their behalf agreed with him for a sum on account of costs and maintenance, which he paid, and the indictment was dropped. Afterwards, the plaintiff discovered

that the order of sessions was defective and void, and he brought an action against the clerk for money had and received:—Held, that the clerk was not liable, having done nothing in the prosecution beyond preferring the indictment; and that, if the compromise was illegal, the plaintiff, being in *pari delicto* with the other parties offending, could not sue them for the money which he had paid. *Goodall v. Lowndes*, 6 Q. B. 404; 9 Jur. 177.

A sheriff seized goods in the possession of S., to satisfy a *fi. fa.* issued against him upon a judgment of nonsuit for 67*l.* S. had previously conveyed all his estate and effects to H., by a deed, which, it was contended, was fraudulent and void against creditors; and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them up, except on payment of 97*l.* (the additional 30*l.* being claimed for poundage, expenses, &c.), which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of 67*l.* In an action brought by S. against the sheriff to recover back the 30*l.*:—Held, that it was not necessary to prove a tender of the 67*l.* *Searje v. Hulifaz*, 7 M. & W. 283.

Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not; and that, if it was not, he was entitled to recover; and that the sheriff was not estopped by his return to say, that the excess beyond the 67*l.* was not the money of S. *Ib.*

The defendant having recovered judgment against H. on the 25th of April, lodged with the sheriff a *fi. fa.* The sheriff neglected to execute the writ until the 11th May, when he seized the goods of H., and assigned them to the defendant by a bill of sale, which stated the consideration to be 250*l.*, paid by the defendant to him. He then returned the *fi. fa.* Before the seizure the defendant had notice of an act of bankruptcy committed by H. before the 25th of April, upon which a fiat issued in August, and assignees were appointed, who recovered from the sheriff the value of the goods seized, whereupon he brought an action to recover back the money so paid:—Held, first, that although no money, in fact, passed, the plaintiff and defendant were, as between themselves, in the same situation as if the plaintiff had sold the goods to the defendant, and received the money. *Standish v. Ross*, 8. Exch. 527; 19 L. J., Exch. 185.

Held, secondly, that though the money was not the plaintiff's, still he was entitled to recover, since it was money which he ought to have received as soon as he had been compelled by the owner to pay for the goods seized. *Ib.*

Held, thirdly, that the plaintiff was not estopped, by his return, from saying that the then title of the debtor was defeated by matter subsequent. *Ib.*

Held, lastly, that the money having been paid by the plaintiff, in ignorance of the facts, he was entitled to recover it back, although the defendant could not, in every respect, be placed in statu quo. *Id.*

B.'s goods had been assigned to trustees for the benefit of creditors. While the goods were in the possession of the trustees, a sheriff's officer entered, and claimed the goods, under a f. fa., but made no seizure; and the trustees remained in possession of the goods, until a messenger took possession under a fiat of bankruptcy issued against B. Afterwards the sheriff's officer broke open the door, made an inventory of the goods, and threatened to sell. The assignees of B. having thereon paid under protest the amount of the levy:—Held, that the payment was not voluntary, and might be recovered back. *Valpy v. Manley*, 1 C. B. 594; 9 Jur. 452; 14 L. J., C. P. 204.

**Money paid under a distress.**—Where a party threatened with a distress for rent pays money where he might legally have defended himself, it is not a payment by compulsion, and can neither be recovered back nor set off against another demand. *Knibbs v. Hall*, 1 Esp. 84—Kenyon.

And this action will not lie to recover back money paid for the release of cattle damage feasant, though the distress was wrongful. *Lindon v. Hooper*, Cowp. 414.

Where goods, distrained by the plaintiff, are delivered by him to the defendant on his promising to pay the rent, an action for money had and received will not lie for the value of the goods, though the defendant does not pay the rent. *Leery v. Goodson*, 4 T. R. 687.

Where a broker who distrained on a tenant for rent was requested not to sell, and promised his charges in consideration of such forbearance, and time was given and the charges paid, but the tenant objected to the amount of the charges:—Held, that this was not a voluntary payment; and that if the charges were irregular, they might be recovered back. *Hills v. Street*, 5 Bing. 37; 2 M. & P. 96.

A. tenant to B. received notice from C., a mortgagee of B.'s term, that the interest was in arrear, and requiring payment to her, B., of the rent due. A., notwithstanding the notice, paid the rent to B. (under an indemnity, which turned out to be unauthorized), and was afterwards compelled by distress to pay the amount over to C.:—Held, that the payment to B. was a voluntary payment with full knowledge of the circumstances, and therefore not recoverable back. *Higgs v. Scott*, 7 C. B. 63.

Where cattle are distrained as damage feasant, the owner cannot, without tendering amends, pay, under protest, an excessive sum demanded for damage, and recover the amount as money received to his use. *Guliver v. Cosens*, 1 C. B. 788; 9 Jur. 606; 14 L. J., C. P. 215.

If a sufficient tender is made before the distress, the remedy is replevin or trespass;

if after the distress (and before the impounding), detainee. *Id.*

Where, rent being in arrear, the landlord takes goods of the tenant as a distress, and claims more than the amount of such arrears: and the tenant, in order to regain possession of the goods, pays the amount demanded, he cannot afterwards maintain an action to recover back the money so paid by him in excess of the amount really due. *Glynn v. Thomas*, 11 Exch. 870; 2 Jur., N. S. 378; 25 L. J., Exch. 125—Exch. Cham. S. P., *French v. Phillips*, 2 Jur., N. S. 1169—Exch. Cham.

In order to render the detention of the goods in such a case unlawful, the tenant must tender the rent really due. *Id.*

A landlord who has sold his tenant's goods under a distress for rent is not liable for money had and received, at the suit of the mortgagee of the goods, to recover the overplus money in the landlord's hands, the proper remedy being by an action against him for not paying over the overplus to the sheriff, pursuant to 2 Will. & M., sess. 1, c. 5, s. 2. *Yates v. Eastwood*, 6 Exch. 805; 29 L. J., Exch. 303.

A landlord or a bailiff who has distrained, even if not bound (as semble he is), to restore goods remaining unsold to the premises on which he distrained them, is at liberty to do so, and his doing so will not be a conversion, even although they are the goods of third parties, and the bailiff has had notice of this from them, after the impounding, and has promised to act on the notice, both as to goods unsold and the surplus proceeds of goods sold, for such a promise does not impose any duty on the bailiff to deliver the goods to the right owner, neither will it sustain an action to recover the surplus proceeds of the goods sold. *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Exch. 50.

A purchaser of a leasehold interest, entering into possession before execution of an assignment, is entitled to sue the vendor for money paid to the landlord under a distress for rent accruing due before entry. *Gregory v. Stanway*, 2 F. & F. 309—Martin.

A declaration alleged that the plaintiff was tenant to the defendant of a house, and the defendant wrongfully distrained for arrears of rent on goods of the plaintiff of much greater value than the arrears and of the charges of the distress and appraisal and sale, although part of the goods was of sufficient value to have satisfied the arrears and charges, and thereby made an unreasonable distress contrary to the statute. There was a second count for money had and received. The plaintiff, before the distress, had assigned the goods seized to trustees, for the benefit of his wife. The plaintiff, his wife, and one of such trustees resided in the house. The sum of 9*l.* was in arrear for rent, when the defendant distrained for 18*l.* for rent in arrear and the costs, and seized goods to the value of 100*l.* The plaintiff offered to pay 9*l.* and costs and charges. This offer was refused, and the money distrained for, and costs and charges

were paid under protest. The plaintiff suffered annoyance from these proceedings:—Held, that the declaration disclosed a good cause of action, and that there was sufficient evidence of an interest in the goods, on the part of the plaintiff, to go to the jury in respect of the first count; and that the plaintiff was entitled to recover the excess of the money paid under protest, and damages for the annoyance which he had suffered. *Fell v. Whitaker*, 41 L. J., Q. B. 78; 7 L. R., Q. B. 120; 20 W. R. 817; 25 L. T., N. S. 880.

As to recovery for money paid on distress, as paid to use of another,—see this title, II., 1.

**Money paid on claim of lien or pressure.]—**Money paid, as the only means of recovering possession of property to which a party is entitled, constitutes a compulsory payment, and may be recovered back. *Shaw v. Woodcock*, 9 D. & R. 889; 7 B. & C. 73.

If a man buys property which is in the hands of a third person, who sets up an unfounded claim, and who will not deliver unless that claim is paid, and the purchaser several months afterwards goes and pays the demand, he is bound to give notice to the seller; and if he does not, he cannot recover the money so paid from the seller. *Bevan v. Waters*, 3 C. & P. 520—Best.

An action will lie to recover back money paid to release goods wrongfully detained on a claim of lien. *Ashmole v. Wainwright*, 2 G. & D. 217; 2 Q. B. 837; 6 Jur. 729.

Goods had been delivered to a carrier to be carried, without any bargain as to the price; the carrier refused to give them up at the end of the journey without payment of a certain sum for the carriage, which the plaintiff paid under protest; the plaintiff then brought an action for money had and received, and delivered a bill of particulars, stating that the action was brought to recover the whole of the sum or such part as was an overcharge; the jury found that a smaller sum than that demanded and paid was due:—Held, that a tender of the smaller sum was not necessary to enable the plaintiff to maintain the action. *Id.*

A lease was about to be granted to the plaintiff, to which it was necessary that C. should be a concurring party. The attorney of the proposed lessors applied to him for that purpose, and the defendant, as C.'s attorney, answered the application, requiring certain documents to be furnished; for which business the defendant had a claim on C. It was ultimately agreed that C. should concur in the lease, on the terms, as the defendant contended, that all the past costs, as well as those to be occasioned by his joining in the lease, should be paid by the lessors; as the plaintiff contended, that the latter costs only should be paid. The lease, having been engrossed and executed by the lessors, was sent to the defendant to procure C.'s execution; the defendant sent an account of his costs against C. to the attorney of the lessors, who complained of the amount, on which the de-

fendant said that C. should not execute unless that amount was paid. The attorney of the lessors, after tendering a smaller sum to the defendant, paid him the larger sum under protest, for the plaintiff, to obtain possession of the lease:—Held, that an action to recover the overplus was rightly brought by the plaintiff against the defendant, although the latter merely acted as C.'s attorney, and that such action was maintainable. *Smith v. Seap*, 12 M. & W. 583.

A mortgaged, with a proviso for repayment, and a covenant for conveyance at the costs and charges of the mortgagor. Upon notice to repay the sum borrowed, the mortgagor's solicitor sent the solicitors for the mortgagee a draft reconveyance, which was approved by them; but they refused to redeliver up the title-deeds unless their bill of costs was paid. One of the charges in the bill was in respect of the reconveyance; the others arose exclusively from the relation of the mortgagee and the defendants, as client and solicitor. In an action by A. to recover the money so paid:—Held, first, that the defendants were not entitled to withhold the deeds from the mortgagor. *Wakefield v. Newbn*, 6 Q. B. 276; 8 Jur. 735; 13 L. J., Q. B. 253.

Held, secondly, that the mortgagor might maintain this action against the defendants, for money extorted under duress of his goods, and paid by him under protest to the defendants for their own benefit. *Id.*

The attorney for a mortgagee, who had advertised a sale of the mortgaged property, under a power reserved to him for non-payment of interest, having extorted from the administratrix of the mortgagor money exceeding the sum due for principal, interest and costs, under a threat that he would proceed with the sale unless his demand were complied with:—Held, that the administratrix might recover it as money had and received. *Close v. Phipps*, 7 M. & G. 586; 8 Scott, N. R. 381.

Deeds of the plaintiff were placed by A. in the hands of the defendant, her attorney, and upon application, A. declined to give any information about them unless upon payment of a sum of money which she claimed to be due to her from the person who had devised to the plaintiff's wife the property to which the deeds related, and ultimately referred the plaintiff to the defendant. He also refused to give them up; and the plaintiff, in order to obtain them, paid the amount claimed, saying at the same time to the defendant, "You shall hear of this again:—Held, that this was not a voluntary payment, and that the amount was recoverable as money had and received. *Oates v. Hulton*, 6 Exch. 346; 20 L. J., Exch. 284.

A testator gave to A. "all my interest and claim on household property in W., on which I have a mortgage of 1,500*l.*" At the time of his death, debts were due in respect of repairs done in his lifetime to the mortgaged premises; these were paid by the executrix:—Held, that she was not entitled to be reim-

bursed by A. the sums so paid. The executrix having compelled A. to pay her the interest, and the debts above mentioned, before she would give up the title-deeds of the mortgaged premises to him:—Held, that (assuming the executrix to have assented to the bequest) A. was entitled to recover back the amount. *Gibbon v. Gibbon*, 13 C. B. 205; 17 Jur. 416; 22 L. J., C. P. 131.

A mortgagee having agreed to assign his security on payment of principal, interest, and costs, made a claim for costs to which he was not entitled. The assignee, on the mortgagee refusing to execute the assignment on any other terms, by the direction of the mortgagor, paid the sum claimed under protest:—Held, that the mortgagor might recover the excess, not as money paid under duress, in the strict legal sense of the term, but as a payment made involuntarily under undue pressure. *Fraser v. Pendlebury*, 31 L. J., C. P. 1; 10 W. R. 104.

Held, also, that the mortgagor was not estopped from setting up this claim by a recital in the assignment to which he was a party, that the sum paid was due for principal, interest and costs; for a recital, although an estoppel upon the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the main object of the deed. *Ib.*

The legal estate in lands being vested in trustees, and the plaintiff equitably entitled to the rents, by his direction a tenant, holding under the trustees, paid his rent to the defendant in discharge of an annuity claimed by the latter as charged upon the land; and the plaintiff sought, by an action for money had and received, to recover back the money so paid:—Held, that he was not entitled to sustain the action. *Leader v. Leader*, 6 Ir. R., C. L. 20—C. P.

**Overcharges by railway companies.]—**Where a railway company exacted from a carrier more than they charged to other carriers, for the conveyance of goods for him on their line, in breach of their acts of parliament:—Held, that the sums thus obtained, being payments not made voluntarily, but in order to induce the company to do that which they were bound to do without requiring such payments, were recoverable back as money had and received. *Parker v. Great Western Railway Company*, 7 M. & G. 253; 7 Scott, N. R. 835; 8 Jur. 194.

The Bristol and Exeter Railway and Great Western Railway are continuous lines, but are worked by independent companies, and by their acts of parliament are bound to charge all persons under the same circumstances for the carriage of goods, &c. By the scale bills issued by each of the companies, certain sums were specified as the charges for the carriage of goods, where the goods were to be collected and delivered by the companies, and a smaller sum was specified as chargeable where the goods were to be collected and delivered by the parties themselves. A carrier sent certain goods, which he had undertaken to collect

and deliver on his own account, by the Bristol and Exeter Railway Company, to be carried upon both lines of railway; but he objected to the charges as being excessive, and paid the whole amount claimed under protest:—Held, first, that he was entitled to recover back the amount so paid in excess of what was a fair and reasonable charge, although he had not made any tender of any specific sum as a fair and reasonable charge. *Parker v. Bristol and Exeter Railway Company*, 6 Exch. 702; 6 Railw. Cas. 776.

Held, secondly, that the whole sum so paid in excess was recoverable from the Bristol and Exeter Railway Company, although they had received a portion of it as agents only of the Great Western Railway Company. *Ib.*

The Great Western Railway Company, before the 7 & 8 Vict. c. 3, came into operation, was obliged by the 2 & 3 Vict. c. 27, s. 34, to charge for carriage to all persons equally; but they charged a carrier differently from, and more than, the public:—Held, that the overcharge was recoverable as money received to the carrier's use. *Edwards v. Great Western Railway Company*, 11 C. B. 588; 21 L. J., C. P. 27.

Money paid in excess, in disregard of the equality clauses of railway acts, can be recovered back in an action for money had and received. *Great Western Railway Company v. Sutton*, 4 L. R., H. L. Cas. 226; 38 L. J., Exch. 177; 18 W. R. 92. Compare *Finnis v. Glasgow and South-Western Railway Company*, 2 Macq. H. L. Cas. 177.

**Illegal fees.]—**The payment of illegal fees cannot generally be considered as voluntary, so as to preclude a plaintiff from recovering them back in an action for money had and received. *Morgan v. Palmer*, 4 D. & R. 233; 2 B. & C. 729. S. P., *Dew v. Parsons*, 2 B. & A. 502; 1 Chit. 295.

The plaintiff applied to the defendant, a parish clerk, for liberty to search the register book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four years, and made twenty-five extracts, for which the defendant charged him 3s. 6d. each, and he accordingly paid the defendant 4l. 7s. 6d.:—Held, that the charge for extracts was illegal, since 6 & 7 Will. 4, c. 86, s. 35, only authorized a charge for a search, and for a certified copy; and that the payment was not voluntary, so as to preclude the plaintiff from recovering back the excess; and that the defendant was the proper person to be sued. *Steele v. Williams*, 8 Exch. 625; 17 Jur. 464; 23 L. J., Exch. 225.

When money is paid under an illegal demand, colore officii, the payment can never be voluntary. *Ib.*

Upon the plaintiffs claiming as joint tenants of four separate copyhold tenements, to be admitted by one admission, the steward refused to admit unless four admittance fines,

four sets of steward's fees, and four stamps were paid. The plaintiffs then claimed to be admitted by two separate admissions—one to two tenements, formerly Delabere's, the other to two tenements, formerly Edwards's—but insisting on the right to a single admission. In order to avoid a forfeiture, one of the plaintiffs was admitted, on behalf of himself and his joint tenant, by four admissions. On the bill of fees being presented, the solicitor for the plaintiffs said, "I protest against them," but paid them, delivering a written protest, which extended only to a claim to be admitted by two admissions:—Held, that the steward having no right to a separate fee upon the admission of each joint tenant, the plaintiffs were entitled to recover the excess as money paid under compulsion. *Treharne v. Gardner*, 5 El. & Bl. 913; 2 Jur., N. S. 394; 25 L. J., Q. B. 201.

### 3. Money obtained by Fraud or Wrong; Waiver of Tort.

**In general.**—If money has been obtained by fraud, an action for money had and received lies to recover it back, to which it is no answer that the defendant is really entitled to the money, if his right to it depends upon a question which is not of common law jurisdiction. *Crockford v. Winter*, 1 Camp. 124—Ellenborough.

So, if one recovers money *malâ fide*, by suit in an inferior court, an action for money had and received will lie to make him refund. *Moses v. Macpherlan*, 2 Burr. 1005; 1 W. Bl. 219.

If a bill is filed to compel the performance of a contract and payment of money, and the defendant puts in no answer, and is obliged to pay the money, and he afterwards discovers that he was deceived in the contract, he will not be barred from his action by having paid the money, if he comes immediately after discovering the fraud. *Jendwins v. Slade*, 2 Esp. 572—Kenyon.

An action will lie against an infant, to recover money which he has embezzled. *Bristow v. Eastman*, 1 Esp. 172; Peake, 223—Kenyon.

#### Instances of fraud, misrepresentation, &c.]

—Where a party, knowing a check to be post dated, and that the drawers were insolvent, presented it for payment to the bankers upon whom it was drawn, who, without knowledge of these facts, paid it, although they had no funds of the drawers in their hands at the time, but expected some in a few days:—Held, that they were entitled to recover it back. *Martin v. Morgan*, 3 Moore, 635; 1 B. & B. 289; Gow, 122.

If a person undertakes to procure for another an appointment, which he knows at the time he is unable to do, and receives in consideration a sum of money, to be paid back in three months if he fails in his undertaking, the other person may immediately commence an action to recover it back, with-

out waiting till the end of the three months. *Hogan v. Shee*, 3 Esp. 522—Kenyon.

A sale of goods effected by fraud does not change the property in them; therefore, where the defendant fraudulently induced the plaintiff to sell goods to S., who could not pay for them, and on a nominal re-sale of those goods by S., in which the defendant was concerned, obtained the money paid on such re-sale:—Held, that the plaintiff might recover from the defendant the value of the goods unpaid for by S. in an action for money had and received. *Abbotts v. Barry*, 5 Moore, 98; 2 B. & B. 369.

If A. fraudulently procures a bill of exchange from B., and afterwards becomes bankrupt, and his assignees receive the money for the bill, B. may recover it from them. *Harrison v. Walker*, Peake, 111—Kenyon.

The plaintiff was, by means of a fraud, induced to draw and pay away two checks on his banker. Six days after the date of the checks the defendant, acting *bonâ fide*, gave cash for them to a third person (who had not given value for them), and presented the checks, and obtained payment. In an action by the plaintiff to recover back this money:—Held, that the checks could not be treated as bills overdue, and therefore taken by the defendant at his peril, but that the real question in the case was, whether the defendant acted *bonâ fide* and with due caution. *Rothschild v. Corney*, 9 B. & C. 388.

A. drew a bill on B. in the country, making it payable at the house of C. in London, without authority from C., and B. accepted the bill in this form, without giving notice to C., or providing for the payment of the bill at C.'s house. A. negotiated the bill, which, upon becoming due, was presented by the holder to C., who paid it under a supposition that the bill so presented was another bill of a different amount and date, drawn by B. on and accepted by himself, and did not discover his mistake until a fortnight afterwards, when the other bill was presented. B. became bankrupt:—Held, that C. could not recover against A. for money had and received. *Davies v. Watson*, 2 N. & M. 709.

A., acting for B., a foreign principal, but in his own name, bought of E., in London, a cargo of wheat on board a vessel represented to be on its way from Galatz, payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, and the bill was duly paid. B. afterwards came to London, saw the contract, and ratified all that A. had done. It turned out that the cargo had been fraudulently disposed of by the captain, prior to the date of the contract of sale by C. to A.:—Held, that B. could not maintain an action against A. to recover back the money paid, upon a failure of consideration, but that his only remedy, whether in his own name or in that of A., was against C., the seller. *Ris-*

*bourg v. Brackner*, 3 C. B., N. S. 812; 27 L. J., C. P. 90.

The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract, on the ground of fraud, and was repaid the purchase-money. In an action by the plaintiff for the keep of the horse:—Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud. *Murray v. Mann*, 2 Exch. 538; 12 Jur. 634; 17 L. J., Exch. 256.

A. placed in the plaintiff's hands a fund, out of which the plaintiff was directed to satisfy certain acceptances. The defendant falsely represented to the plaintiff that he held one such acceptance, and thereby induced the plaintiff to pay him the amount of the alleged acceptance out of the fund;—Held, that the plaintiff might maintain an action for money had and received against the defendant. *Holt v. Ely*, 1 E. & Bl. 795; 17 Jur. 892.

The plaintiff became a purchaser of shares in a mining company, which carried on business upon the cost-book principle, and he paid deposits upon the shares. The mine was worked, dividends were declared, and he received additional shares as an equivalent for such dividends as were due to him. Afterwards, and while he continued to hold the shares, the company was registered as a company with limited liability, and was subsequently wound up under an order in Chancery. While the proceedings for winding up were going on, the plaintiff discovered, as he alleged, that he had been deceived by the fraudulent representations of the defendants, who were three of the directors of the company, and who by fraud had induced him to become a shareholder, and he therefore brought an action to recover back the money which he had paid on account of the shares which had been allotted to him, claiming to recover it as money received by the defendants for his use:—Held, that he could not maintain the action. *Clarks v. Dickson*, 4 Jur., N. S. 832; 27 L. J., Q. B. 223; E. L. & Bl. 148.

The plaintiff, being in embarrassed circumstances, offered his creditors a composition of 5s. in the pound. The defendant, a creditor, refused to accept it unless the plaintiff paid him 50l., and gave him a bill of exchange for 100l. The other creditors would not accept the composition if the defendant did not. The plaintiff paid the defendant the 50l., and gave him the bill of exchange, and the defendant executed the composition deed:—Held, that the plaintiff might recover back the 50l. in an action for money had and received. *Atkinson v. Denby*, 7 H. & N. 934; 8 Jur., N. S. 1012; 31 L. J., Exch. 362—Exch. Cham.

The plaintiff authorized the defendant, as his broker, to negotiate for the purchase of a particular ship on the basis of an offer of 9,000l., but eventually the ship was purchased

through defendant for 9,250l. Prior to the sale, an arrangement had been made between the vendor and a broker, S., that if S. could sell the ship for more than 8,500l., he might retain for himself the excess; and it was arranged between S. and the defendant, without the knowledge or sanction of the plaintiff, that the defendant should receive from S. a portion of such excess; and accordingly the defendant received 225l., part of the excess over 8,500l. On discovering this, the plaintiff brought an action for money had and received for the 225l. In addition to the above facts, the jury found that the defendant was the agent of the plaintiff to purchase the ship as cheaply as she could be got, and that the plaintiff could have got her cheaper but for the arrangement between the vendor and S.:—Held, that the action would lie. *Morison v. Thompson*, 9 L. R., Q. B. 480; 43 L. J., Q. B. 215; 30 L. T., N. S. 869; 22 W. R. 859.

#### Waiving, condoning or satisfying torts.—

A. and B. went together to the house of C's mother, and A. seized there a sum of money belonging to C. There was some evidence of A. and B. having gone with the intent to get the money, but there was no evidence that B. went into the house. They subsequently paid the money into a bank to their joint account:—Held, that C. might waive the trespass and maintain an action for money had and received against A. and B. *Neal v. Harding*, 6 Exch. 349; 20 L. J., Exch. 250.

Where, after a wrongful sale of goods, the owner claims the proceeds of the sale as money received to his use, and the wrong-doer thereupon pays, and the owner accepts part of the proceeds as money received to his use; the tort is waived, and the owner's remedy for the residue of the amount of the sale is by an action for money had and received to his use. *Lythgoe v. Vernon*, 5 H. & N. 189; 29 L. J., Exch. 164.

To an action for money received, the defendant pleaded that the debt was for money due from the defendant jointly with A., and that the plaintiff had already sued A. in trover, and recovered judgment against him for 100l., and that the causes of action for which the plaintiff recovered judgment included all the present causes of action. The evidence was, that the defendant and A. had wrongfully converted the plaintiff's goods by selling them, but that the defendant alone had received the proceeds, 150l.; and that the plaintiff had sued A. in trover, and recovered 100l. as the value of the goods at the time of the conversion. The plea was then amended by striking out the allegation, that the debt was for money due from the defendant and A. jointly, and substituting that the money sued for was money received as the proceeds of the sale of the goods in the declaration mentioned:—Held, that the plea, as amended, was an answer to the plaintiff's claim for the whole proceeds of the sale. *Buckland v. Johnson*, 15 C. B. 145; 18 Jur. 775; 23 L. J., C. P. 204. See *Brinsmead v. Harrison*, 6 L. R., C. P. 584.



**Money received upon lost securities, by holders in bad faith.]**—An action for money had and received will lie by the true owner of money or notes against a third person, into whose hands they have come *malâ fide*; provided their identity can be traced and ascertained. *Clarke v. Shea*, Cowp. 197, 384; 2 Dougl. 698, n.

An agent for the sale of goods was authorized to draw bills on the purchasers at the usual credit; and by the course of his employment he was to transmit them indorsed to his principals. He sold goods at a credit beyond the usual period, and drew for the amount; but instead of transmitting them to his principals, he used them for his own purposes. They got into the hands of a bill-broker, who discounted them:—Held, that proof of these facts alone did not afford sufficient evidence of fraud connected with the bill-broker, to give the principals a *prima facie* right to recover the amount of the bills from him as money had and received, and make it incumbent on him to show that he gave full value for the bills. *Davis v. Willis*, 1 H. & W. 679.

To an action by an indorsee for value of a bill which had been lost, it is no defense that the bill was taken under circumstances which ought to have excited the suspicion of a prudent and cautious man. *Crook v. Jades*, 3 N. & M. 257; 5 B. & Ad. 909.

Unless the circumstances are such that *malâ fides* can be inferred. *Backhouse v. Harrison*, 3 N. & M. 188; 5 B. & Ad. 1098.

L. & Co., being the bankers of K., received on his account a check for 100*l.* from T., drawn by him upon the Bank of England, which check was lost by L. & Co. T., at the request of L. & Co., wrote to the Bank of England, requesting them not to pay the check, if presented. T. was afterwards requested by L. & Co. to give them another check for the same amount, upon receiving an indemnity from all loss which he might sustain by so doing, which he promised to do, and the indemnity was accordingly sent. T. subsequently wrote to L. & Co., to say he could not conveniently send the check, but that he would take the earliest opportunity of handing them the amount. L. & Co. were called upon and obliged to pay the amount of the lost check to K.:—Held, that an action by L. & Co. against T. for money paid, or on an account stated, could not be supported; and that L. & Co.'s remedy was by an action of special assumpsit. *Lubbock v. Tribe*, 3 M. & W. 607; 1 H. & H. 160.

#### 4. Money Paid on Invalid or Illegal Consideration, or on Consideration which has failed.

**Money paid on moral obligation, merely.]**—Where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back. *Bize v. Dickason*, 1 T. R. 285.

Nor where a man has paid a debt which

would otherwise have been barred by the Statute of Limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though not compellable by law, can he call on the payee to refund; but where money is paid under a mistake which there was no ground to claim in conscience, the party may recover it back again. *Id.*

But money paid voluntarily cannot be recovered back. *Cartwright v. Rowley*, 2 Esp. 723—Kenyon.

Where a creditor refused to sign a composition deed without a bill of exchange for the remainder of his debt, which the debtor gave him, and the former then signed the deed; the debtor having subsequently paid the amount of the bill to his creditor:—Held, that it was a voluntary payment, and could not be recovered back. *Wilson v. Hay*, 2 P. & D. 253; 10 A. & E. 83; 3 Jur. 384.

**Money paid on illegal contracts.]**—An action will not lie to recover back the money paid for doing an illegal act. *Webb v. Bishop*, Bull. N. P. 182.

But where A. receives money to the use of B., on an illegal agreement between B. and C., in an action by B. for money received, he cannot be allowed to set up the illegality of the contract as a defense. *Tennant v. Elliott*, 1 B. & P. 3.

If a party knowingly engages with another in an illegal transaction, the money advanced by him in such business is not recoverable; aliter, where a party has been ignorantly drawn in by the craft or imposition of such person. *Drummond v. Deey*, 1 Esp. 152—Kenyon.

If A. receives money of B., to the use of C., it may be recovered by C., though the consideration on which B. paid it was illegal. *Furmer v. Russell*, 1 B. & P. 296.

The plaintiffs, a Frenchman and a Swiss, carrying on trade at Lisbon under the name of the defendant, a Portuguese, shipped a cargo thence for a port of France, which cargo being captured by a British cruiser, and libeled for condemnation in the Court of Admiralty, as French, and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiffs' privity and consent, a claim to it as his own property:—Held, that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the true question, by establishing a false fact, estopped from maintaining an action against the defendant for the proceeds, by showing the true fact, that the property was their own, and that the defendant was their agent. *De Metton v. De Mello*, 12 East, 234; 2 Camp. 420.

A testator having borrowed money on a *respondentia* contract prohibited by the laws of England, his executors refunded the money to the lenders:—Held, that the executors could not maintain an action to recover back this money, notwithstanding the lenders could not have compelled them to pay it. *Munt v. Stokes*, 4 T. R. 561.

But where A., in consideration of 210*l.* paid by B., gave a bond for the payment of an annuity to the latter of 103 guineas, till the hop duties should amount to a certain sum: and before this event had taken place, B. brought an action to recover back the 210*l.* of A.:—Held, that the action was maintainable. *Tappenden v. Randall*, 2 B. & P. 467.

A person who has authorized the application of his money to an illegal purpose can recover it before it has been paid over for or applied to such purpose. *Bone v. Ekless*, 29 L. J., Exch. 438; 5 H. & N. 925.

E., being an owner of a ship or a vessel, in order to effect a sale of it to the Turkish Government, authorized B., his agent, to bribe the officials of that government. B. accordingly sold the ship for 6,500*l.*; 6,000*l.* to be paid to E. and 500*l.* to the officials, and received the whole sum of 6,500*l.* from the government. It appeared that the whole transaction was a fraud on the government. B. paid over to the officials 300*l.*, but did not pay over the remaining 200*l.*:—Held, that E. was entitled to recover the 200*l.* from B. *Id.*

Money paid or goods delivered for an illegal purpose may be recovered back before that purpose is carried out, notwithstanding that the party seeking to recover may be compelled to allege that his purpose in making such payment or delivery was illegal. If, however, the illegal purpose has been carried out he cannot recover by alleging its illegality. *Taylor v. Bowers*, 24 W. R. 409; 1 L. R., Q. B. Div. 291; 45 L. J., Q. B. Div. 163; 34 L. T., N. S. 263—C. A.

T., in order to defraud his creditors, transferred all his goods to A., who agreed, after applying part thereof in paying to T.'s creditors a composition of 1*s.* in the pound, to return the remainder. T. represented to B., one of his creditors, that this transfer was bona fide, but B. was aware of its real nature. A., acting without T.'s authority or knowledge, gave to B., as security for his debt, a bill of sale on T.'s goods, which was duly registered, and under which B. took possession of the goods. The composition with T.'s creditors was not effected, and T. brought an action against B. to recover his goods, and obtained a verdict in his favor. B. thereupon obtained a rule nisi calling on T. to show cause why the verdict should not be set aside upon the ground that he could not recover the goods by the allegation of his own fraud:—Held, that T. was entitled to a verdict. *Id.*

Money paid on consideration which subsequently fails.]—A., a loan contractor, delivered to B. certain scrip receipts, stating that B. had paid him 10*l.* per cent. deposit in respect of a certain quantity of Neapolitan stock, and that on payment of the balance the bearer would be entitled to certificates for that amount of stock. B. transferred the receipts to C. for a valuable consideration; A., by advertisement, offered the holders of the

receipts, upon certain conditions, an extension of time for payment of the balance due on them; requiring also that the receipts should be left at his office for the purpose of being marked, as holden under the new conditions. The receipts transferred by B. to C. were by him sent to A.'s office, when indorsed by A. with C.'s name. The latter having failed to comply with the new conditions, A. refused to deliver the certificates or return the deposit. C. claimed the return of the deposit as being retained by A. without consideration:—Held, that C. was not entitled to recover the same, because B. had full consideration for the deposit in the option which the scrip receipts gave him to become the proprietor of so much stock, by payment of the balance of the price, on the day named. *Rothschild v. Hennings*, 9 B. & C. 470; overruling *Hennings v. Rothschild*, 4 Bing. 315; 12 Moore, 559.

A stock-broker sold for the defendant four Guatemala bonds, and paid him the amount. The bonds, after they had been in the hands of the purchaser two days, were discovered not to be marketable; whereupon the broker, without communicating with the defendant, took them back, and reimbursed the purchaser. The defendant, on being applied to, wrote to say that he was only an agent as to part of the bonds, but that if payment had been made on his part, he would reimburse the broker. The defendant failed to prove that all the bonds were not his. It was proved that brokers on the stock exchange do business as principals in dealing in foreign stock:—Held, that an action for money had and received was maintainable against the defendant. *Young v. Cole*, 3 Bing. N. C. 724; 4 Scott, 489; 3 Hodges, 126.

Upon a contract of sale and return, with a certain sum to be paid for hire if a return should be made, the money received by the seller becomes money had and received to the use of the other party if a return is made, and may be recovered as money had and received. *Hurst v. Orbell*, 3 N. & P. 237; 1 W., W. & H. 156; 8 A. & E. 107; 2 Jur. 840.

The plaintiff remitted to the defendant the price of some hay which he had sold for the defendant, before the money had been paid by the purchaser, and then sent the defendant's servant with the hay to the purchaser. The servant having been cheated of the hay before he arrived at the purchaser's:—Held, that the defendant was liable to refund the money remitted. *Gingell v. Glascock*, 8 Bing. 86; 1 M. & Scott, 125.

On the 14th August, the defendants, share-brokers at Liverpool, bought for the plaintiff, in their own names, thirty railway scrip shares, to be delivered on the next account day, which was the 29th August, at the price, including their commission, of 148*l.* 10*s.* This sum the plaintiff transmitted to the defendants on the 26th August, and requested them to forward to him the scrip. On the 22d August the railway company called in the scrip for registration, and before it was

re-issued, which was not till the middle of December, made a call of 5*l.* per share. The plaintiff was aware of these circumstances. The call was necessarily paid by the party selling to the defendants, and he presented the shares to them, with the additional demand for the call. The plaintiff repudiating the transaction, they declined to accept, and the shares were re-sold at a loss of 22*l.*, which the defendants paid to the original seller:—Held, that the 148*l.* 10*s.* was not money received in the first instance to the use of the plaintiff; and that it had not become money had and received to the use of the plaintiff, by a failure of consideration produced by misconduct of the defendants, inasmuch as it was the duty of the plaintiff to supply the funds for meeting the call. *M'Ewen v. Woods*, 11 Q. B. 18; 12 Jur. 329; 17 L. J., Q. B. 206.

The defendant having sold to T., through the agency of the plaintiffs, who were factors, some bark, which he agreed should be equal to the sample, drew a bill on them for the price of the bark, which they accepted. The bark not being equal to the sample, and being rejected by the buyer:—Held, that the consideration of the bill having failed, the plaintiffs were entitled to recover the amount of it from the defendant. *Hooper v. Tuffry*, 1 Exch. 17; 16 L. J., Exch. 283.

The plaintiffs in London ordered from the defendant, at Singapore, first, 25 tons, and then 150 tons of gum, at 18*s.* per cwt., all charges included. The defendant sent invoices and bills of lading of these two quantities, as shipped at Singapore, which invoices and bills were handed to the plaintiffs in exchange for their acceptances for the respective amounts according to the invoices, and before the arrival of the goods the plaintiffs paid the amounts of their acceptances. When the goods arrived, they were found to be four and a-half per cent. deficient in weight, part of which deficiency was attributable to evaporation during the voyage, and the rest to the fact that the weight of the baskets and leaves in which the gum was packed was included in the invoice weight. At Singapore, the gum in question is usually purchased by gross weight, including the baskets and leaves; but in the London market it is bought at the net weight, deducting packages:—Held, that there was a failure of consideration, and that the plaintiffs were entitled to recover the excess above the price of the net weight of the gum at 18*s.* per cwt. from the defendant. *Deaux v. Conolly*, 8 C. B. 640; 19 L. J., C. P. 71.

The plaintiff had employed P. as his agent to purchase goods, which P. bought in his own name from W. & Co. and others, and invoiced in his own name to the plaintiff, taking from him his acceptances in payment. One of these acceptances, partly for goods which had been purchased of W. & Co., remained in the hands of P. until his bankruptcy, when it was taken possession of by the official assignee, and the amount received

and carried to the credit of the estate. Before the bankruptcy W. & Co. had applied to the plaintiff for payment; and after the bankruptcy and after payment of the bill by the plaintiff they sued him, and he settled their claim:—Held, that he was not entitled to recover the amount of the bill from the official assignee, as, even assuming that he was liable to W. & Co. for the goods bought of them, there was only a partial failure of consideration, and the payment to them was voluntary, with full knowledge of the facts. *Barber v. Pott*, 4 H. & N. 759; 28 L. J., Exch. 381.

A. purchased from B. an unstamped bill of exchange, which purported on the face of it to be drawn at Sierra Leone. B. declined to indorse it, but allowed A. to have it to make inquiries as to the solvency of the parties. The acceptor became bankrupt, and on proof against his estate being tendered, it turned out that the bill was drawn in London, and proof of it was rejected:—Held, that A. was entitled to maintain an action for the recovery of his purchase-money against B., on the ground that there had been a total failure of consideration. *Gompertz v. Bartlett*, 2 El. & Bl. 849; 2 C. L. R. 395; 18 Jur. 266; 23 L. J., Q. B. 65.

A broker having an order to buy fifty bales of cotton, executed it by buying them along with 250 other bales in a single contract with one vendor:—Held, that money given to the broker to pay for the fifty bales, in the belief that the order had been duly executed, might be recovered back as paid on a total failure of consideration. *Bostock v. Jardine*, 3 H. & C. 700; 11 Jur., N. S. 586; 34 L. J., Exch. 142; 12 L. T., N. S. 577. See *Mollett v. Robinson*, 7 L. R., C. P. 84, 101, 111; 41 L. J., C. P. 65, 76, 81.

The plaintiff was the holder of a license to use a patented invention from the patentee. The patentee intending to apply for a prolongation of this patent, and also for a patent for a new invention of a similar description, the plaintiff agreed to give him 150*l.*, for the free use forever of the former patent, as well as for the free use for three years of the new patent which the patentee was about to take out. The money was paid to the patentee, but he died almost immediately afterwards, and in consequence of his death no application was ever made for a renewal of the former patent, or the grant of one for the new invention. The plaintiff brought an action against the patentee's executors to recover back the 150*l.*, on the ground that the consideration for it had totally failed:—Held, that he was entitled to maintain the action on the ground that on the true construction of the contract between the parties he had bought the right to have an application for the patents made, not merely the right to have the benefit of it if it should happen to be made, and the consideration had, therefore, wholly failed. *Knowles v. Bosill*, 23 L. T., N. S. 70—Exch.

Money expended on the alteration of prem-

ises, for the leasing of which an agreement has been entered into, but which is incapable of being enforced by reason of the Statute of Frauds, may be recovered back as on a failure of consideration. *Pulbrook v. Lawes*, 45 L. J., Q. B. Div. 178; 1 L. R., Q. B. Div. 284; 84 L. T., N. S. 95.

P., by letter, proposed to take a lease for seven, fourteen or twenty-one years of one of L.'s house, conditionally on certain alterations being made. A correspondence ensued between the parties, and it was ultimately agreed that the alterations should be carried out, L. undertaking to contribute a sum of money towards them. By P.'s consent some of the alterations were executed by L.'s workmen. Eventually L. was unable, owing to P.'s fault, to take the house:—Held, that though he was unable to recover damages occasioned through not having a lease granted, by reason of the letters not disclosing an agreement such as to satisfy the Statute of Frauds, he was, nevertheless, entitled to recover on a quantum meruit for the loss incurred in making the alterations. *Id.*

An English company, being possessed of a patent (taken out and valid in England, but not valid in Berlin) for a process of utilizing sewage, agreed to sell to B. for 15,000*l.* the sole and exclusive right to use and exercise the patent process in Berlin. B. was really acting on behalf of H., a large shareholder and director in the English company, and his object was to form a company for using the process in Berlin, and to induce persons to take shares in the Berlin company, under the belief that that company, having bought the right sold to B. by the English company, would be entitled to the exclusive use of the process in Berlin. The scheme was carried out in the following manner:—B. conveyed his interest to L. for 30,000*l.* L. then conveyed his interest so acquired for 30,000*l.* to M., a clerk in H.'s office, as trustee for the intended company at Berlin. The 30,000*l.* was in fact paid to H. and not to B. B. and H. and L. all knew, but the English company did not know, that by the law existing at Berlin no exclusive right to use the process there could be obtained. B. brought an action to recover the 15,000*l.* from the English company, on the ground that, as there was no exclusive right to use the process in Berlin, the consideration had failed:—Held, that no action could be maintained, first, because B. had in fact obtained that for which he had paid the 15,000*l.*, namely, an ostensible grant of the exclusive right, in order to float the Berlin company; and secondly, because B. had paid the money for the purpose of defrauding the shareholders of the intended company at Berlin. *Begbie v. Phosphate Sewage Company*, 25 W. R. 85; 1 L. R., Q. B. Div. 679; 35 L. T., N. S. 850—C. A.; affirming the judgment of the Queen's Bench, 10 L. R., Q. B. 491; 44 L. J., Q. B. 233; 24 W. R. 115.

**Money paid on special contract afterwards rescinded.**—To entitle a purchaser to main-

tain an action to recover back a deposit paid on a contract for the sale of goods, there must be either an agreement to rescind or circumstances upon which a special action for a breach of the contract would lie. *Ful v. Cassanet*, 5 Scott. N. R. 903; 4 M. & G. 89; 6 Jur. 1125; 12 L. J., C. P. 70.

The plaintiff contracted to buy of the defendant shares in a company, the deed of settlement of which provided that the assent of the directors to a transfer should be necessary in order to complete the title of the purchaser. The plaintiff's broker made out the transfer, and procured the signature of the defendant to them, and the plaintiff paid the price contracted to be given for the shares. The directors, however, in consequence of some dispute with the defendant, refused to assent:—Held, first, that it was the duty of the defendant to procure the assent of the directors, and to do all that was necessary to invest the plaintiff with the property in the shares; and that, on his failure to do this, an action might be maintained by him against the defendant to recover the price he had paid for the shares; and, secondly, that the rescission of the transfer was collateral to the contract of purchase, and not a condition precedent to the right to recover the purchase-money. *Loeman v. Lloyd*, 7 Q. B. 27; 9 Jur. 328; 14 L. J., Q. B. 165.

The defendant being employed by the owner to sell a farm, agreed by a written memorandum to sell the farm to the plaintiff for 2,700*l.* without naming the seller. The plaintiff paid the defendant 100*l.* deposit in part of the purchase-money, and two days afterwards signed a contract for sale by S. (the owner) to himself, whereby he agreed to pay on its execution 100*l.* as a deposit for which S. undertook to pay interest till the completion of the purchase. The contract was afterwards rescinded for want of title in S.; but the defendant, before he had notice of the rescission, paid S. 50*l.*, retaining the other 50*l.* under an agreement with S. to give him (the defendant) half of any amount he might get for the farm above 2,600*l.*, but the retention of the 50*l.* was without the consent of S.:—Held, that the plaintiff could not recover in an action against the defendant for any part of the 100*l.* *Harley v. Baker*, 16 M. & W. 26; 16 L. J., Exch. 273.

**Money paid on abortive or abandoned undertakings.**—An allottee of shares, who has paid his money for shares in a concern which never comes into existence, or which is abandoned, may recover it back as money had and received to his use, unless shown to have consented to or acquiesced in the application of the money. *Ashpitel v. Sercombe*, 6 Railw. Cas. 224; 5 Exch. 147; 19 L. J., Exch. 82—Exch. Cham.

An allottee of shares in a mine worked on the cost-book principle, is entitled to recover back deposits paid by him on the shares, where the working of the mine is abandoned before all the shares mentioned in the prospectus

re subscribed for, or the amount of deposits on all the shares paid up, the deposits not being proved to have been spent upon liabilities incurred with the plaintiff's knowledge. *Johnson v. Goslett*, 18 C. B. 728; 25 L. J., C. 274.

Where deposits were paid, according to a rule of the company, to certain bankers, and the account with them was kept in the name of five directors:—Held, that other directors who had interfered in the management were liable along with those five. *Id.*

The defendant, being one of the provisional directors of a projected railway company, issued with them circulars, stating that, "in the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction." The plaintiff applied in writing for shares. The directors, by the authority of the defendant, answered in writing, inclosing the circular, stating that shares were allotted to the plaintiff, that he must pay the deposit by a given day; and on his doing so, and presenting that letter, a receipt would be given him, which would be exchanged for scrip on his executing the parliamentary contract. He paid the deposits, and executed a deed, which was a deed between the shareholders and two trustees; and in terms authorized the directors to expend the deposits for the purpose of obtaining an act. The circulars were sent by the defendant to induce the plaintiff to believe that if the deposits were paid and the deed executed, the deposits would be returned by the defendant and the other directors to the plaintiff, in the event of failure to obtain the act; and the plaintiff was induced to pay the deposit on those terms. No act was obtained. At the trial the following points were made: first, that the contract, if any, between the plaintiff and the defendant was merged in the parliamentary contract, that being under seal. Secondly, that the deed authorized the expenditure of the money, and therefore an action for money had and received would not lie:—Held, that, first, there could be no merger, the agreement and deed not being between the same parties. *Mowatt v. Londonborough*, 4 El. & Bl. 1; 18 Jur. 1094—Exch. Cham.

Held, secondly, that it sufficiently appeared that the defendant agreed to return an amount equivalent to the deposits, and that it was not any objection to an action for money had and received, that by the agreement the specific money deposited might lawfully be spent, and an equivalent amount paid. *Id.*

**Money paid on title which afterwards fails.]**—Rent paid by A. to B., claiming as devisee, the amount of which A. is afterwards compelled to pay to the heir, may be recovered by A., as money had and received to his use, B. setting up no title to the lands when the action is brought, or at the trial. *Newsome v. Graham*, 5 M. & R. 64; 10 B. & C. 234.

A defendant, supposing himself the legal representative of a lessee for years, sold the

term, and delivered the lease to the plaintiff, but without any assignment or formal conveyance, saying "the premises were his, and if anything happened he would see the then plaintiff righted":—Held, that the plaintiff might maintain an action against him for money had and received, the rightful administrator of the tenant for years having ousted the plaintiff by ejectment. *Cripps v. Roade*, 6 T. R. 606.

A. devised to B., C., D. and E., two parcels of land upon trust, to sell and divide the money among his brother's and sister's children: B., C., D. and E., the last being one of twenty-four persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees, and the twenty-three other persons entitled to the money, that E. should become purchaser of the two parcels of land, paying 800*l.* for one, and 700*l.* for the other: a conveyance was accordingly prepared and executed by B. and C. only, upon which E. took possession of the lands, and paid the purchase money, which was divided among the several persons entitled under the will. E., being afterwards evicted from the smaller parcel, in consequence of a defect in the title derived under the will, brought an action against one of the twenty-three persons, to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of land for which 700*l.* had been paid:—Held, that he was entitled to recover. *Johnson v. Johnson*, 8 B. & P. 163.

An action will lie to recover the expenses of the conveyances, and interest of the money procured to purchase an annuity, where the grantor has misrepresented the charges affecting the estate to be charged with the annuity. *Richards v. Barton*, 1 Esp. 267—Kenyon.

A., who resided in New South Wales, being entitled to an annuity for his life, assigned it, in 1847, to trustees, to dispose of it for his benefit. The plaintiff entered into a correspondence with the trustees upon the subject of the purchase; and the terms of the purchase were not finally determined upon and settled until the 28th February, 1849. Upon the 6th of that month the annuitant died. The purchase-money was paid by the plaintiff in ignorance of the fact, and was ultimately received by the executrix of the deceased:—Held, that as at the time of the purchase of the annuity it had ceased to exist, the plaintiff was entitled to recover back the whole of the purchase-money from the executrix, on the ground that the money had been paid without consideration. *Strickland v. Turner*, 7 Exch. 208; 22 L. J., Exch. 115.

The defendant having bought a personal chattel at a sheriff's sale, the plaintiff afterwards offered the defendant, and the defendant accepted, 5*l.* for his bargain, and the plaintiff paid the advanced price to the defendant; afterwards, the chattel was claimed by a third party under a superior title, and the plaintiff was prevented from taking possession of it; both parties knew that the sale took place

under an execution:—Held, that there was no implied warranty of title by the defendant, and that the plaintiff could not recover back the price paid by him, as upon a failure of consideration. *Chapman v. Speller*, 14 Q. B. 621; 14 Jur. 652; 19 L. J., Q. B. 239.

An agreement recited that the defendant had, as he was advised, legally put an end to a lease granted to A. of a farm by entering thereon, by reason of the bankruptcy of A., pursuant to a power in the lease, and it was agreed that the defendant should grant a lease of the farm to the plaintiff at a yearly rent, payable quarterly. The lease was to commence on a day certain if the defendant could legally make it, or as soon as he was in a situation to do so, the rent to commence from the commencement of the term, or on possession being given, which should first happen. The plaintiff was to pay the defendant 500*l.* on possession being given to him, as a bonus for the lease to be granted. The plaintiff was admitted into possession, and occupied the farm for two years, and paid 250*l.* in respect of the bonus. The defendant was unable to grant the lease, the commission of bankruptcy of A. having been superseded. The plaintiff brought an action against the defendant for not granting the lease:—Held, that the recital in the agreement was *prima facie* evidence against the defendant that he had power to grant the lease, but such recital, purporting to be founded upon the supposed bankruptcy of A., the evidence was answered by proof that the commission against him had been superseded, and that the granting of the lease, being the consideration for the bonus, the plaintiff was entitled to recover the 250*l.* as money paid on a consideration which had failed, although he had a beneficial occupation for two years. *Wright v. Collis*, 8 C. B. 150; 19 L. J., C. P. 60.

An action will not lie to recover back a sum of money paid as a deposit on the purchase of an estate, when the instrument under which the deposit was made was under seal. *English v. Blundell*, 8 C. & P. 332—Denman.

When a person, *bona fide* believing he has a title, sells to another property to which in reality he has no title, and the conveyance is duly executed, the purchaser cannot afterwards, on discovery of the defect, recover back the price paid as money had and received. *Clare v. Lamb*, 23 W. R. 389; 10 L. R., C. P. 384.

**Money paid on payment, sale, discount, or exchange of forged or worthless securities.]—**If a forged bill is accepted and paid by the drawee, he cannot recover the money back from the indorsee to whom he paid it. *Price v. Neale*, 3 Burr. 1354; 1 W. Bl. 390.

If the banker of a supposed acceptor of a forged bill discounts it for the agent of one of the indorsers, on the discovery of the forgery, he may recover back the sum paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore

might be taken to know his handwriting. *Fuller v. Smith*, 1 C. & P. 197; R. & M. 49—Abbott.

A person who discounts a forged navy bill for another, who passed it to him without knowledge of the forgery, may recover the money as had and received to his own use, upon the failure of the consideration. *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157.

So, a person who receives forged bank notes in payment. *Id.*

So of a victualing bill, although the full apparent amount has been paid by the officer on presentment. *Bruce v. Bruce*, 1 Marsh. 165; 5 Taunt. 495, n.

A bill of exchange with a forged acceptance, purporting to be payable at the house of A. & Co., bankers, in London, with whom the supposed acceptor kept cash, was indorsed to B. for a valuable consideration: B. indorsed it to his agent in London, who presented it on the 2d of April at the house of A. & Co. for payment; A. & Co. paid it, and sent it on the 30th of April to the supposed acceptor, who disavowed it: A. & Co. immediately gave notice of the forgery to B. and demanded repayment, which B. refused; all parties were ignorant of the fraud:—Held, that A. & Co., by paying the bill, without ascertaining that the acceptance was genuine, were precluded from recovering the amount from B. *Smith v. Mercer*, 1 Marsh. 453; 6 Taunt. 76.

Fauntleroy, being one of three co-trustees, proprietors of stock, and also one of three co-partners in a banking-house, forged the names of his co-trustees to a power of attorney, under which he sold the stock and paid the money into his banking-house. Neither of his co-trustees was privy to the transaction. Fauntleroy was executed for forgery. The surviving trustees sued the surviving partners for the money. On an issue from Chancery, directing that no objection should be taken that Fauntleroy had been interested both as a trustee and a partner in the banking-house:—Held, that the money constituted a debt due from the bankers to the trustees. *Stone v. Marsh*, 9 D. & R. 643; 6 B. & C. 551; R. & M. 364.

A check being drawn upon the G. branch of a banking company by H., who kept an account at that branch, was presented by the defendant at the B. branch of the company, where it was cashed in the usual way across the counter, and the same day sent to G., but H. having no funds there, it was returned to the branch, who gave notice of dishonor to the defendant. H. had no account with the B. branch; and the two branches were distinct in respect of the accounts kept, and issued checks denoting the particular branch upon which they were drawn:—Held, that this did not amount to payment of the check by the B. branch as the bankers of H., or on his credit, but on the credit of the defendant, and that the check proving to be worthless, the bank was entitled to recover back the money paid. *Woodland v. Fear*, 3 Jur., N. S. 587; 26 L. J., Q. B. 202; 7 El. & Bl. 519.



A vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness, and if it turns out that the name of one of the parties is forged and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. *Gurney v. Womersley*, 4 El. & Bl. 130; 3 C. L. R. 3; 1 Ex., N. S. 328; 24 L. J., Q. B. 46.

### 5. Money Paid under Mistake of Fact or of Law.

**Principles.**—Money paid by one, with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered on account of such payment having been made under an ignorance of the law. *Bilbie v. Lumley*, 2 East, 469. S. P., *Brisbane v. Dacres*, 5 Taunt. 143; *Dew v. Parsons*, 2 B. & A. 562; 1 Chit. 295.

But money paid by a person under a forgetfulness of facts which were within his knowledge, may be recovered. *Lucas v. Worswick*, 1 M. & Rob. 293—Denman and Bolland.

So, money paid under a mistake of facts, there being no laches on the part of the payer in not availing himself of the means within his power of knowing those facts, may be recovered. *Milnes v. Duncan*, 6 B. & C. 671; 9 D. & R. 731.

Money paid under a bona fide forgetfulness of facts, which disentitled the party to receive it, may be recovered. *Kelly v. Solari*, 9 M. & W. 54; 6 Jur. 107.

It is not sufficient to preclude a party from recovering money paid by him under a mistake of fact, that he had the means of knowledge of the fact; unless he paid it intentionally, not choosing to investigate the fact. *Ib.*

In such cases, it is a question for the jury to say whether the money was paid in bona fide ignorance or forgetfulness, or whether with a previous determination not to inquire into the facts, and to pay it under any circumstances. *Ib.*

Money paid under a mistake of law is not recoverable. *Ib.*

When a party pays money under a mistake of fact, he is entitled to recover it back, although he may at the time of the payment have had means of knowledge of which he has neglected to avail himself. *Townsend v. Crowley*, 8 C. B., N. S. 477; 7 Jur., N. S. 71; 29 L. J., C. P. 300; 2 L. T., N. S. 537.

#### Instances of payments made under mistake.]

—A bill bearing several indorsements was dishonored, but was taken up for the honor of one of the supposed indorsers by the plaintiff, who struck out the subsequent indorsements. The plaintiff having discovered that the signatures of the drawer, the acceptor, and the supposed indorser to the bill were forgeries, communicated the same to the defendant, and demanded the money back; notice of the dishonor was in time to have been sent to the prior indorsers by the same day's post:—Held, that the erasure of the indorsements did not deprive the defendant

of his remedy against the prior indorsers, and that the plaintiff, having paid the money in mistake, was entitled to recover it from the defendant. *Wilkinson v. Johnston*, 5 D. & R. 403; 3 B. & C. 429.

Where the captain of a king's ship brought home in her public treasure upon the public service, and treasure of individuals for his own emolument; and received freight for both, and paid over one-third of it, according to the usage theretofore established in the navy, to the admiral under whose command he sailed; discovering that the law did not compel captains to pay to admirals one-third of the freight, the captain brought an action to recover it from the admiral's executrix:—Held, that he could not recover back the private freight, because the whole of that transaction was illegal, nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it. *Brisbane v. Dacres*, 5 Taunt. 143.

Where the agents for the grantor and grantee of an annuity rendered an account to the latter, in which they gave him credit for installments due from the former, stating at the same time that the money had not been received, and allowed the grantee to draw upon them for the amount; and the agents having in about twelve months afterwards, become bankrupts, and neglected to apprise the grantee in the interval that the installments still remained unpaid by the grantor, who had become insolvent:—Held, that the money so advanced to the grantee was not recoverable back by the assignees of the agents. *Shaw v. Picton*, 7 D. & R. 201; 4 B. & C. 715.

So, army agents, who allowed an officer to draw for what they conceived were increased allowances due to him in the shape of pay (but which allowances were not in fact intended by government to be given to officers in that situation), and had sent in an account admitting the receipt of the full amount, were not allowed after a lapse of time, when they found out the mistake, to retain the surplus from the representatives of the officer. *Skyring v. Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 C. & P. 517.

The plaintiff was co-surety with K. in a bond given by B. to the guardians of a union, conditioned for the due accounting to them of moneys received by him as treasurer. At the time the bond was entered into B. was a member of a banking firm, into which the moneys of the union were afterwards paid and drawn out by the guardians by checks in their names. The firm became bankrupt, and B. having ceased to be the treasurer, the guardians demanded of the plaintiff, as such surety, the balance due from B., the late treasurer. The plaintiff, in ignorance of the facts, paid the money:—Held, that the sureties were not liable on the bond, and that the plaintiff, having paid the money in ignorance of the facts, was entitled to recover it. *Mills*

*v. Alderbury Union (Guardians)*, 3 Exch. 590; 18 L. J., Exch. 252.

When a party to secure advances made to him, assigned to his creditor his present and also his after-acquired property, and, the former being insufficient to pay the debt, the creditor sold the present and also the after-acquired property with the assent of the debtor, who probably thought that the after-acquired property passed by assignment:—Held, that the proceeds of the after-acquired property, which had been sold under a mistake as to the law, but without fraud, could not be recovered back. *Platt v. Bromage*, 24 L. J., Exch. 63.

An executrix being entitled to 200*l.* lent by her testator in his lifetime, and secured to him by bond and an equitable mortgage, applied to C. the debtor, for payment. C. referred her to a bank which had purchased of him the mortgaged property subject to the charges thereon. The bank paid the 200*l.* It turned out that by a will prepared and attested by the testator, and made subsequently to that under which C. had claimed, but which had been suppressed by the family of C., C. had no title to the property so charged:—Held, that the bank could not recover back the money as having been paid under a mistake of facts. *Aiken v. Short*, 1 H. & N. 210; 25 L. J., Exch. 821.

The defendant supplied the plaintiff with goods to the amount of 71*l.*; the plaintiff authorized M. to pay the defendant that sum. M. paid the defendant 50*l.*, and applied the remaining 21*l.* to his own use. M. also owed the defendant 24*l.*; and the defendant drew on him a bill for 45*l.*, the amount of these two sums, which he accepted, but which was dishonored when due, and M. subsequently became a bankrupt. The defendant applied to the plaintiff for payment of the amount of the bill, representing that it had been left unpaid on the plaintiff's account by M., and the plaintiff on such representation paid the 45*l.* and took possession of the bill. In an action to recover back the balance of 24*l.*, as having been paid under a misrepresentation of the facts:—Held, that the plaintiff was not bound to prove that before action brought he tendered back the bill to the defendant. *Pope v. Wray*, 4 M. & W. 451.

In 1811, L., being possessed of premises under leases which would expire at Midsummer, 1854, granted to T. and E. an annuity of 222*l.* 4*s.* 5*d.* for three lives, to secure which he granted to each of them an underlease of the premises for forty-three years, if the lives, or the survivor of them, should so long endure. In 1827, the premises were assigned to the plaintiff for the residue of the terms granted to L., subject to the annuities, and to the underleases for securing the same. In 1825, T. and E. were let into possession of the premises, at the rent of 550*l.*, payable to them in equal moieties. T., the last survivor of the cestuis que vie, died in 1851, and from his death, down to the expiration of the leases granted to L., E., as their agent, applied for and received the rent from the

plaintiff for them and the representative of L., and accounted for a moiety to each of them, deducting payments then-out in respect of ground rent, rates, taxes, insurance, repairs, and commission:—Held, that the plaintiff was entitled to recover back the sums paid by him under the mistake, impressing on him the right to receive it still as a moiety, deducting only the sums paid by the agent in respect to ground rent, rates and taxes. *Baker v. Brown*, 1 C. B., N. S. 121; 3 Jur., N. S. 16; 26 L. J., C. P. 41.

By an agreement between the outgoing tenant of a farm and the incoming tenant, the amount to be paid by the latter to the former was referred to two valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting 2,000*l.* paid on account) was given by the plaintiff to the defendant; and the plaintiff entered it to possession. On the occasion of his selling his interest in the farm to a third person, the plaintiff discovered that errors had been made in the former valuation, by including items that ought not by the custom of the country to have been valued to him, and items that did not exist. He nevertheless paid the promissory note at maturity without objection. Afterwards, without having given the defendant any information as to the nature of his complaint of the valuation, and without having made any demand, he brought an action for money had and received:—Held, that the plaintiff could not recover. *Freeman v. Jeffries*, 4 L. R., Exch. 189; 38 L. J., Exch. 116; 20 L. T., N. S. 533.

The plaintiff paid to a dock company dock dues estimated by the plaintiff according to an erroneous scale of measurement promulgated by the commissioners of customs:—Held, that the excess could not be recovered back. *Moss v. Mersey Dock and Harbor Board*, 20 W. R. 700—Q. B.

An executor, acting, as he believed, in accordance with the true construction of the testator's will, paid money to the plaintiff. Afterwards, the executor having died, his administrator was advised by counsel that the money had been wrongly paid to the plaintiff, and ought to have been paid to another legatee. An independent opinion of counsel obtained by the plaintiff took the same view as to the construction of the will, and, accordingly, in winding up the testator's estate, the administrator debited the plaintiff with the money which was supposed to have been wrongly received by her, and paid over that amount and the balance of the same fund, which had been retained in the executor's hands, to the other legatee. Two years later the plaintiff filed a bill against the administrator and the other legatee for repayment of the money, on the ground that it had been paid under a mistaken construction of the will:—Held, that the suit was, in fact, merely an action for money had and received, and could not be maintained. *Rogers v. Ingham*, 25 W. R. 338; 46 L. J., Chanc. Div. 322; 3 L. R., Ch. Div. 851; 35 L. T., N. S. 677—C. A.

**Payments made on settlement of accounts.]**—There being mutual accounts between A. and B., the latter met C., A.'s brother, to settle them. Two accounts were brought by C. The first contained various items of money received by B. for A. B. settled and signed his account. C. then produced another account between the parties respecting other items, which B. disputed, and refused to settle. No evidence was given of money had and received but the above:—Held, that A. was entitled to recover upon the count for money had and received. *Lorymer v. Stephens*, 1 C., M. & R. 62; 4 Tyr. 869.

A sum of money allowed in account by mistake on a settlement between the plaintiff and the defendant, when the defendant paid the balance after deduction of that sum, cannot be recovered, the sum allowed never having passed between the parties otherwise than by such allowance. *Lee v. Merrett*, 8 Q. B. 820; 10 Jur. 916; 15 L. J., Q. B. 289.

**Money received under mistake by agent and paid over to principal.]**—Where a defendant received from his principal abroad a bar of silver, and took it to the plaintiff, who melted it, and sent a piece to an assayer to be assayed at the defendant's expense, and paid a price for the bar to the defendant, as for the number of ounces of silver which by the assay it was calculated to contain, which number was afterwards discovered to exceed the true number:—Held, that the plaintiff might, after having offered to return the bar, maintain an action against the defendant for the price thus paid to him under a mistake, although he had forwarded his account to his principal, and in it had placed the price received to the credit of his principal. *Cox v. Prentice*, 3 M. & S. 344. And see *Gomery v. Bond*, 3 M. & S. 378.

But when money has been paid to an agent under a mistake of fact, and the agent has either paid it over or settled his account with his principal, and is guilty of no fraud in the matter, he is not liable to refund the money. *Holland v. Russell*, 30 L. J., Q. B. 308; 9 W. R. 737; 4 L. T., N. S. 547; 1 B. & S. 424; affirmed on appeal, 32 L. J., Q. B. 297; 11 W. R. 757; 8 L. T., N. S. 468; 4 B. & S. 4—Exch. Cham.

Certain bales of cotton were consigned by merchants at Madras to London for the account of their correspondents, the plaintiffs, who were merchants at Liverpool, under bills of lading having in the margin, pursuant to the course of business at Madras, a note of the measurement and the amount of freight. On the ship's arrival, the plaintiff's brokers sent the cotton to a wharf with a copy of the bills of lading, another copy of the bills of lading being forwarded to the plaintiffs. According to the ordinary practice, the wharfinger, on receiving the cotton, measured it, and sent a note of the measurement to the defendants, who were the ship's brokers (one of them also being the owner). The defendants, as brokers, made out a freight-note,

adopting the measurement from the wharfinger's note, which in consequence of the swelling of the bales on the voyage was considerably more than the Madras measurement in the margin of the bills of lading. The freight-note so made out was sent by the defendants to the plaintiff's brokers, who, assuming it to be correct, paid the amount, and received credit for it in their account with their principals; and the defendants settled the ship's accounts upon the supposition that all was right. The plaintiffs, on balancing their accounts with the Madras house at the end of the following year, discovered for the first time that they had overpaid the defendants to the extent of 887. 8s. 3d., and brought an action to recover it back:—Held, that the money having been paid under a mistake of fact, the plaintiffs were entitled to recover it back from the owner of the ship, but not as against the two defendants as ship's brokers, who had settled accounts with the owner in the bona fide belief that the payment had been rightly made. *Shand v. Grant*, 15 C. B., N. S. 324; 9 L. T., T. S. 390.

A. bought cotton of B., both being cotton-brokers at Liverpool, and each acting for an undisclosed principal. Weight-lists of the cotton were in the usual course delivered to each party from the warehouse keeper at the dock; but by a mistake made by a clerk of B. in adding up the figures, the quantity appeared to be 100 cwt. more than it really was, and A., in ignorance of the mistake, paid B. 500*l.* 15*s.* too much. The mistake was not discovered by either party until several months afterwards. In the meantime B. had allowed the money so received by him to be settled in account between himself and his principals, to whom he had made advances; and at the close of the transactions between them there was a large balance owing by his principals to B.:—Held, that A. was entitled to recover back from B. the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has bona fide paid over moneys received by him on account of his principals. *Newall v. Tomlinson*, 6 L. R., C. P. 405; 23 L. T., N. S. 383.

#### 6. Money in Hands of Stakeholders, Bailees, Trustees, &c., or Received from Third Parties to Plaintiff's Use; Specific Appropriation or Assignment of Money.

**Money received by stakeholders.]**—An action will not lie between two parties who have by consent deposited money with a stakeholder, unless it is proved that the defendant refused to permit the plaintiff to receive the money. *Holmes v. Hall*, Peake, 127—Kenyon.

The particulars stated the cause of action to be for the amount of stakes deposited in the defendant's hands by the plaintiff and R., and won by plaintiff of R.:—Held, that

he could not recover the amount of his own stake, on proof that he had re-demanded it from the defendant before it was paid over. *Davenport v. Davies*, 1 M. & W. 570.

Where money in litigation between two parties has by mutual consent been paid over to a trustee in trust for the party entitled, it can only be sued for and recovered from the stakeholder by the party entitled to it, and not from the original party who was indebted, though he agreed to waive all objections to form. *Ker v. Osborne*, 9 East, 878.

By an agreement A. undertook to procure for B. a license for a hotel, then in the occupation of B., or to forfeit a sum of money deposited with a stakeholder. Notice was given to both to attend before the magistrates on the licensing day; but B. would not attend, and the license was refused:—Held, that B. could not maintain an action for the deposit. *Bryant v. Beattie*, 4 Bing., N. C. 254; 5 Scott, 751; 1 Arn. 65; 2 Jur. 276.

A. took from the Board of Works a piece of ground at Westminster for the erection of galleries at the king's coronation, and underlet part of it to B. on the same terms. The rent was paid by B. to A., who deposited it in the hands of his bankers, with a condition, that if the coronation did not take place, and the rent was in consequence remitted by the Board of Works, the money was to be returned to B. The coronation took place; but, in consequence of the speculation being unprofitable to the parties, the crown remitted the whole rent to A., who refused to return the money paid him by B.:—Held, that B. might maintain an action for money had and received against the bankers as stakeholders. *Truscott v. Marsh*, 2 D. & R. 712.

In an action to recover sums deposited with the defendant, as the treasurer of a money club, it appeared that the money had been deposited, not by the plaintiff, but by his son, a minor, who was a member of the club, and who had made several payments himself, but had afterwards run away from his service, and the payments were then continued by his sister, from money furnished by her mother. There was no evidence that the defendant knew anything of the plaintiff:—Held, that the proper question for the jury was, whether there was any privity of contract between the defendant and plaintiff; and that a direction that if the money deposited was the money of the plaintiff he was entitled to recover, was wrong. *Bluck v. Sildaway*, 15 L. J., Q. B. 359—B. C.—Wightman.

A., a subscriber to a lottery for the Derby stakes, established by the defendant, drew a ticket and sold it to the plaintiff. The agreement was, that the holders of the tickets having on them the names of the first and second horses should have prizes. The ticket which A. drew had on it the name of the second horse. The defendant had no notice of the transfer of the ticket to the plaintiff till after the race was run:—Held, that the plaintiff could not maintain an action for money had and received against the defend-

ant. *Jones v. Carter*, 8 Q. B. 134; 10 Jur. 83; 15 L. J., Q. B. 96.

A dispute having arisen as to whether B. was entitled, in respect of 200 shares, to be registered as a shareholder in a company, it was arranged between him and the company, that he should deposit 400*l.*, on account of such shares, with the secretary, which was to be repaid, if B. failed to make out his claim. The following minute of the transaction was made by the defendant:—"26th April, 1833. E. C. R. Company. B. has deposited with me 400*l.*, on account of 200 shares, for which he claims to be registered, on condition that B. is to accept back the money so deposited, if he cannot substantiate, to the satisfaction of the board of directors, his claim to be registered for the same. (Signed) J. C. N., Secretary." The 400*l.* being paid to the secretary in a check, he paid it in to his bankers, on his private account. He quitted the employment of the company in February, 1833. B. never was registered in the books as a shareholder:—Held, first, that an action for money had and received, and which was not commenced until more than two years after the money was so deposited, was rightly brought against the secretary; and secondly, that B. was entitled to recover the 400*l.* without showing that he ever attempted to substantiate his claim to be registered as a shareholder. *Baird v. Robertson*, 1 M. & G. 991.

On a sale of premises by auction, the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser, and by the vendor's attorney, subscribing himself as "agent for the said S. S., the vendor." The purchaser paid his deposit to the attorney, who gave a receipt, signed by himself as "agent for S. S." The sale going off through the vendor's default, and the deposit-money not being returned:—Held, that the purchaser could not bring an action for it against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor. *Bamford v. Shuttleworth*, 11 A. & E. 926.

A party who repudiates a wager before the result of it is ascertained is not precluded from recovering his deposit from the stakeholder by 8 & 9 Vict. c. 109, s. 18, which avoids contracts by way of gaming and wagering, and prohibits the maintenance of an action for the recovery of money won upon any wager, or deposited in the hands of a stakeholder to abide the event of any wager. *Martin v. Heason*, 10 Exch. 737; 1 Jur., N. S. 214; 24 L. J., Exch. 174.

**Bailees.**—An action for money had and received does not lie against the bailee of a bill of exchange not due at the time of action brought, which he has wrongfully deposited with his own bankers, although he has obtained money upon the joint credit of that and other bills. *Atkins v. Owen*, 6 N. & M. 309. See *Palmer v. Jarmain*, 2 M. & W. 292.

A sum of money was handed by the plaintiff

the defendant to carry to a particular place, and there to pay to a certain person for the plaintiff. The defendant took the money, and in answer to the inquiries of the plaintiff the subject, said that he had lost it:—Held, that an action for money had and received was maintainable on proof of these facts merely; though it was objected that the proper form of action was a special action for his negligence. *Barry v. Roberts*, 5 N. & M. 69; 3 A. & E. 118; 1 H. & W. 242.

**Trustees.**—Where money is paid into the hands of a trustee for a specific purpose, it cannot be recovered back, until it is shown that the trust is closed, and that a balance is left. *Case v. Roberts*, Holt, 500—Burrough.

The defendant's son agreed to communicate to the plaintiff a secret for a dye, and the plaintiff agreed to pay him 25*l.* if a color should be produced to the satisfaction of B., and the plaintiff handed over to the defendant a check for 25*l.*, to be paid to his son in that case; but if the color was not good, the money was to be returned. On the 2d September an experiment was commenced as to the dye, and on the 3d, before it was concluded, the defendant got the check cashed; on the 4th the experiment was finished, and the dye turned out a failure, and was disapproved of by B. The plaintiff demanded the money of the defendant, but without mentioning the decision of B.:—Held, that he must be nonsuited, as he had no cause of action till the decision of B. had been communicated to the defendant. *Wilkinson v. Godfrey*, 3 P. & D. 411; 9 A. & E. 536.

Held, also, that as the check had been treated throughout as money, the defendant had not committed any breach of his duty by getting it cashed, so as to make him liable for money had and received. *Id.*

By the deed of consecration of a chapel built by subscription, of which the plaintiff was one of the founders, the chapel-wardens for the time being were to receive the pew-rents, the surplus of which, after payment of certain expenses, was to go towards the repayment of the expense of building the chapel. S. & G., the chapel-wardens for 1838, at the close of their year of office, had in their hands a surplus, payable to the plaintiff as one of the founders. The plaintiff and the defendant were the succeeding chapel-wardens. G. handed over the money to the defendant, together with his accounts, with a direction not to pay it over to the plaintiff, until the determination of an action against the plaintiff by another of the founders, to recover back money advanced towards the plaintiff's share of the expenses of building the chapel:—Held, that the plaintiff could not sue the defendant for the amount before the determination of that cause. *Sewell v. Raby*, 6 M. & W. 22.

Where money has been received by A. upon trust to make payments of an unascertained amount, and to pay the surplus to B., B. can-

not sue A. for money had and received while the trusts remain open. *Edwards v. Bates*, 7 M. & G. 590; 2 D. & L. 299; 8 Scott, N. R. 406; 8 Jur. 539; 13 L. J., C. P. 156.

D. was appointed by deed by the plaintiff, the mortgagor of an estate, and P., the mortgagee, the receiver of the rents of the estate; and by the terms of the deed he was, after allowing for taxes and repairs, to hold all the remaining rents in trust for certain purposes: viz., first, to pay taxes; secondly, the costs of collection; thirdly, a commission; fourthly, premiums on a policy of insurance; and lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July in each year, of the accruing interest on the principal money secured, and to pay the ultimate surplus, if any, to the plaintiff; with a proviso, that if, on the 6th January or 6th July, he should have rents and profits in hand, it should be lawful for him to retain the whole or part for the purpose of paying the premiums in that year on the policy of insurance. D. did not execute the deed:—Held, that D. was not bound by the terms of this deed to pay the surplus existing on each 6th January and 6th July to the plaintiff; and, therefore, that although he had a balance in his hands on either of those days after payment of the half-yearly interest, he was not liable, the trust still continuing, to be sued by the plaintiff for money had and received. *Bartlett v. Dimond*, 14 M. & W. 49; 14 L. J., Exch. 373.

Stock was bequeathed in trust to pay H., a married woman, the accruing dividends for her sole use, her receipts to be the only good discharges to the trustees. The trustees received a dividend, and informed H. that the sum was lodged with their agents, and would be paid to her on her signing a receipt, and on execution by her and her husband of a deed prepared under an order of the Court of Chancery relating to the trust affairs. H. and her husband did not give the receipt or sign the deed, and the dividend not being paid, they brought an action for money had and received:—Held, that the deposit with the agents, and notice to H., were not such an appropriation and admission of a balance as made the amount demandable from the trustees without giving H.'s receipt, and that the refusal to give such receipt justified them in withholding the dividend, though they had also demanded, as a condition of payment, execution of the deed, which they had no right so to enforce. *Boul v. Nurse*, 10 Q. B. 244; 11 Jur. 655; 16 L. J., Q. B. 196.

A paper as follows:—"I hold of M. T. 37*l.* to put into a savings bank for her," signed and dated, is evidence of a legal debt of 37*l.* from the party signing to M. T., the money not having been put into a savings bank, but partly paid to the use of M. T., and does not show a mere trust; and M. T. may recover, though parol evidence is given that the party signing received the money, to be applied, at his discretion, to the use of M. T. *Remon v. Hayward*, 2 A. & E. 666.

**Assignees or grantees.]**—A. was tenant of a farm over which two railways passed, in respect of which tenant's damages were payable to the owner of the land, or to his lessees or tenants. A. received the money:—Held, that if the land covered by the railways passed to A. by the agreement under which he became tenant, the owner could not recover that money as received to his use. *Wilson v. Anderson*, 1 C. & K. 544—Cresswell.

An execution issued against one of two partners for a separate debt, under which the goods of the partnership were seized; before the sale, a fiat in bankruptcy issued against the partnership. The partnership property was afterwards sold, and the produce received by the assignees:—Held, that the execution creditor could not maintain an action against the assignees for a moiety of the produce as money had and received to his use, having acquired no legal interest in the goods. *Garbett v. Veale*, D. & M. 458; 5 Q. B. 40; 8 Jur 335.

The defendant being indebted to the plaintiff in 150l., and being employed by T. to perform works, for which he was receiving a percentage, wrote an order to T. to pay the plaintiff 150l. out of the first moneys due to the defendant. Afterwards, being indebted to B. in 997l., he executed a deed, reciting the above acts, assigning to B. such sums as then were or should become due to him, the defendant, from T., in trust—first, to pay the plaintiff; and secondly, to pay the 997l. The defendant afterwards received 150l. from T., and the plaintiff sued him for money had and received:—Held, that the action lay for the 150l., though no proof was given of T.'s assent to the order; and though, at the time of making the deed, there was not 150l. due from T. *Pooley v. Goodwin*, 4 A. & E. 94; 5 N. & M. 466; 1 H. & W. 567.

In an action for money had and received, if the defendant shows a deed of assignment of the money to himself, and a receipt for the consideration money indorsed, it is a good discharge, though there is pregnant evidence of suspicion that the consideration is falsely recited, and that the money never was paid. *Rountree v. Jacob*, 2 Taunt. 141.

The relief on the ground of imposition is in equity. *Id.*

Where money is paid by A. to B., to be applied by the latter, pursuant to a binding contract between the parties, A. cannot revoke its destination. *Yates v. Hoppa*, 9 C. B. 541.

The drawer of an accommodation bill, a few days before its maturity, handed money over to the acceptor, for the purpose of meeting the bill. A fiat having been issued against the drawer between the day of such deposit and the maturity and payment of the bill:—Held, that the money having been handed over to the acceptor in pursuance of a binding contract, upon a good consideration, viz., an implied contract of indemnity, the bankruptcy of the drawer was no revocation of the authority to apply the money in satisfaction of the bill, and consequently that his assignees could not recover it back from the

acceptor as money had and received to their use. *Id.*

**Other instances of money received by defendant to use of plaintiff from third persons.]**

—The brokers to a ship charged to their employers certain sums of money for work done to their ship under the head of stevedore. The labor of a stevedore was performed by a man whom they employed, and to whom they paid several sums of money, but far less in amount than their own charges; the ship-owners were aware that the brokers charged them more than they paid the workmen, but made no objection, on account of their skill and diligence:—Held, that one of the workmen under such circumstances could not maintain an action for the larger sum received by the brokers, as money received to his use. *Wilson v. Cohen*, 2 C. & P. 333—Gaselee.

Three ship-brokers agreed in writing with a ship-owner to freight his vessel at a certain commission, dividing profits of commission. One of the brokers alone paid and received money on account of the ship; and delivered to the owners an account, charging a liquidated sum for commission. The owner acquiesced in the accuracy of the account, but objected to the charge for commission, but which the broker retained in his hands. There was no adjustment of account between the brokers:—Held, that money had and received would not lie by the two brokers against the third for their share of the commission. *Bovill v. Hammond*, 9 D. & R. 183.

Where agents in England effected a policy of insurance for a correspondent abroad, on which a loss happened, and he drew a bill upon them, which was presented for acceptance by an indorsee, but they said they could not accept it, having no funds in hand, but that on a settlement taking place with the underwriters it should be paid:—Held, that after they had received a sum from the underwriters less than the amount of the bill, it might be recovered from them by the indorsee as money received to his use. *Langston v. Corney*, 4 Camp. 176—Gibbs.

The plaintiff, an attorney, agreed for a consideration to convey to the defendant an estate, which the latter had purchased, upon the terms that the vendor and vendee should pay for the conveyance in equal proportions, and the plaintiff also agreed, that, if the vendor objected to pay any expenses, he, the plaintiff, would not apply to the defendant for any further remuneration. The conveyance was made by the plaintiff; the defendant agreed with the vendor, that, if the vendor would pay the whole expense of another transaction between himself and the defendant, he, the vendor, should not pay any of the expenses of the above conveyance:—Held, that so much of those expenses as the defendant (as between himself and the vendor) had been allowed to set-off against his share of the liability on the other transaction, was money had and received to the plaintiff's use.



It might be recovered by him, besides the consideration originally agreed upon for making the conveyance. *Noy v. Reynolds*, 1 & E. 159.

A., a manufacturer, contracted with B, C, and D., who were partners, occupying a mill, the property of B., for the drying of his wool in a room in the mill. B., C. and D. effected an insurance on the mill, covering wool in the room. D. retired from the partnership, after which C. and D. had no interest in the room. B. and C. effected another insurance, also covering goods in the room. A dissolution of partnership took place between B. and C., which was not communicated to A., and C. afterwards effected an insurance in his sole name; and A.'s wool being damaged by fire, the insurance office paid the proceeds of the damaged wool to A., and the amount of loss on the wool to the extent of the sum insured thereon, to C. Similar losses had been paid by the partnership to A., under the former policies:—Held, that as it was not shown that B. had authorized the effecting of the then policy, or that the partnership was bound to insure, an action for money had and received could not be maintained by A. against B. and C. jointly. *Arncliffe v. Winterbottom*, 1 M. & G. 130; 1 Scott, N. R. 23.

R., possessed of a licensed house, mortgaged the premises, together with the license. After the license had been suspended for irregular conduct on the part of R., the mortgagee sold the premises, under a power of sale contained in the deed. The defendant, the assignee of R., who had in the meantime become bankrupt, obtained a new license in the name of the purchaser, for which the latter paid him 150l.:—Held, that this was not money had and received to the use of the plaintiffs. *Munifield v. Morris*, 7 Scott, 404; 5 Bing. N. C. 420; 2 Arn. 10; 3 Jur. 302.

The plaintiff, having married a lady possessed of funded property, to which she was entitled by the settlement on her marriage with a former husband, they employed the defendant to dispose of it, and out of the proceeds, first, to pay off a mortgage of the former husband, and to prepare a settlement of the residue, the interest to be secured for the wife for life, with remainder to the plaintiff for life if he survived her, with reversion to her children; the defendant and two other persons to be trustees:—Held, that although the defendant had paid over to the plaintiff certain sums out of the proceeds of the sale (after payment of the mortgage), the plaintiff could not sue him for the residue, as money had and received to his use. *Mileham v. Eicke*, 3 M. & W. 407; 1 H. & H. 102.

A., B. and C., being separate traders, agreed to a joint speculation in importing corn. The agent for buying the corn abroad knew that the speculation was on the joint account of A., B., and C., and was to consign to A., drawing on him at two or three months. Corn was bought, and bills for the value drawn on and accepted by A., payable at a banker's in London, the correspondents of

the plaintiffs, who were bankers at Hull. A. had a banking account with the latter, who, being in the habit of paying his acceptances at the house of their London correspondents, paid the above among other acceptances, not then knowing of the joint speculation of A., B. and C. A., by way of part security to the plaintiffs, indorsed to them two accommodation bills drawn by himself on B.; these were unpaid, and A. and B. became bankrupts; C. had contributed his third of the purchase, but did not appear to have known from what source A. obtained his funds for that purpose:—Held, that the Hull bankers could not recover against C., as for money lent, or had and received, the amount of the bills drawn by A. on B., though they had given A. credit for them in his account, as partly liquidating their advances to pay for the corn bought for A., B. and C. at their joint profit or loss. *Smith v. Crazen*, 1 Tyr. 308; 1 C. & J. 500.

A husband having received a sum of money, which had been bequeathed to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, and took from the bankers an accountable receipt in her son's name, bearing interest:—Held, that the bankers were liable to the husband for the amount, in an action for money had and received. *Calland v. Loyd*, 6 M. & W. 20.

The plaintiff in Calcutta wrote to his agent in England to transmit to him a sum of money through the defendants' house, to be placed to his credit there. His agent showed his instructions to the defendants, and paid them the money, who placed it in their books to the credit of their correspondents in Calcutta, and sent them a letter of advice to account for it to the plaintiff. Before this letter reached Calcutta their correspondents failed, but the defendants had, between the date of the letter and the failure, accepted bills, drawn by their correspondents before the receipt of such letter, to an amount exceeding the money paid in by the plaintiff:—Held, that the money could not be recovered from the defendants, for that they had done all they were instructed or were bound to do, and the situation in which they stood towards their correspondents had been thereby altered. *McCarthy v. Colvin*, 1 P. & D. 420; 9 A. & E. 607.

A seizure of spirits having been made on the plaintiff's premises by an excise officer, and a writ of appraisement issued, the commissioners afterwards, upon the application of the plaintiffs, restored the spirits to them at the appraised value, under an agreement that "they (the plaintiffs) gave up all claim to the seizure, and held themselves responsible for such proceedings for penalties as the board might think fit to institute." The appraised value was paid by the plaintiffs to the defendant, the receiver-general of excise. Penalties were subsequently recovered of the plaintiffs. The plaintiffs then gave the de-

fendant notice of action, and re-demanded the money:—Held, that the plaintiffs could not recover back the money so paid, inasmuch as it was paid on a binding agreement, made upon good consideration, whereby the plaintiff agreed that it should not be recoverable back; and further, that they were precluded from recovering by the provisions of the 7 & 8 Geo. 4, c. 53, s. 98:—Held, also, that, at all events, the action could not be maintained against the defendant, inasmuch as the money was received by him only for the purpose of its being paid over pursuant to act of parliament, and it was not shown that it remained in his hands till he had notice to retain it. *Atlee v. Backhouse*, 3 M. & W. 633; 1 H. & H. 135.

**Defendant's knowledge of title to money or appropriation.**—When bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And when the money realized by the sale is wrongfully applied by the agent, the remitter is entitled to recover the value of the bills, as money had and received to his use, from the purchaser of them, who has notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent. *Muttilloll Seal v. Dent*, 5 Moore Ind. App. 328; 8 Moore P. C. C. 319.

A. employed B., a broker at Liverpool, to purchase a Hartlepool bond for 2,000*l.* for him, for which purpose he remitted him a letter of credit for 2,010*l.* on a bank there, payable to B. or order. C., who had had dealings with B., in the course of which the latter had become indebted to him in 1,040*l.*, under pretense of borrowing the money for a few days, and knowing that it was A.'s money, induced B. to part with it, and then insisted upon applying it in discharge of B.'s debt to him:—Held, that A. might recover the amount from C. *Litt v. Martindale*, 18 C. B. 314.

As to privity of contract between plaintiff and defendant,—see this title, III., 1.

#### 7. Evidence to sustain Action.

**Proof of receipt of money.**—The defendant, captain of the plaintiff's ship, drew a bill on the plaintiff's agent for expenses incurred on account of the ship; and the plaintiff's agent having paid the bill, the plaintiff afterwards brought an action for money had and received to his use against the captain; and, at the trial, proved payment only of the bill by his agent, without giving evidence that any of the sum for which the bill was drawn had ever reached the defendant's hands:—Held, that the bill of exchange was not evidence of money had and received to the plaintiff's use. *Scott v. Miller*, 3 Bing. N. C. 811; 5 Scott, 11; 3 Hodges, 169.

By 5 & 6 Will. 4, c. 76, s. 48, an overseer neglecting to sign the burgess lists of a borough is liable to a penalty of 50*l.*, to be

recovered by any person suing within three calendar months, and the money so recovered, after payment of the costs and expenses attending the recovery, is to be paid and appropriated, one moiety to the person suing, and the other moiety to the treasurer of the borough. The defendant recovered a penalty against an overseer, with taxed costs, as between party and party, and received the amount:—Held, that in an action against the defendant by the corporation for money had and received, it was sufficient *prima facie* for the corporation to prove the recovery and receipt of the penalty and the taxed costs; and that, in default of proof by the defendant of extra expenses, the corporation was entitled to a verdict for half the penalty. *Harriod (Mayor, &c.) v. Gant*, 5 El. & Bl. 183; 1 J. & N. S. 708.

Upon the reading of the will of A. in the presence of her family, B., who had resided with her, produced a parcel containing bank-notes, and stated that A. had given it to her about a fortnight before her death; upon which C., the brother of B., took up the notes, and said that he would keep them until B. required them, or, as stated by other witnesses, until the claims of the executors were disposed of:—Held, that in an action by B. against C. for money had and received, evidence of what had been stated by B. was admissible to show her title to the notes. *Hayslip v. Gymer*, 3 N. & M. 479; 1 A. & E. 162.

Held, also, that such statement, coupled with evidence of possession, of B.'s conduct at the time of the reading of the will, of her having told her sister some days before the death of A. of the gift having been made to her, and of the circumstance of other money of A.'s being untouched, although B. had had opportunities of possessing herself dishonestly of the notes, was sufficient evidence to go to the jury, upon a question raised whether B. was justly entitled to the notes. *Id.*

The executor of B., the survivor of A. and B., had, by instituting legal process, obtained payment of a promissory note, purporting to be payable to A. and B. The administrator of A. brought an action for money had and received, and adduced evidence to show that the note had been made payable to A. and had been altered so as to make it payable to A. and B.:—Held, that there was no evidence to go to the jury in support of the count for money had and received to the use of the administrator, because, assuming his case to be correct, the money was not received in discharge of the genuine note which belonged to him. *Vaughan v. Matthews*, 13 Q. B. 187; 13 Jur. 470; 18 L. J., Q. B. 191.

Where a party sued for money had and received, rested his defense on his having obtained the money *bona fide*, in satisfaction of an equitable claim, and the plaintiff, at the trial, merely endeavored to impeach the fairness of the receipt, and the claim generally, and the jury found for the defendant; the court refused to entertain a motion for a new

made on the ground that, admitting fairness of the transaction, the defendant cared, upon the plaintiff's case at the trial, to be not entitled to retain more than a third. *Moore v. Eddowes*, 2 A. & E. 183.

Where an action was brought in the name of A. against B. on a bill of exchange, but it appeared that C., the drawer of the bill, was the real plaintiff, and that A. only lent his name, because C. was unwilling that his name should appear, and that A. gave no instructions to, and had no communication with the attorney; and the attorney received a sum of money from B., on the settlement of that action:—Held, in an action by A. against the attorney to recover such sum, the jury having found that it was received for C. and not for A., that the plaintiff could not recover. *Clark v. Dignam*, 3 M. & W. 478; 1 H. & H. 166; 3 Jur. 419.

Notice of an order was given to the party to whom it was directed before it was due, and he wrote letters to the plaintiff, in one of which he undertook to honor the order when he had funds in his hands, and in a later one said he had received money available for the order, but had disposed of it in other ways:—Held, that it might be read in evidence against the defendant in support of a claim for money received, founded upon his assent to a direction to hold a fund in his hands for the use of the plaintiff. *Griffin v. Weatherby*, 87 L. J., Q. B. 280; 3 L. R., Q. B. 753; 9 B. & S. 726.

**Proof of failure to pay over money.]—**Where a servant was in the habit of receiving debts for his master, and paying the same over without any written vouchers, the master must prove that the servant has not paid the money over, as well as that he has received it, in an action against him for money had and received. *Evans v. Birch*, 8 Camp. 10—Ellenborough.

**Proof of amount.]—**The plaintiff must prove to what specific sum he is entitled. *Harvey v. Archbold*, 5 D. & R. 500; 3 B. & C. 626; R. & M. 184.

In order to recover a share of a stake from a stakeholder, the plaintiff must show his exact proportion of the sum deposited. *Robson v. Andrade*, 2 Chit. 263; 1 Stark. 372.

#### IV. ACCOUNT STATED.

##### 1. What constitutes; and when the Action lies.

###### (a) In general.

**Principles.]—**A plaintiff cannot recover on an account stated, without showing some item, to a specific amount, agreed upon as due, though a single item would be sufficient. *Lane v. Hill*, 18 Q. B. 252; 21 L. J., Q. B. 318; 16 Jur. 490. S. P., *Highmore v. Primrose*, 5 M. & S. 65; *Kirton v. Wood*, 1 M. & Rob. 253.

In order to support an account stated, there must be an admission of a debt due. *Lemere*

*v. Elliott*, 6 H. & N. 656; 7 Jur., N. S. 1206; 30 L. J., Exch. 350; 4 L. T., N. S. 304.

There must be an acknowledgment of a subsisting debt. *Tucker v. Barrow*, 1 M. & R. 518; 7 B. & C. 623; M. & M. 189; 3 C. & P. 85, 80.

An offer to pay a sum less than the sum claimed, if not accepted, is no evidence against a defendant for the larger sum on an account stated. *Atkinson v. Woodall*, 31 L. J., M. C. 174—Exch.

A qualified acknowledgment of a sum due to the plaintiff will not entitle him to recover on an account stated. *Evans v. Verity*, R. & M. 230—Littledale.

Whether a conversation between the defendant and a witness is sufficient to entitle a plaintiff to recover on an account stated, is a question of law and not of fact. *Bishop v. Chambre*, 3 C. & P. 55; M. & M. 110—Tenterden.

As to effect of account stated, and when it may be re-opened,—see this title, IV., 2.

**What transactions amount to statement of account, between parties, generally.]—**Where A. was shown an account, and he objected to one of the items, but made no remark with respect to the rest:—Held, evidence of an account stated by him of the items of the account to which no objection was made. *Chisman v. Count*, 2 M. & G. 317; 2 Scott, N. R. 569.

The plaintiff demanded 40*l.* upon an agreement by the defendant, an incoming tenant, to pay for growing crops; he offered to pay 17*l.*:—Held, no evidence to support an account stated. *Wayman v. Hilliard*, 7 Bing. 101; 4 M. & P. 720.

An admission by a defendant, that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count for an account stated, though not for goods sold and delivered. *Knowles v. Michel*, 13 East, 249. S. P., *Pinchon v. Chilcott*, 3 C. & P. 230.

In an action for goods sold, and on an account stated, to recover the value of growing poles purchased from the plaintiff by the defendant, and afterwards carried away by them; it appeared that, at the time of the bargain, some memorandums in writing had been made, but which were neither stamped nor signed by the parties; and that the defendant, after the poles were carried away, admitted that a balance was due to the plaintiff, who, under these circumstances, was nonsuited:—Held, that such nonsuit was proper, as it was not proved that the defendant had admitted a precise and definite sum to be due to the plaintiff; and, therefore, that he could not recover on the account stated, without reference to the memorandums, which were not admissible. *Teall v. Auty*, 4 Moore, 542; 2 B. & B. 99.

An acceptor of a bill of exchange, on application to him for payment, answered that the bill had been altered as to the ac-

ceptance, by being made payable at a particular place; that he never made it payable there, nor elsewhere than at his own house; and that he should take such steps as the law would authorize on the subject; that he had been prepared for payment, and the party might have had the money by calling at his house:—Held, that this was no acknowledgment of a subsisting debt. *Calvert v. Baker*, 4 M. & W. 417; 1 H. & H. 404; 7 D. P. C. 17; 2 Jur. 1020.

In an action by an attorney for business for which no signed bills had been delivered, an admission by the defendant, in an examination before the commissioners under a commission of bankruptcy since superseded, that the sum claimed was due, is not sufficient evidence of an account stated. *Eicke v. Nokes*, 4 M. & Scott, 585; 1 M. & Rob. 359.

In an action on an attorney's bill of costs, if he fails on the count for work and labor, because no bill has been delivered, he cannot recover upon an account stated, though he proves that the charges were assented to by the client. *Brooks v. Burkett*, 9 Q. B. 847; 11 Jur. 284; 10 L. J. Q. B. 178.

**Acknowledgment or memorandum in writing.**—The defendant agreed to buy a piece of land, and to pay the purchase-money on the 1st January, 1845, and the plaintiff agreed, upon payment of the purchase-money, to convey the land to the defendant. The plaintiff, in support of an account stated, put in a document, dated the 19th January, 1849, in these terms:—"I acknowledge the above account to be correct, the amount owing by me as cash the 12th January, 1849, being 1,053*l.* 7*s.* 1*d.*" Signed by the defendant. The jury found a verdict for the plaintiff:—Held, that the defendant became bound to pay the purchase-money on the 1st of January without a conveyance, and that the plaintiff was entitled to recover upon the account stated. *Yates v. Gardiner*, 20 L. J., Exch. 327.

A member of a banking company wrote to the manager of it, respecting a mistake which had been made, in not debiting his account and crediting the bank for the payment of the several calls due from him, and added, "Please debit me with the amount of the calls due on my 200 shares. I think it will be 500*l.*, the second call, on the first hundred shares; and 1,000*l.* on the two calls on the second hundred shares; and advise me in a private letter. Your bank shall be credited here upon that date." To this letter no answer was sent:—Held, not sufficient evidence of an account stated. *Lughe v. Thorpe*, 5 M. & W. 656. And see *Newhall v. Holt*, 6 M. & W. 662.

T., by will, desired that 500*l.* lent by her to the defendant should be allowed to remain in his hands during the life of her sister, he paying the interest to her sister, but that on her sister's death T.'s executors should collect

the 500*l.* and divide it between her two nieces, one of whom was the plaintiff, and the other the defendant's wife, the same to be for their sole and separate use, free from the control and debts of any husband, with benefit of survivorship. During the lifetime of the tenant for life, the plaintiff's husband took from the defendant his acceptance for 242*l.* payable in twelve months, as and for the share of the plaintiff's wife in the legacy. The plaintiff and her husband and the defendant and his wife, signed a receipt to the executor of T.'s will as and for a receipt of the legacy of 500*l.* But no money ever in fact passed; the 500*l.* was never collected from the defendant; the acceptance was never negotiated; and on the death of the plaintiff's husband the defendant procured a return of it to him. Again; the plaintiff's father bequeathed to her the proceeds of a life policy, and made the defendant his executor, who, acting in that capacity, received 200*l.* upon the policy. Afterwards, and after the death of the plaintiff's husband and the defendant's wife, the plaintiff claimed from the defendant payment of the two sums of 242*l.* and 200*l.*, and a further sum for money lent to her by him. At an interview between them, in the presence of the plaintiff's attorney, the defendant dictated, and the attorney wrote out, a memorandum, by which the defendant charged himself with the 242*l.* and 200*l.*, and the item for money lent, and with interest from the date of the death of the plaintiff's husband. At the same interview he mentioned certain claims of his against the plaintiff's husband, and asked whether he could set them off, but did not enter them in the memorandum. He also afterwards, at the same interview, signed on the back of the memorandum an authority to his attorney to pay the plaintiff the amount due to her out of any moneys that might be received on his account, referring verbally to an intended sale of some property on his behalf. At the trial no evidence was given of any set-off. It was objected that the 242*l.* had been reduced into possession by the plaintiff's husband, and therefore she had no right of action in her personal capacity; and that the 200*l.* was held by the defendant as executor, and therefore he could not properly be sued in his personal capacity; and that the memorandum and authority, taken together, were not, under the circumstances, a statement of an account as due in present:—Held, that the jury was justified in finding that the memorandum was a statement of account sufficient to entitle the plaintiff to maintain her action in respect of both the sums. *Topham v. Morecroft*, 8 El. & Bl. 972.

**Promissory notes.**—In August, 1844, the defendant gave the plaintiff a promissory note for 23*l.* 2*s.* 8*d.*, which the note described as being the amount of interest due on a note for 117*l.* 4*s.*, dated 6th July, 1838, up to 6th July, 1844:—Held, to be evidence of an account stated in August, 1844, of a subsisting

debt of 117*l.* 4*s.* *Perry v. Slide*, 8 Q. B. 115; 10 Jur. 31; 15 L. J., Q. B. 10.

A note payable five years after date, for value received, is evidence of an account stated, against which the Statute of Limitations does not commence running until the maturity of the note. *Fryer v. Roe*, 12 C. B. 437.

**I O U's.**—C. joined in giving a joint and several promissory note for a debt due to the plaintiff from another of the makers, for which C. was not previously liable. The note was afterwards returned to the makers to have another maker's name added (which was afterwards done), and an I O U for value received, signed by C. and another of the makers, was in the meantime left with the plaintiff as a security. Semble, that such a document given for a debt for which C. was not primarily liable would not support an action on an account stated against C. *Gould v. Coombs*, 1 C. B. 543; 9 Jur. 404; 14 L. J., C. P. 175.

Held, that, even if the note was for want of a stamp in consequence of the addition of a new maker void, it was admissible upon the account stated, to show, that, before the alteration, and at the time when the I O U was given, there was a debt due to the plaintiff upon the note, to which C. was primarily liable. *Id.*

An I O U in the defendant's writing, not addressed to any one, but produced by the plaintiff, is *prima facie* evidence of an account stated with him. *Douglas v. Holme*, 4 P. & D. 685; 12 A. & E. 641. S. P., *Payne v. Jenkins*, 4 C. & P. 324.

But not of money lent. *Fesenmayer v. Adcock*, 16 M. & W. 449.

If the defendant wishes to rebut the inference arising from its production by the plaintiff, he should show that it has been in the hands of some other party. *Curtis v. Richards*, 1 M. & G. 46; 1 Scott, N. R. 155; 4 Jur. 508.

The directors of a mine conducted on the cost-book principle, wanting money to work the mine, entered into an agreement that they should each take 100 shares in it, at 1*l.* per share, and each of them accordingly gave his I O U to the secretary for 100*l.*—Held, evidence of an account stated between the secretary and a director who had given his I O U pursuant to the agreement. *Graves v. Cook*, 2 Jur., N. S. 475—Exch.

Upon a sale of a leasehold, the vendee agreed to pay a deposit of 50*l.*, and the residue on completion. Instead of actually paying the 50*l.* he gave the vendor 5*l.* and an I O U for 45*l.*—Held, that the vendor, failing to make a good title, was not entitled to recover the 45*l.*, as money due upon an account stated, and that the defense was admissible under the plea of never indebted. *Wilson v. Wilson*, 14 C. B. 616; 2 C. L. R. 818; 18 Jur. 581; 23 L. J., C. P. 187.

At the sale of an estate, one of the conditions being that a deposit should be paid

immediately, a lot was knocked down to a person, who, having no money with him, an arrangement was entered into, with the sanction of the vendor's solicitor, in virtue of which the vendee gave his I O U, addressed to the auctioneer, for the deposit, and signed a memorandum that he had purchased the property and paid the deposit, and bound himself to complete the purchase, which memorandum was also signed by the auctioneer as agent of the vendor. The bargain having afterwards gone off:—Held, that the auctioneer might recover the amount of the I O U under an account stated. *Clouse v. Moors*, 3 Jur., N. S. 48—Exch.

The premium stated in an indenture of apprenticeship was 20*l.*, but at the time of execution the defendant agreed to give the plaintiff (the master) four I O U's for 20*l.* more, for which instruments the defendant, on the application of the plaintiff, who feared that they were void promissory notes, afterwards substituted a single I O U in a proper form, and on that the action was brought. The jury found that the deed of apprenticeship, though void, was the very deed which the defendant bargained for:—Held, that the plaintiff was entitled to recover. *Westlake v. Adams*, 4 Jur., N. S. 1021; 27 L. J., C. P. 271; 5 C. B., N. S. 248; S. C. at Nisi Prius, 1 F. & F. 183.

Where a defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and on being asked for a deposit, gave an I O U for 25*l.*, but afterwards refused to complete the purchase:—Held, that the I O U was evidence of an account stated. *Lemere v. Elliott*, 6 H. & N. 656; 7 Jur., N. S. 1206; 30 L. J., Exch. 350; 4 L. T., N. S. 304.

An agreement for the purchase of a public-house contained the following stipulations:—“And, as earnest of this agreement, the purchaser has paid into the hands of the vendor, 50*l.*, which is to be allowed in part payment at the completion of this agreement. If the vendor shall not fulfill the same on his part, he shall return the deposit, in addition to the damages hereinafter stated; and, if the purchaser shall fail to perform his part of the agreement, then the deposit money shall become forfeited, in part of the following damages; and if either of the parties neglects or refuses to comply with any part of this agreement, he shall pay to the other 50*l.*, mutually agreed upon to be the damages ascertained and fixed, on breach hereof.” Instead of depositing the 50*l.*, the purchaser gave an I O U for the amount. The purchaser failed to complete the purchase, and the vendor sold the public-house for 10*l.* less than the purchaser agreed to pay for it. In an action by the vendor against the purchaser for breach of the agreement:—Held, that he was entitled to recover the 50*l.*, and was not limited to the amount of damage which he had actually sustained. *Hinton v. Sparkes*, 3 L. R., C. P. 161; 87 L. J., C. P. 81.

As to effect of I O U as evidence of loan,—see this title, 1., 2.

**Time of accounting.**—An acknowledgment by a defendant, after action, of money being due to the plaintiff, when there is no debtor account between them proved to have existed before action, is not evidence on an account stated. *Allen v. Cook*, 2 D. P. C. 546.

Nor is an offer of a cognovit after action brought. *Spencer v. Parry*, 4 N. & M. 770; 3 A. & E. 831.

**Consideration to support.**—A plaintiff was allowed to recover on a subsequent promise, under a count on an account stated, where the original agreement was void by the Statute of Frauds. *Seago v. Deane*, 4 Bing. 459; 1 M. & P. 227; 3 C. & P. 170.

An agreement respecting the transfer of an interest in land, required by the Statute of Frauds to be in writing and signed, cannot be enforced by an action upon the agreement against the transferee for the stipulated consideration, notwithstanding that the transfer has been effected, and nothing remains to be done but to pay the consideration; but if, after the transfer, the transferee admits to the transferor that he owes him the stipulated price, the amount may be recovered as money due upon an account stated. *Cocking v. Ward*, 1 C. B. 858; 15 L. J., C. P. 246.

A landlord being in possession of premises lately held by his insolvent tenant, in which were fixtures belonging to the latter, agreed to give up possession on his assignees paying 7*l.* for the rent due. They entered and sold the fixtures, but no occupation by them was proved:—Held, that the 7*l.* could not be recovered on an account stated, the agreement to pay that sum not being bottomed on any previous transaction between the parties. *Clarke v. Webb*, 1 C., M. & R. 29; 2 D. P. C. 671; 4 Tyr. 673.

A plaintiff put in evidence an account signed by the defendant, showing a balance of 82*l.* 5*s.* to be due. The first item in this account was, "To principal and interest of old account with Dr. J. French, transferred as per letter, 146*l.* 8*s.* 6*d.*" The letter was as follows:—"I hereby acknowledge to have received from J. M. French, Esq., 321*l.* 5*s.*, and should I die during my absence from England, or at any time before the said debt is liquidated, it is my desire that he should be paid out of whatever property I might possess at the time of my death, with legal interest on the same."—Held, that the plaintiff was not entitled to recover the 146*l.* 8*s.* 6*d.*, the evidence showing a mere promise, without consideration, to pay the debt of a third person. *French v. French*, 3 Scott, N. R. 121; 2 M. & G. 644; 5 Jur. 410.

A widow, being pressed to pay M. a debt owing from her deceased husband to the deceased husband of M., signed and gave to M.'s attorney the following note, addressed to the attorney: "I beg you will not proceed against me for M. for the 100*l.* and interest which I owe her; I will pay the interest,

amounting to 9*l.* due on the 23d December, and the principal as soon as I am able."—Held, that this did not support a count for money found to be due from the widow to M. on an account stated between them. *Peck v. Lyon*, 9 Q. B. 147; 15 L. J., Q. B. 393.

A company having contracted a debt with the plaintiff, and the debt not being paid, he laid an attachment on money of theirs in the hands of bankers. While the attachment was in force, the defendant, representing himself to be a director of the company, called on the plaintiff's attorney for the purpose of making an arrangement about the debt, when it was agreed that the following letter should be written by the defendant to the plaintiff, which was accordingly done: "As director of the company, I have to request you will accept 50*l.* on account of your claim of 116*l.* 19*s.* 7*d.* against the company; and in consideration of your withdrawing the attachment against the funds of the company, I agree on the part of myself, and on behalf of the other directors, to pay you the balance of 66*l.* 19*s.* 7*d.*."—Held, that this letter, coupled with the facts, was evidence of an account stated, and that it was no answer to show that the defendant was not a member of the company when the original debt was contracted. *Barker v. Birt*, 10 M. & W. 61; 6 Jur. 736.

A plaintiff signed a contract of sale of goods to the defendant; he afterwards sued the defendant for a sum which he contended was due to him out of the proceeds of the goods as a balance, after repaying the amount advanced by the defendant on their security. The plaintiff gave evidence that on the sum being demanded by his agent as the balance out of the proceeds, the defendant admitted the correctness of the amount, and said he would pay it over:—Held, that though the sale was absolute in law, there was evidence that it was accompanied by a trust that the defendant should account for the proceeds, and that the facts showed a sufficient consideration for the account stated by the defendant to entitle the plaintiff to recover the balance, as money due upon an account stated. *Howard v. Brownhill*, 2 C. L. R. 125; 23 L. J., Q. B. 23—B. C.—Crompton.

A plaintiff, having a claim for work and materials against the defendant, to the amount of 67*l.*, was indebted to him in 111*l.* The defendant, as security for 100*l.*, held an equitable mortgage upon land of the plaintiff. The parties having met together, ascertained the value of the plaintiff's interest in the land to be 70*l.*; and it was verbally agreed that the defendant should have the plaintiff's equity of redemption, and that the plaintiff should be credited with 70*l.*, which being added to the 67*l.*, the debt of 111*l.* was to be wiped out, and a balance of 26*l.* left in his favor; but it was finally agreed that it should be taken at 22*l.* The plaintiff, before action, sold the land to the defendant:—Held, that the plaintiff was entitled to recover the balance of 22*l.* as money due upon an account stated. *Laycock v. Pickles*, 4 B. & S. 497;



10 Jur., N. S. 336; 33 L. J., Q. B. 43; 18 W. R. 76; 9 L. T., N. S. 378.

A claim which is absolutely void by reason of an illegality or immorality in the consideration, cannot be relied on in support of a count upon an account stated. *Kennedy v. Brown*, 18 C. B., N. S. 677; 9 Jur., N. S. 119; 32 L. J., C. P. 137; 11 W. R. 284; 7 L. T., N. S. 626. See *Mostyn v. Mostyn*, 39 L. J., Chanc. 780, 781.

A promise by a client to pay money to a counsel for his advocacy, or for other services incidentally connected with litigation, whether made before, during, or after the litigation, has no binding effect, and therefore such a promise is not sufficient to support an account stated. *Id.*

The defendant promised the plaintiff, orally, that if certain goods were supplied to A., a third party, he would see the plaintiff paid for them. The plaintiff accordingly supplied the goods, and A. left the country without having paid for them. The defendant subsequently orally acknowledged his liability to the plaintiff for the price of the goods:—Held, that the plaintiff was not entitled to recover, upon the account stated, founded upon the acknowledgment; for, although the admission of a liability to pay a liquidated sum is *prima facie* evidence of an account stated, evidence had been properly given to show the nature of the consideration upon which it was founded; and, it appearing that the sum acknowledged was not the subject of a direct liability from the defendant to the plaintiff, a verdict for the defendant had been rightly entered. *Wilson v. Marshall*, 2 Ir. R., C. L. 356; 14 W. R. 699—Exch. Cham.

Although an account stated may be founded upon a mere equitable liability, it must be a direct liability from the defendant to the plaintiff. *Id.*

The circumstance that the Statute of Frauds bars a party from recovering upon a mere parol contract does not prevent the liability created thereby from forming a good ground for an action founded upon a subsequent statement of accounts between the parties. *Id.*

**Effect upon right of action of existence or execution of deed.**—Where money is secured by a deed and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it, an action on an account stated will not lie, but the action must be brought on the deed. *Middleditch v. Ellis*, 2 Exch. 523.

In an action for dividends sold and assigned it appeared that the plaintiff, being entitled to the dividends on bank stock, agreed to sell them to the defendant for 175*l.* After the bargain was made, it was found that the stock was standing in the name of the accountant-general, and that it required an order of the court to enable the defend-

ant to receive the dividends. It was then agreed that the deed of transfer should be executed, and the question as to the costs of obtaining the order should be referred to two solicitors. The deed was accordingly executed, and 125*l.* paid by the defendant to the plaintiff at the time of its execution. The deed stated that the whole purchase-money was paid, and released it, but in pursuance of a previous arrangement the defendant retained 50*l.* to abide the event of the reference. The plaintiff's evidence consisted of a paper signed by the defendant, in which credit was given for 125*l.* and 50*l.* stated as remaining due. The defendant gave in evidence the deed of transfer, and also an agreement signed by the parties at the time of signing the paper, to refer the question as to the costs, and an arrangement whereby the 50*l.* was to abide the decision of that question:—Held, that the plaintiff could not recover the remainder of the purchase-money, inasmuch as there was no debt until the deed was executed, and upon its execution the debt was released, and that there was no evidence of an account stated. *Baker v. Heard*, 5 Exch. 959; 20 L. J., Exch. 444.

#### (b) By and between Particular Parties.

**Partners and others jointly liable.**—A., B. and C. were railway contractors in partnership, and had entered into a contract to do work for a railway company. D. had entered into a sub-contract to do part of the work, for which part bricks were required, and it was necessary that D. should have coals to burn the bricks. In order to induce the plaintiff to supply D. with coals, A., without the previous knowledge or subsequent assent of his copartners, entered into a guaranty, in the name of the firm, to secure the payment of the price of the coals to be supplied to D. by the plaintiff. The managing clerk of the firm, without the knowledge of B. and C., wrote letters to the plaintiff containing evidence of an account stated respecting the amount due under the guaranty:—Held, that as the giving the guaranty was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B. and C. *Brettel v. Williams*, 4 Exch. 623; 19 L. J., Exch. 123.

B. lent money to A. upon C.'s promise to become surety for its repayment; and on the money being advanced, A. and C. signed and delivered to B. the following memorandum: "We, jointly and severally, owe you 60*l.*:"—Held, evidence of an account stated by A. and C. jointly. *Buck v. Hurst*, 1 L. R., C. P. 297; 12 Jur., N. S. 704.

**Husband and wife.**—A count by husband and wife for money found to be due from the defendant to the wife before her marriage on accounts stated between them, and for money found to be due from the defendant to the plaintiffs since their intermarriage on accounts stated between them since the intermarriage,

is a bad count, for not averring that the accounts were stated in respect of money due in right of the wife, or otherwise showing her interest in the money. *Johnson v. Lucas*, 1 El. & Bl. 659; 17 Jur. 1066; 22 L. J., Q. B. 174.

Semble, that a count by husband and wife on an account stated with them in respect of a debt averred to be due in right of the wife, or for which she had been the meritorious cause of action, would be good. *Id.*

**Lunatics.]**—A. kept cash with a banker, and the balances to his credit were stated from time to time in a pass-book. He became a lunatic, but the account continued to be kept by his family; and, in the pass-book, the entries in which were in the banker's handwriting, a balance was stated to the credit of A. :—Held, that this was not evidence to support a count on an account stated with A., in an action by his representative against the banker, to recover the amount of such balance. *Tarbut v. Bispham*, 2 M. & W. 2.

**Executors.]**—Among the papers of a testator were found two letters, sealed and directed, "For G., my late servant." G. had been in his service as housekeeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money; and one of the letters stated, that the testator inclosed 200*l.* as a mark of respect; and the other letter stated that the inclosed was for her long and faithful services. G. applied to the executors for payment of the notes, and upon seeing the notes they paid her a portion, and promised to pay the remainder, but afterwards refused to do so:—Held, as an action was not maintainable by G. upon the notes, which were in effect a legacy, and an informal one, in not being duly attested as required by 7 Will. 4 and 1 Vict. c. 26, and therefore void, that the action was not maintainable on an account stated, inasmuch as the promise of the executors was made on a supposed debt which in fact was not due. *Gough v. Findon or Tindon*, 7 Exch. 48; 21 L. J., Exch. 58.

In an action by the executors of the payee of a note, against the makers, the executors proved the note, with the following indorsement upon it, signed by the makers and one of the executors:—"Hull, 1838.—Memorandum, that the sum of 1*l.* 7*s.* 6*d.*, one quarter's interest, was paid on the within note. William Purdon, Thomas Purdon:—Held, sufficient evidence of an account stated with the executors, without any proof of the time of the testator's death. *Purdon v. Purdon*, 10 M. & W. 562; 12 L. J., Exch. 3.

**Agents.]**—To connect B. with A., who had stated an account with the plaintiffs as a co-promisor, it was shown that they were the trustees of an insolvent estate, in respect of which the debt arose; that A. and B. were at the counting-house of the plaintiffs on several occasions together; and at a meeting of the

creditors of the insolvent estate, the amount of the plaintiffs' debt was stated by one of the defendants in the presence of the other, and that B. had admitted in a letter that there was a debt due to the plaintiff:—Held, that the jury was justified in coming to the conclusion that A., in stating the account with the plaintiffs, had authority to bind B. *Chisman v. Count*, 2 M. & G. 317; 2 Scott, N. R. 569.

In order to constitute an account stated, the admission of liability must be made to the opposite party or his agent. *Bates v. Townley*, 2 Exch. 152; 12 Jur. 606; 19 L. J., Exch. 399.

The particulars in an action were, "to a beast sold and delivered, 13*l.* 10*s.*" The only evidence was, that the plaintiff admitted, in a conversation with a third person, not shown to be an agent of the plaintiff, that he owed the latter 13*l.* 10*s.*:—Held, that this was no evidence of an account stated, and that it was not evidence on the count for goods, as it was not shown to be applicable to the particulars. *Breckon v. Smith*, 1 A. & E. 488.

## 2. How Pleaded and Proved; Operation and Effect.

**Counts.]**—A count was as follows:—"The plaintiff sues the defendant for money found to be due from the defendant to the plaintiff on accounts stated between them," omitting the words "for money payable by the defendant to the plaintiff," given in the form in Schedule B to 15 & 16 Vict. c. 76, as words which should precede the money counts there set out:—Held, sufficient, for the count followed in substance, though not literally, the form given. And per Crompton, J., it being averred that the accounts were stated, and money thereupon found due, the count contained, by necessary implication, an averment that the money was payable on request. *Fagg v. Nudd or Mudd*, 3 El. & Bl. 650; 2 C. L. R. 680; 18 Jur. 699; 23 L. J., Q. B. 299.

**Pleas.]**—Under non assumpsit a defendant may show that there were errors in the account. *Thomas v. Hawkes*, 8 M. & W. 140; 9 D. P. C. 802.

Or give in evidence a subsequent account alleged to be in his favor. *Fidgett v. Penny*, 1 C., M. & R. 108; 2 D. P. C. 714; 4 Tyr. 650.

A plaintiff sued upon an account rendered by the defendant:—Held, that the plaintiff might impeach an item in the account by which the defendant sought to retain money under an illegal contract, notwithstanding that account was the only evidence in the action. *Rose v. Savory*, 2 Bing. N. C. 145; 1 Hodges, 269; 2 Scott, 199.

It is a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill of costs was delivered. *Scauld v. Eyles*, 9 Q. B. 858.

**Action by drawer against acceptor of bills of exchange, amounting to 912*l*.** A plea, that an account was stated between the plaintiff and the defendant of and concerning the causes of action, and other demands of the plaintiff against the defendant, and certain other demands of the defendant against the plaintiff; and that the sum of 50*l*., and no more, was found to be, and was due from the defendant to the plaintiff, which sum the defendant paid to the plaintiff in satisfaction of the sum so due, is a good answer, and well pleaded, for the plea in effect sets up the allowances in account by way of partial payment, and an actual payment of the residue. *Callander v. Howard*, 1 L. M. & P. 562; 10 C. B. 290; 14 Jur. 672; 19 L. J., C. P. 312.

On a settlement of accounts between the plaintiff and the defendant, the latter overpaid the plaintiff 1*l*. 11*s*. 5*d*., which they agreed should go in discharge of the plaintiff's ensuing account. The plaintiff having afterwards done work for the defendant, sued him for the amount:—Held, that the defendant had a good defense as to 1*l*. 11*s*. 5*d*., under never indebted. *Smith v. Winter*, 10 Jur. 908; 21 L. J., C. P. 168; 12 C. B. 487.

As to pleading the common counts,—see this title, V.

**Evidence to support.]**—In an action to recover sums received by the defendant, as servant to the plaintiff, the defendant put in the following memorandum, written by the plaintiff on the back of an unstamped receipt, "Balanced up to this day as per cash book, 19th November, 1845, S. F.:"—Held, that this memorandum was admissible without a stamp, though the receipt on which it was written was not; and that in the absence of any evidence by the plaintiff to the contrary, it was evidence that up to the day of its date the account between the parties had been adjusted, and that nothing was then due from the defendant. *Finney v. Tootel*, 5 C. B. 504; 12 Jur. 291; 17 L. J., C. P. 158.

When the particulars of demand were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for the want of a promissory note stamp:—Held, that the account stated might be proved by other evidence than the memorandum. *Singleton v. Barrett*, 2 C. & J. 308.

Held, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by installments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it. *Ib*.

In an action for use and occupation, 4*l*. were paid into court on the account stated. The plaintiffs proved that the defendant, being indebted to them as surviving executors, and having no other account with them, was called upon by them for payment, and refused, saying that he had a cross demand on the funds of the testator. The plaintiffs gave evidence of a debt exceeding 4*l*., and

contended that these facts, with the admission implied by the payment into court, entitled them to recover the larger sum on the account stated, the other counts being inapplicable:—Held, that they could not so recover, for that the averment of an account stated could only refer to a single occasion; and the answer of the defendant, with the subsequent payment into court, merely showed that upon that accounting, which alone was in question, the defendant was found indebted 4*l*. *Kennedy v. Withers*, 3 B. & Ad. 767.

Evidence of an account stated whereby the defendant admitted a balance due to the plaintiff, is not done away, but confirmed by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any. *Hall v. Odber*, 11 East, 118.

A., in January, 1853, gave to B. his I O U for 65*l*. After A.'s death, B. having claimed the amount, his receipt for the amount was produced. B. swore positively that the amount had never been paid. A court of equity held, that it could not act on his unsupported testimony against the written evidence. *Farrow, In re*, 22 Beav. 400.

**Re-opening account.]**—In an action on a schoolmistress's bill, with a set-off, it was opened on the part of the defendant, that a friend of his (since dead) had paid former school accounts due from the defendant to the plaintiff, and in settling those accounts had paid overcharges of which the defendant now meant to avail himself under his plea:—Held, that, in the absence of fraud, the settled accounts could not be opened. *Lewis v. Eastmore*, 8 C. & P. 205—Abinger. See *Andrews v. Waller*, 3 M. & W. 312.

Action on a covenant in a lease of mines to pay tonnage rent. Plea, as to the rent alleged to be due during eight years, that after the expiration of the eight years an account of the ore won during each year was stated between the defendant and the plaintiff, and upon each of such accountings a certain sum was agreed to be the balance due, which balances were paid to the plaintiff, and accepted by him in satisfaction and discharge of the rent payable by the defendant for the eight years. Replication, that divers tons of ore which ought to have been taken into account, and divers amounts of tonnage rents payable in respect thereof, were, through mistake and ignorance of the facts on the part of the plaintiff, not taken into account upon the accountings, and the balances alleged to have been found to be due were erroneously found to be the balances due, and the balances so erroneously found to be due were paid and accepted in satisfaction and discharge of the amounts so erroneously found to be due:—Held, that the plea, showing only a statement of accounts on one side, did not show a statement binding the plaintiff, at any rate not conclusively, and was at any rate

answered by the replication showing error in the account, though not fraud. *Perry v. Attwood*, 6 El. & Bl. 691; 2 Jur., N. S. 1071; 25 L. J., Q. B. 408.

A., being surveyor to trustees of a turnpike road, delivered annual accounts, in which the real expenditure was understated. These accounts were believed by the trustees to be correct, as A. intended, and they were acted upon on that assumption. There was no actual fraud by A., his object being to make the apparent expenditure as light as possible, and to avoid complaints from the trustees. Eventually the omitted items were brought into one account on the discovery of their omission by the trustees, who, however, refused to pay the same. A. having brought an action:—Held, that he could not recover, on the ground that a man shall not be allowed to affirm at one time and deny at another, making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. *Cave v. Mills*, 7 H. & N. 918; 10 W. R. 471; 31 L. J., Exch. 265.

#### V. PLEADINGS.

**Common counts.**—[In Schedule B. to the Common Law Procedure Act of 1852 the following forms of money counts are prescribed:

—1. *Money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant.* 2. *Money paid by the plaintiff for the defendant at his request.* 3. *Money received by the defendant for the use of the plaintiff.* 4. *Money found to be due from the defendant to the plaintiff on accounts stated between them.]*

In a count for money lent it is not necessary to allege a request. *Victors v. Davis*, 1 D. & L. 984; 12 M. & W. 758; 13 L. J., Exch. 241.

Aliter, in a count for money paid. *Id.*

Where a plaintiff by his declaration claims one sum in respect of work and labor, money paid, and money had and received, the whole forms only one count. *M'Gregor v. Graves*, 8 Exch. 84; 18 L. J., Exch. 109. S. P., *Morse v. James*, 11 M. & W. 831; 1 D. & L. 240; 7 Jur. 679; 12 L. J., Exch. 416.

A declaration alleging that the defendant was indebted to the plaintiff for freight for the conveyance of goods is bad in substance, it not appearing that the debt was a money debt. *Place v. Potts*, 22 L. J., Exch. 269; 8 Exch. 705.

But a declaration stating that the plaintiff sues the defendant for money found to be due from the defendant to the plaintiff upon accounts stated between them is sufficient since the Common Law Procedure Act, 1852. *Fagg v. Mudd or Nudd*, 23 L. J., Q. B. 289; 8 El. & Bl. 650.

The common count for interest is good; and a writ of error, assigning for cause that no promise to pay interest could be implied by law from the forbearance of money at the defendant's request, is frivolous. *Nordenstrom v. Pitt*, 13 M. & W. 723; 2 D. & L. 672; 14 L. J., Exch. 160.

**Pleas.**—In an action for money had and received it is open to a defendant, under the plea of non assumpsit, to show that although the money was received by him, it was not received by him for the use of the plaintiff, but for the use of another person. *Clark v. Dignam*, 3 M. & W. 478; 1 H. & Il. 166; 2 Jur. 419.

To an action for money had and received the defendant pleaded, that a race was about to be run, and that an illegal game called a lottery was set up by the defendant for subscribers of 1*l.* each, to be paid to him under regulations: in substance, that the subscriber whose name should be drawn out of a box next after the name of the horse, drawn from another box, which horse should be placed first in the race, should be entitled to receive from the defendant 100*l.* The plea alleged, that the subscriptions were paid by the plaintiff and others to the defendant, and that the plaintiff, under the regulations, was entitled to the 100*l.*—Held, that the plea disclosing a transaction within the prohibition of 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119, was good in form, as setting up illegality of consideration by statute, and did not amount to the general issue. *Allport v. Nutt*, 1 C. B. 974; 8 D. & L. 233; 9 Jur. 900; 14 L. J., C. P. 272. S. P., *Gatty v. Field*, 9 Q. B. 431; 10 Jur. 980; 15 L. J., Q. B. 408.

Action for money had and received. Plea, by way of defense on equitable grounds, that the money had been bequeathed to the separate use of the plaintiff's late wife, who, during the coverture, assigned the money to the defendant, on trusts in which the plaintiff took no interest. Replication, that before this assignment the plaintiff's wife assigned the money to the plaintiff, and that the receipt by the defendant was as agent for the wife, in order to give a discharge to the executors:—Held, that the plea was good, admitting a receipt of the money *prima facie* to the use of the husband, and avoiding it by showing that in equity the receipt was on trusts in which the husband took no interest, thereby sufficiently negating any marital right arising on her death. *Sloper v. Cottrell*, 6 El. & Bl. 497; 2 Jur., N. S. 1046; 26 L. J., Q. B. 7.

Held, also, that the replication was good, as showing a prior equitable assignment for the husband's benefit. *Id.*

As to pleas to count upon account stated,—see this title, IV., 2.

## Money Paid into Court.

See PAYMENT.

## Monk.

**Effect of profession.**—The doctrine of civil death, in consequence of profession as a monk or a nun, is not law. *Blake v. Blake*, 4 Ir. Chanc. Rep. 349. S. P., *Metcalfe, In re*, 10 Jur., N. S. 224; 33 L. J., Chanc. 308; 12 W. R. 538; 2 De G., J. & S. 122.

## Monopoly.

**Illegality.**—An illegal monopoly is a public grievance. *Reg. v. Prosser*, 11 Beav. 306; 13 Jur. 71; 18 L. J., Chanc. 35.

The crown has always exercised a control over the trade of the country; and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3), within reasonable limits, the crown might grant the exclusive right to trade with a new invention for a reasonable period. This statute did not create, but controlled the power of the crown in granting to the first inventors the privilege of the sole working and making new manufactures. *Caldwell v. Vanolissengen*, 9 Hare, 415; 16 Jur. 115; 21 L. J., Chanc. 97.

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## I. REQUISITES AND VALIDITY OF CONTRACTS OF MORTGAGE.

## 1. Subject-Matter; and Parties.

**Bills of exchange** are not proper subjects of mortgage, and are *prima facie* presumed to be given in part payment as they become due. *Hills v. Parker*, 14 L. T., N. S. 107—H. L.

**Shipping.**—The expression legal mortgage, when applied to the mortgage of a ship, means a first mortgage. *Thompson v. Clerk*, 11 W. R. 23; 7 L. T. N., S. 269—Q. B.; at *Nisi Prius*, 8 F. & F. 181.

**Annuities and benevolent funds.**—The Customs Annuity and Benevolent Fund was established by act of parliament for the benefit of the widows, children, and other relatives of officers of the customs, who are expected to subscribe an annual sum to it out of their salaries. By the act directors were appointed with power to frame rules for the management of the fund, with a discretion to admit persons other than relatives of the subscribers as their nominees to the benefit of the fund. It was also enacted that, in order to insure to the widows of the subscribers, or any other claimants on the fund, the full benefit intended by the act as an alimentary provision for the widows or other claimants entitled thereto, the interest of any widow or other claimant should not be assignable without the consent of the directors. Rules were drawn up which provided that one-third of the portion payable on the death of a subscriber should be set aside for his widow, and that the remaining two-thirds should be subject to the directions of the subscriber (to be given by will, or codicil, or any instrument in writing signed by him in the presence of an attesting witness and deposited with the directors during his life, or within three months after his death, and which instrument might at the option of the subscriber be made irrevocable), and should be applied or paid in any manner or proportion which he might think fit for the benefit of his widow, children, or relatives, or nominees who should have been duly admitted by the directors. A subscriber to the fund, by instrument duly executed and deposited with the directors, irrevocably assigned two-thirds of the portion

payable on his death to mortgagees to secure an advance made to him, and the mortgagees were duly admitted by the directors as his nominees:—Held, that the mortgage was valid as against the widow, children, and relations of the subscriber. *Macleay, In re*, 19 L. R., Eq. 274—R.

**Mortgages under powers, by trustees &c., with power of sale.**—A power to raise money by sale or mortgage authorizes a mortgage with a power of sale. *Bridges v. Longman*, 24 Beav. 27.

An institution was incorporated by royal charter and deed of settlement, authorizing the council or managing body to hold lands, tenements or hereditaments, and to sell, grant, demise, exchange and dispose of the same; but no sale, mortgage, incumbrance or other disposition of any such lands, tenements or hereditaments to be made, except with the approbation and concurrence of a general meeting of the proprietors of the corporation. At a general meeting of the proprietors the council was authorized to mortgage the property of the corporation for 25,000*l.*:—Held, that the council had no power to grant a mortgage with a power of sale. *Clarke v. Royal Panopticon*, 4 Drew. 26; 3 Jur., N. S. 178; 27 L. J., Chanc. 207.

A testator directed his trustees to raise a sum of money by mortgage, as they thought fit, and subject to such mortgage devised the estate to certain persons:—Held, that the direction to mortgage gave the trustees power to insert in the mortgage a power of sale. *Chawner, In re*, 22 L. T., N. S. 262—V. C. M.

As to sales under powers of sale in mortgages,—see this title, VII., 1.

**Mortgages by insane persons.**—The mere insanity of a mortgagor to whom or to whose agent the mortgage money has been honestly paid, and of whose insanity no advantage was taken in the transaction, does not annul the rights of the mortgagee. *Campbell v. Hooper*, 3 Sm. & G. 153; 1 Jur., N. S. 670; 24 L. J., Chanc. 644.

**By agents or attorneys.**—The defendant employed his attorney to obtain a loan of 100*l.* for him on mortgage, and placed his title-deeds in his hands for that purpose. The attorney forged the defendant's signature to a mortgage deed to the plaintiff for 420*l.*, and received the money, and concealed the transaction from the defendant, to whom he afterwards advanced 198*l.* in various sums, and subsequently took from him a mortgage to a third person, to cover that advance:—Held, that the plaintiff had no cause of action against the defendant, even to the extent of 100*l.* *Painter v. Abel or Abil*, 2 H. & C. 113; 33 L. J., Exch. 60; 11 W. R. 651; 8 L. T., N. S. 287.

In 1841, a client, before going abroad, gave a power of attorney to his solicitor in England to manage the whole of the client's property and concerns in England while he was abroad,



and, generally, to do all other acts, deeds, matters or things whatsoever in or about the estates, property and affairs of the client, as amply as the client could do or have done. In the year 1849, the attorney, professing to act under the power, borrowed 500*l.* upon deposit of a policy of assurance belonging to the client, and afterwards misapplied the money;—Held, that whether the power of attorney per se authorized the raising of the money upon the security of the policy or not, yet, when coupled with a correspondence between the attorney and client, showing that the latter, believing the power to have that effect, desired it to be so exercised when occasion should require, it precluded the client from disputing the validity of the mortgage. *Perry v. Holt*, 2 De G., F. & J. 39; 29 L. J., Chanc. 677; 6 Jur., N. S. 661; 8 W. R. 570.

**Mortgages to partners.**—When a mortgage in the ordinary form is made to partners in trade to secure a partnership debt, one of such partners takes no authority to bind the others or the mortgagor by a sale under the power in the mortgage; and if a person to whom he has contracted to sell the property expends money in repairs on the faith of such contract, the money so expended cannot be recovered from the firm. *Warr v. Jones*, 24 W. R. 695—V. C. H.

### 2. Agreements for Mortgages.

**Damages for not executing or completing contract.**—The owner of building land, upon which he had erected houses, mortgaged it, first, to a building society for 4,800*l.*, with a power of sale in default of payment; secondly, to the defendant for 350*l.*, and afterwards to several other persons for various sums. Being unable to proceed with the building, by deed, to which he, the building society, the defendant, and other mortgagees were parties, the premises were conveyed to the plaintiff in fee, discharged from all equity of redemption, but subject to the mortgage of the building society, in trust, in his discretion, to sell the same, and out of the proceeds to pay, first, expenses; secondly, the building society; thirdly, the defendant; fourthly, advances made by the plaintiff, and afterwards the other mortgagees in the order of their priority, with liberty for the plaintiff to raise a sum not exceeding 5,000*l.*, for the purpose of carrying into effect the trusts of the indenture. The defendant covenanted that he would execute all assurances, reasonably required, for enabling the plaintiff to execute the trusts of the deed. The plaintiff had made advances to the extent of 1,150*l.* He had also arranged with the building society to accept 4,100*l.* in satisfaction of their claim; and he had contracted for a loan of 5,000*l.* on mortgage of the premises. The mortgage deed was prepared and all parties attended, when the defendant refused to execute it unless he was paid his debt of 350*l.*,

and in consequence the building society sold the premises for 4,510*l.*, which was not more than sufficient to pay their mortgage and expenses:—Held, that the plaintiff was only entitled to recover as damages the costs of the abortive mortgage. Per Pollock, C. B., and Bramwell, B. Per Martin, B., that the plaintiff was entitled to recover, in addition to the costs of the abortive mortgage, the difference between 5,000*l.* and the value of the land as building land; or, at all events, 900*l.*, the residue of the 5,000*l.*, after paying 4,100*l.* to the building society. *Duckworth v. Ewart*, 2 H. & C. 129; 33 L. J., Exch. 24; 9 L. T., N. S. 297.

**Enforcing agreements in equity.**—An agreement to borrow a sum of money is not such a contract as a court of equity can compel the specific performance of. *Rogers v. Challis*, 29 L. J., Chanc. 240; 27 Beav. 175.

The plaintiff, who was a builder, agreed with the defendant, who was an owner of freehold land, to erect thirty-one houses on the land on the terms of such agreement, and also of a parol understanding communicated to the plaintiff on behalf of the defendant, prior to the signing of the principal agreement. The chief stipulation of the parol understanding was the advance of moneys in definite installments by or through the defendant to the plaintiff for the purposes of the buildings. The plaintiff afterwards took leases of the unfinished houses and executed two successive mortgages to enable defendant to raise money on them as a security for the same purposes. The defendant failed to supply the plaintiff with the required funds as stipulated under the parol agreement, which, however, had been successively departed from:—Held, in a bill praying specific performance of the parol understanding, together with damages, or at all events damages, that the plaintiff was entitled to neither, but that (the defendant submitting to it) the plaintiff might have the ordinary redemption decree. *Thorpe v. Hoxford*, 20 W. R. 922—V. C. B.

When an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, the court, in settling the form of the deed, will, although the agreement is silent on the subject, insert a proviso that the postponement shall be conditional on punctual payment of interest, and, if the property is leasehold, on observance of the covenant; so that, if the mortgagor should make default in either of these respects, the mortgagee's remedies by sale or foreclosure will immediately arise. *Seaton v. Twyford*, 11 L. R., Eq. 591; 40 L. J., Chanc. 123; 23 L. T., N. S. 648.

The court will decree specific performance of an agreement to execute a mortgage with an immediate power of sale. *Herrmann v. Hodges*, 16 L. R., Eq. 18; 43 L. J., Chanc. 192; 21 W. R. 571—C.

When a person had agreed to execute a mortgage of leasehold premises in the usual form, containing an absolute power of sale,

in consideration of money due, and had, when requested to do so, failed to execute such mortgage, the court made a decree for specific performance. *Ashton v. Corrigan*, 13 L. R., Eq. 76; 41 L. J., Chanc. 96—V. C. W.

### 3. What Constitutes a Mortgage, Generally; and Form and Execution of Instrument.

**Distinction between mortgage and conditional or absolute sale.**—A., by deeds of lease and release, purporting to be an absolute conveyance, as upon a sale, in consideration of 550*l.*, conveyed premises to B. By an agreement of the same date, B. agreed to re-convey the premises to A., if the latter should pay him within a year 550*l.* and 13*l.* which B. had paid for the conveyance; and B. was to be permitted to retain the rents of the premises, instead of interest, if he preferred it, until the day of payment. B. immediately entered into and continued in possession of the premises:—Held, that the transaction was a conditional sale, and not a mortgage. *Williams v. Owen*, 5 Mylne & C. 803; 13 L. J., Chanc. 207.

A. conveyed a life estate to B., in consideration of 4,739*l.* By a deed of even date B. contracted that if A. should at any time desire to re-purchase the life estate for 4,739*l.*, B. would re-convey it to him for that sum. All the expenses of this transaction were paid by A. B. took possession, insured A.'s life for 4,739*l.*, and after payment of premiums the surplus rent was between 6*l.* and 6*l.* 10*s.* per cent. on the purchase-money. B. left a will, by which he spoke of the life estate as redeemable on payment of 4,739*l.* and interest, and spoke of his interest as a security. A., after a lapse of nearly thirty years, and many years after the death of the solicitor who conducted the transaction, filed a bill to redeem, and failed in proving that the parties intended a mortgage:—Held, that the transaction was to be treated as a conditional sale, and not as a mortgage, and that A. had no right to an account of rents and profits. *Alderson v. White*, 2 De G. & J. 97; 4 Jur., N. S. 125.

In ejectment, the plaintiff and the defendant claiming to have purchased the premises, and the defendant having, in fact, had them knocked down to him at an auction, but the plaintiff having paid the deposit and the purchase-money, and had the estate conveyed to him; the case for the defendant being, that the plaintiff was to advance the money to him for the purchase, and that the estate should be conveyed to the plaintiff only by way of mortgage, the question was left to the jury whether this was so understood by or agreed on between the parties. *Bradlock v. Derisley*, 1 F. & F. 60—Wightman.

A., who held under a lease from Trinity College customarily renewable, demised to B., who sub-demised to C. In 1861, B., being 160*l.* in C.'s debt, assigned by deed all his interest in the premises to C., who wrote

the following letter: "At any time within the next ten years you come forward and pay 160*l.*, provided you want it for yourself or any of your children, or satisfactorily arrange the 160*l.* by three or four installments (that is to say), the house I have purchased this day in [ &c. ], I will hand you the possession of same with pleasure, and become your yearly tenant."—Held, that the transaction was not a mortgage, but a sale with an agreement for re-purchase. *O'Reilly v. O'Donoghue*, 10 L. R., Eq. 73—R.

Five years afterwards, A.'s interest was evicted by the college, who adopted C. as their yearly tenant. B. tendered the 160*l.* within the ten years:—Held, that he had an equity under his right of re-purchase to get the new interest acquired by C., or to have it declared a graft on the old interest. *Id.*

**Operation of conveyance in trust as mortgage.**—A. conveyed lands to B., on trust in case a sum of money and interest should not be paid by a day named, to sell, and after payment of principal, interest and costs, to reconvey the lands remaining unsold, or pay over the residue of the money; and B. covenanted not to sell without giving six months' notice, but the deed contained no proviso for redemption:—Held, that this was a mere mortgage, and that A. was therefore entitled to six months' time to redeem. *Bell v. Carter*, 17 Beav. 11; 17 Jur. 478; 22 L. J., Chanc. 933.

**Form of mortgage.**—A harbor company was empowered by its acts of incorporation to raise money on mortgage of the work and tolls, which were not to be effectual until they were entered in the company's books by its clerk, and a memorial of the entry was indorsed on them:—Held, that an unindorsed mortgage, regular in other respects, was effectual. *Jortin v. South-Eastern Railway Company*, 6 De G., M. & G. 270; 1 Jur., N. S. 433; 24 L. J., Chanc. 343.

B. in consideration of a sum of money lent to him by parties, who carried on business under the name of "The City Investment and Advance Company," assigned by deed certain goods of his to the company, to hold as their own proper goods; nevertheless, by way of mortgage, for securing the repayment of the loan, with full power to the mortgagees to sell the goods, and out of the proceeds to reimburse themselves the loan and costs of sale, and to pay the residue, if any, to B.:—Held, that the property in the goods passed by such deed to the mortgagees, and that a party who claimed the same goods under a subsequent assignment to him from B., could not maintain an action against them for selling the goods without taking reasonable care to obtain the best prices for them. *Maughan v. Sharpe*, 34 L. J., C. P. 19; 17 C. B., N. S. 443.

Held, also, that the parties need not be described in the deed by their christian names or surnames, and that the conveyance of the

property to the company operated as a conveyance to the company, on its being ascertained that they were the persons described under the name of such company. *Ib.*

**Execution by sureties.]**—By a mortgage deed between the mortgagor and two others, as sureties, and the mortgagee, after reciting that the mortgagor was possessed of certain hereditaments, and of a policy of insurance on his life for —£—, and that the mortgagee had agreed to lend him 1,000£, to be secured as therein provided, and that "upon treaty for the loan, it was agreed that the repayment should be further secured by the sureties joining in the deed;" the mortgagor mortgaged the hereditaments and the policy of insurance for —£—, and all moneys assured or to become payable under it, as security for the debt. There were covenants by the mortgagor and the two other sureties to pay the interest, and to pay the premiums on the policy, and any sums necessary for effecting another, if it should become void. There was a power of sale by the mortgagee of the hereditaments and the policy. The mortgagor covenanted that if the mortgagee should be unable to execute the power of sale, or if the proceeds should not be sufficient, he would pay the deficiency to the amount of 300£. To an action on this covenant it was pleaded that no policy was effected; and that one of the sureties had not executed the deed:—Held, first, that it was a condition precedent that a policy should have been effected. *Coyte v. Elphick*, 23 W. R. 541—Q. B.

Held, secondly, that in the absence of express provision it was not a condition precedent that the other surety had signed. *Ib.*

**Proof of execution.]**—A mortgage deed could not be produced, and a copy purporting to have been furnished by the solicitor who held the deed was produced on behalf of the plaintiff as evidence of the deed; the plaintiff also deposed to the existence of the mortgage. The defendants had in their answers not expressly challenged the mortgage deed, and had admitted that there had been a reconveyance of part of the property comprised in the mortgage:—Held, that as against them the mortgage deed was sufficiently proved. *Heath v. Crenlock*, 10 L. R., Ch. 22; 44 L. J., Chanc. 157; 31 L. T., N. S. 650.

**Expenses of obtaining or executing mortgage.]**—A mortgagor cannot be charged with the expenses of preparing a deed of declaration of trust, from the mortgagee to a cestui que trust, who advanced the money to the mortgagor, as such deed forms no part of the security of the mortgage. *Martin's case*, 2 M. & P. 240; 5 Bing. 160.

D., having given a cognovit for 357£, mortgaged certain premises as a security for the payment of that sum, and the costs of the judgment, and all other costs and charges whatsoever attending the same. The mortgagee having levied execution, her right to the goods seized was disputed in actions at

the suit of certain persons who claimed to be assignees of D. under a bankruptcy. The mortgagee failed upon a first trial, but succeeded in a second, D. not proving to be a bankrupt:—Held, that the mortgagee could not claim from D. the costs of this action, as costs or charges attending the judgment confessed by D. *Dos d. Holt v. Roe*, 6 Bing. 447; 4 M. & P. 177.

Where B., being desirous of raising a sum of money upon mortgage, employed an attorney for the purpose, who applied to A., an attorney, telling him at the same time the name of his principal, and A. agreed to advance the money on behalf of a client, but ultimately the negotiation failed from a defect of title:—Held, that A. could not maintain an action against B. for his fees, although it was proved to be the practice for the proposed borrower to pay the expenses of the proposed lender; the course being for the attorney of the latter to send his bill to the attorney of the former, who, if the bill was reasonable, recommended his client to pay it. *Rigley v. Daykin*, 2 Y. & J. 88. See *Grissell v. Robinson*, 3 Scott, 829; 3 Bing. N. C. 10; *Webb v. Rhodes*, 3 Bing. N. C. 732; 4 Scott, 407.

By a written agreement, preliminary to an intended mortgage, the plaintiff undertook to advance the defendant a sum on the mortgage of certain named premises; the defendant was to deliver a complete abstract of title to the plaintiff's solicitor within a week after the date of the agreement, and to produce the title-deeds necessary to verify the abstract, and deduce a marketable title within a month from such delivery. If the defendant did not do so at either period, the plaintiff was to have the option of considering the agreement void. It was then agreed that the defendant should forthwith pay the plaintiff all costs and charges incurred by him in investigating the title to the premises. Abstracts were delivered, but disclosed no title to some, and a defective title to other, parts of the premises. The time for completing the title expired on 24th of September, 1831, but the negotiations went on till 14th of May, 1832; the defendant had repeated notice between those dates that the plaintiff's money was lying idle, but he tried to amend his title till the latter day, when it remained defective, and the bargain was broken off:—Held, that the original contract remained in force, and that its terms were not sufficiently comprehensive to enable the plaintiff to recover interest, or more than the costs of investigating the title. *Sweetland v. Smith*, 3 Tyr. 421.

Where a negotiation for a mortgage goes off through the default of the mortgagor, the mortgagee's attorney cannot recover his costs from the mortgagor, in the absence of an express contract on the part of the latter to pay them. *Wilkinson v. Grant*, 18 C. B. 319; 25 L. J., C. P. 233.

A bill of costs for preparing a mortgage security, delivered to a mortgagor by a firm

of solicitors, one of whom was the mortgagee, is not a mortgagee's costs. *Gregg v. Slater*, 2 Jur., N. S. 246; 25 L. J., Chanc. 440; 22 Beav. 314.

An intended mortgagor agreed to pay the reasonable costs of the mortgagor's solicitor, if the matter went off:—Held, that this did not include the expenses of withdrawing the money from a banker's and of remitting it to London for payment. *Blakesley, In re*, 32 Beav. 879; 9 Jur., N. S. 1265; 11 W. R. 656; 8 L. T., N. S. 843.

When the negotiations for a mortgage are broken off owing to the proposed mortgagee being dissatisfied with the security upon investigation, the proposed mortgagor has no claim upon the proposed mortgagee for the costs attending the investigation, but if the negotiations go off without such reason, the proposed mortgagee may recover his costs reasonably incurred. *Carter v. Merriion*, 32 L. T., N. S. 663—C. P.

**Solicitor's lien for costs.**—A mortgagor instructed his solicitors, to whom he was indebted in a bill of costs, to prepare a conveyance of the mortgaged property. They did so, and sent the engrossment to the mortgagees' solicitors, with an intimation that they had a lien on it, and a request that the mortgagees' solicitors would hold it on account of the mortgagor's solicitors. The engrossment was executed by the mortgagees. The mortgage money was not paid, but the mortgagor sold the property to purchasers, who agreed to pay it:—Held, that the mortgagor's solicitors had a lien on the engrossment, and that such lien was not prejudiced by their having parted with the engrossment under the above circumstances, nor by the execution of it as a deed, nor by a promissory note delivered to the solicitors not covering their whole demand, and that the purchasers had been properly restrained by injunction from proceeding to recover the deed. *Watson v. Lyon*, 7 De G., M. & G. 288.

A solicitor who acts for both parties to a mortgage cannot, after the execution of the mortgage, claim a lien on the title deeds of the property for any costs due from the mortgagor. *Snell, In re*, 25 W. R. 823; 46 L. J., Chanc. Div. 627; 6 L. R., Ch. Div. 105; 37 L. T., N. S. 350—R.

#### 4. Equitable Mortgage by Deposit of Title Deeds.

**When equitable charge or mortgage is created by deposit merely.**—An intention of charging an estate may be presumed, where the proprietor deposits all or part of the title-deeds. *Richards v. Borrett*, 3 Esp. 102—Kenyon.

It is not necessary to create an equitable mortgage that all the title-deeds, or even all the material title-deeds, should be deposited. It is sufficient if the deeds deposited are material evidences of title, and are shown to have been deposited with the intention of

creating a mortgage. *Lyon v. Allen*, 3 Drew. 579; 26 L. J., Chanc. 18.

An equitable mortgage of copyholds may be created by the mere deposit of the copy of court roll. *Whitbread v. Douvris*, 1 Y. & C. 303.

Where, in order to prevent immediate proceedings, the title-deeds of an estate were deposited by a debtor with his creditor's attorney, for the purpose of preparing a mortgage of the property:—Held, that this transaction amounted to an equitable mortgage by deposit of title-deeds. *Keys v. Williams*, 3 Y. & C. 55; 2 Jur. 611.

Where title-deeds are left in the hands of an attorney, for the purpose of preparing a mortgage, as a security for money previously advanced, this is an equitable mortgage by deposit of title-deeds. *Ib.*

The delivery of title-deeds to an attorney to prepare a mortgage deed, does not amount to an equitable mortgage; otherwise, if deposited expressly as a security for a debt. *Ex parte Bulleed*, 2 Cox, 243.

Where a mortgagor deposits the title-deeds of his estate with his solicitor, by way of equitable security to a mortgagee, until the completion of a legal mortgage, the solicitor is thereby constituted trustee for the mortgagee, and an equitable charge upon the estate will be created by such deposit. *Lord v. Attwood*, 5 Jur., N. S. 1322; 3 De G. & J. 614; 20 L. J., Chanc. 97.

To constitute a good equitable mortgage it is not necessary that the deeds deposited should show a complete title in the depositor, provided they are material to the title. *Dixon v. Muckleston*, 20 W. R. 619; 26 L. T., N. S. 752—R.

An equitable mortgage by deposit is not taken out of the operation of 17 & 18 Vict. c. 113, Locke King's Act, because it is unaccompanied by a memorandum. *Davis v. Davis*, 24 W. R. 963—V. C. B.

—by deposit with memorandum or agreement in writing.]—A secretary of a banking company had a credit account with the bank to the extent of 5,000*l.*, secured by a memorandum, specifying certain securities by way of equitable mortgage. On his dying a debtor to the bank in 4,000*l.*, there was found in his office in the banking-house the securities mentioned in the memorandum, with others, tied in a bundle and indorsed and labeled as securities. There was evidence that he had stated that the bank was secured in 5,000*l.*:—Held, that the bank was equitable mortgagee of all the securities. *Ferre v. Mullins*, 2 Sm. & G. 373; 2 Eq. R. 809; 18 Jur. 713.

T., being in possession of a plot of land for a term of years, by deed of the 2d April, 1845, assigned it by way of mortgage to S., as a security for 300*l.* and interest, with a power of sale on default of payment on a certain day. By a memorandum of the same date, T. undertook to deposit with S. a lease, when the same was executed, of another plot of

land, as a further and collateral security for the 300*l.* and interest. A mill and other buildings stood partly on one plot of land and partly on the other. On the 18th December, 1845, the lease mentioned in the memorandum was granted and deposited with S. By deed of the 2d March, 1847, T. assigned a moiety of the entire premises to A.; and on the 20th September, 1847, executed an assignment of all his estate and effects for the benefit of his creditors. By deed of the 31st August, 1848, S. assigned both plots of land, mill and buildings to the defendant, subject to the equity of redemption, and with such power as S. possessed. In April, 1852, the defendant offered the premises for sale by auction, and the conditions stated that he sold as mortgagee; and that as he had only an equitable interest in the second plot, the purchaser should accept such title as he was able to deduce and convey. A purchaser of both lots refused to complete, on the ground that the legal estate in the second plot was outstanding and might be used adversely to him, and brought an action to recover back the deposit:—Held, that there was no failure of consideration, inasmuch as, first, the assignment by T. of the legal estate in the one plot and the memorandum of deposit of the future lease of the other plot were one and the same transaction and security, and the lease when deposited was subject to the same conditions, including the power of sale, as were contained in the assignment, and consequently T. would not be entitled in a court of equity to redeem the second plot; and secondly, that by the express terms of the conditions of sale, the defendant contracted, with reference to that plot, to sell an equitable interest only. *Ashworth v. Mounsey*, 9 Exch. 175; 2 C. L. R. 418; 23 L. J., Exch. 73.

John S. entered into an agreement with E. for securing payment of sums of money owing by him to E. In this agreement there was a covenant that John S. would give to E., as part of the securities, a mortgage on the lots of a particular estate, and James S., the brother of John, and therein described as being the owner of lot No. 1, was to join in the mortgage of it. By a subsequent agreement, under seal, to which John S., E. and James S. were parties, after reciting the first agreement, John covenanted that he would, before a certain time, convey, or cause to be conveyed to E., lot No. 1, to be held by E. in fee:—"And it is agreed by and between the parties hereto," that if John S. shall pay E. the moneys due to him, E. shall re-transfer "all securities of whatever nature or kind." Provided, that if payment shall not be made, E. may, "by entry, foreclosure, sale or mortgage of any part or parts of the land," levy the deficiency. "And each of them, John S. and James S., for himself, his executors, &c.," covenanted to pay any deficiency, so that out of the interest or dividends on railway shares (previously deposited), or by cash payments of John S. or James S., there should be re-

ceived a certain sum every year. All the three parties duly executed this agreement:—Held, that this amounted to an equitable mortgage, binding on the estate of James S. *Eyre v. McDowell*, 9 H. L. Cas 619.

A. being entitled to three properties, the title-deeds of one of which were held by his bankers as a security, deposited the title-deeds of the other two with B. as a security for a debt, and he gave him an order to the bankers (written by himself, but not signed) to deliver over the deeds of the third property when their lien had been satisfied:—Held, that this gave B. a valid equitable mortgage on the property mortgaged to the bankers. *Daw v. Terrell*, 33 Beav. 218.

An equitable mortgage by the deposit of title-deeds, with an agreement in writing by the party making the deposit, to execute a formal mortgage of the property to the mortgagee for the balance which might be due to him, constitutes the equitable mortgage a purchaser for good consideration within 27 Eliz. c. 4, in respect of such balance. *Lister v. Turner*, 5 Hare, 281; 10 Jur. 751; 15 L. J., Chanc. 336.

A. agreed by a written memorandum to deposit with B., as an equitable security for the repayment of 500*l.* and interest, the lease of certain premises which were thereby charged with that amount. A. further agreed to execute a valid legal mortgage of the premises comprised in the lease, with the usual powers and covenants, when called upon so to do:—Held, that the mortgagee had a right in equity to enforce a sale, and was not compelled to take a legal mortgage. *Matthews v. Goulday*, 8 Jur., N. S. 90; 31 L. J., Chanc. 282; 5 L. T., N. S. 572.

T. agreed to let to B. premises in Holborn, which B. was to fit up forthwith as a luncheon-bar and restaurant, such fittings to be of the value of 500*l.* and to T.'s satisfaction, and B. was to pay a premium of 1,000*l.*, upon payment of which, "the premises being fitted up as aforesaid," T. was to grant B., and B. agreed to take, a lease for twenty-one years; and T. further agreed to lend or obtain for B., "upon security of the premises as fitted and licensed," 1,000*l.* for two years at 5 per cent. Before any lease was granted or any money paid, B. became bankrupt, and his assignee seized and sold the fittings and fixtures under an order of the court:—Held, that, until the execution of the proposed lease, the agreement constituted an equitable contract between T. and B. that "the premises as fitted and licensed" should stand as a security for the 1,000*l.* premium, and consequently that T. was entitled to them as equitable mortgagee. *Tebb v. Hodge*, 5 L. R., C. P. 73; 39 L. J., C. P. 56—Exch. Cham.

When a deposit of title-deeds is accompanied with a memorandum in writing, the kind and amount of charge intended to be created by the deposit must be ascertained solely by reference to the written document. *Shaw v. Foster*, 42 L. J., Chanc. 49—H. L.

As to what property is affected by equitable mortgage,—see this title, II., 3; recovery of money secured,—see this title, VII., 3, b.

### 5. Stamping.

**Statutes.**—[55 Geo. 3, c. 184, and previous statutes by which duties were imposed upon mortgages, were impliedly repealed by 13 & 14 Vict. c. 97, which contained, in Schedule, Title "Mortgage," a scale of duties thereby enacted upon mortgages and transfers and assignments of mortgages. By 28 & 29 Vict. c. 96, s. 17, the last mentioned act was amended as to the duties imposed on the transfer or assignment of mortgages. A new scale of duties is enacted by The Stamp Act, 1870. See Schedule, and ss. 105–115. By The Stamp Act, 1871 (34 Vict. c. 4, s. 5), a different duty is imposed upon the mortgage of any stock or marketable security.]

#### What instruments require to be stamped.]

—A firm that was negotiating to obtain an advance of money on their bill, wrote to the proposed lender, stating that, in consideration of his accepting their draft, they handed him therewith a bill of lading and a policy of insurance for wines expected to arrive, which would afford him security beyond the amount of the bill, and engaging to land and warehouse the wines, to be held at his disposal:—Held, that this document did not require a mortgage stamp, within 55 Geo. 3, c. 184. *Harris v. Birch*, 0 M. & W. 591; 1 D., N. S. 899.

The following document given in evidence by a defendant in replevin in support of his right to distrain as bailiff of J. W.:—"I, J. W., having, on the 7th October, 1843, borrowed from J. P. 300*l.*, did pledge with him the title-deeds of houses in T., in order to secure to him 300*l.* with interest; I did authorize J. P. to receive the rents of the houses during my right and interest therein; and I hereby confirm and make valid all acts, distresses, and particularly a distress on W. P., tenant of one of the houses, by J. P., and other proceedings made or taken, or to be made or taken, by J. P., and that the rents and profits of the houses may be received and taken by J. P. during all my estate and interest. (Signed) J. W."—does not require a stamp, either as an agreement accompanied with a deposit of title-deeds for making a mortgage, or as an authority to distrain, or as an agreement. *Pyle v. Partridge*, 15 M. & W. 20; 15 L. J., Exch. 129.

In an action by indorsee against payee upon the following instrument: "On demand I promise to pay W. T. H., or order, 500*l.*, for value received, with interest; and I have lodged with W. T. H. counterpart leases as a collateral security for the 500*l.* and interest:"—Held, that the latter part was not an agreement or contract within 55 Geo. 3, c. 184, and, therefore, that the instrument required only to be stamped as a promissory note. *Fancourt v. Thorn*, 9 Q. B. 312; 10 Jur. 639; 15 L. J., Q. B. 344.

A document, stating goods to have been deposited as a security for the repayment of money lent, and containing, in default of payment, a power of sale, does not require a mortgage stamp within 13 & 14 Vict. c. 97. *Attenborough v. Inland Revenue Commissioners*, 25 L. J., Exch. 22; S. C., nom. *Attenborough*, *In re*, 11 Exch. 461.

When title deeds are deposited by way of equitable mortgage, a memorandum merely stating the purpose for which they are deposited is not an agreement for a mortgage, and need not be stamped. *Meek v. Baylis*, 31 L. J., Chanc. 448.

**Ad valorem duties; and amount of stamp duty, in general.**—By a deed dated the 17th November, 1845, reciting that A. was indebted to B. in 100*l.*, A. assigned to B. all the goods fixtures, tools, &c., which they were, or at any time during the continuance of the security should be, in and upon certain premises to have, receive and take the goods, &c., thereby assigned, as per schedule, unto B. The deed contained a covenant by A. for payment of the 100*l.* on the 8th November, 1846, with interest thereon from the 8th August preceding:—Held, that a mortgage stamp on the deed, applicable to a sum not exceeding 100*l.*, was sufficient within 55 Geo. 3, c. 184. *Daines v. Heath*, 3 C. B. 933.

An indenture recited, that in consideration of 400*l.* (part of 500*l.*, agreed to be advanced by the plaintiffs to the defendant), paid to certain mortgagees, by the plaintiffs, in discharge of their claim, the mortgagees surrendered into the hands of the lord land, to the intent that he might re-grant the same to the plaintiffs, in trust to sell the land and return the 500*l.* The indenture contained covenants by the defendant with the plaintiffs to pay them 500*l.*, with interest, on a certain day, and that, in default of payment, the plaintiffs might enter upon the land. The indenture was stamped with two stamps, of 1*l.* 15*s.* and 1*l.* 5*s.*:—Held, that this was not a declaration or a deed for defeating or explaining or qualifying any conveyance of land, and that it did not require an ad valorem mortgage stamp, under 55 Geo. 3, c. 184. *Haywood v. Bibby*, 1 D. & L. 290; 11 M. & W. 812; 19 L. J., Exch. 404.

T. surrendered copyhold property to the lord of a manor by way of mortgage to C., in consideration of a loan of 100*l.*; and, by an indenture of even date, covenanted to repay the money borrowed, and also gave the mortgagee power of sale in case of default in payment. This indenture was stamped with an ad valorem stamp of 30*s.*:—Held, sufficient. *Sillick v. Trevor*, 11 M. & W. 722; 12 L. J., Exch. 401.

By indenture between A. and B.,—reciting that B., having become surety for A., for payment of 600*l.* due from A. to C., in consideration of C.'s forbearing proceedings against A., for securing to B. the payment of the 600*l.*, in case he should be required, as such surety, to pay the same to C., had executed a



bond to B., conditioned for the payment to B., his executors and administrators, of 600*l.* on a certain day; and that for the better securing to B. the payment of the 600*l.* in case he should be required as such surety to pay the same to C., A. had agreed to grant his leasehold goods and effects to B.,—A., in consideration of B. having become surety, granted his goods and effects unto B., his executors and administrators forever. The indenture contained a proviso, to be void on payment to C. of 600*l.*, with interest, on a given day; a covenant by A. with B. to pay the 600*l.* and interest to C., and to indemnify B., his executors and administrators, from the payment; a covenant by A. for quiet enjoyment by B. in case of default; a covenant to insure; and a power of sale, for payment to C. of the 600*l.* and interest:—Held, that this indenture was properly stamped with a 1*l.* 15*s.* stamp, without either an ad valorem or a 25*l.* stamp, the bond from A. to B. having been stamped with the progressive duty upon 600*l.* *Watson v. Macquire*, 5 C. B. 830.

By a deed made between a duke, of the first part, the marquis, his son, of the second part, and R., of the third part, it appeared that the duke was entitled to estates for his life, with remainder to the marquis, and that he was also entitled to other real and personal property, and that the real and personal property was subject to incumbrances amounting to 1,027,282*l.*; that the marquis covenanted with the duke to concur in raising a mortgage upon the property, 1,100,000*l.* to be applied in payment of the incumbrances; that the 1,100,000*l.* should be considered as the debt of the duke; that the marquis had proposed to the duke that the marquis should take of and absolutely purchase from the duke all the equity of redemption, estate or title to the real and personal property comprised in the schedules to the deed, to which proposal the duke had acceded; that the duke granted to R. all the lands, to hold the same, subject to the charges in trust for the marquis, and that the real and personal property should be the primary fund for satisfying the debts and liabilities. There was also a covenant by the marquis that he would apply all the moneys that should come into his hands in respect of the estates, chattels, &c., towards the relief and indemnification of the duke. This deed having been stamped with the duty of 1*l.* 5*s.* each, and the opinion of the commissioners having been desired on the question, they were of opinion that the deed was chargeable, under 55 Geo. 3, c. 184, with the ad valorem duty of 1,000*l.*, and with nine progressive duties of 1*l.* each, as a conveyance upon the sale of property:—Held, that the crown was entitled to the smaller duty only. *Chandos v. Commissioners of Inland Revenue*, 6 Exch. 464; 20 L. J., Exch. 269.

A mortgage deed which was expressed to be made in consideration of the advance, and also for the purpose of re-settling the property, and reversed the equity of redemption to the mortgagor and his wife, or the survivor, does

not require an extra stamp for a settlement, in addition to the ad valorem stamp on the mortgage. *Dawson v. Madhurst*, 14 L. T., N. S. 623—V. C. W.

—where amount secured is uncertain, or without limit.]—By 55 Geo. 3, c. 184, Schedule Part 1, mortgages were subjected to a duty of 25*l.* if the amount of the money secured thereby be uncertain, and without limit; but if it be limited, then to an ad valorem duty:—Held, that the limit must be one expressed on the face of the deed; and, therefore, that a mortgage for 1,500*l.*, with covenants for payment of the yearly premium, and other charges of an insurance of 1,000*l.* upon a particular life for seven years, required a 25*l.* stamp. *Halse v. Peters*, 2 B. & Ad. 807.

By a mortgage deed, A. assigned certain barges to three of his creditors, as a security for three distinct debts, to each in their separate rights. The aggregate amount only was stated in the deed:—Held, that an ad valorem stamp on such amount was sufficient. *Reed v. Wilmott*, 5 M. & P. 553; 7 Bing. 577.

If copyhold premises are mortgaged with other property by separate deeds, the ad valorem duty must be charged upon the instrument relating to the other property. *Ib.*

A mortgage deed to secure 3,000*l.* and interest, together with all expenses incurred in the execution of the powers of sale, contained in the deed and interest thereon, did not require a 25*l.* stamp as a security for an uncertain and indefinite amount. *Doe d. Scruton v. Smith*, 1 M. & Scott, 230; 8 Bing. 146.

A mortgage deed, to secure 300*l.* and interest, with a proviso for redemption, if the mortgagor should repay the sum due, and should pay all rates and taxes which might be imposed on the premises, and containing a covenant, also to the same effect, was properly stamped with an ad valorem stamp under 55 Geo. 3, c. 184, and did not require the 25*l.* stamp payable on deeds securing a sum of indefinite amount. *Doe d. Mccreron v. Bragg*, 8 N. & P. 644; 8 A. & E. 620.

Where a mortgage of leasehold premises, subject to a proviso for redemption on payment of the principal and interest, contained covenants by the lessee (the mortgagor) to procure, at his own costs, renewals of the lease (under a power contained in the original lease), and in case the mortgagor refused or neglected to do so, then it should be lawful for the mortgagee to procure such renewals; and a covenant that all the fines, costs and expenses of the mortgagee in procuring such renewals, should be a charge on the premises, and the same should not be redeemed or redeemable until payment of such costs, charges and expenses:—Held, that an ad valorem stamp of 4*l.* was sufficient, and that the deed did not require a stamp of 25*l.*, within 55 Geo. 3, c. 184, as a security for repayment of money to be thereafter advanced or paid, the amount of which was uncertain and without limit. *Wroughton v. Turle*, 11 M. & W. 561; 1 D. & L. 473; 13 L. J., Exch. 57.

shall conceal any settlement, deed, will or other instrument material to the title, or any incumbrance from the mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment, by fine or imprisonment, for any term not exceeding two years, with or without hard labor, or by both, as the court shall award, and shall also be liable to an action for damages at the suit of the mortgagee, or those claiming under the mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will or other instruments, or incumbrances so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree;

And in estimating such damages, where the estate shall be recovered from such mortgagee, or from those claiming under the mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land;

But no prosecution for any offense included in this section against any mortgagor, or any solicitor or agent, shall be commenced without the sanction of the attorney-general, or in case that office shall be vacant, of the solicitor-general, and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct.

By s. 25, the term "land" shall be taken to include all tenements and hereditaments, and any part or share of, or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and the term "mortgage," every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent and to be reconveyed, re-assigned or released on satisfaction of the debt; and the term "mortgagor," every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and the term "mortgagee," every person to whom or in whose favor any such conveyance, assignment, pledge or charge as aforesaid is made or transferred.]

**Fraud upon mortgagor.]**—A mortgagee of leasehold premises was induced by the mortgagor (his solicitor) to execute deeds, represented as being leases, but by which, in consideration of a sum, never in fact paid, the mortgagee was made to assign the premises, by way of sale, to a female servant, by whom they were afterwards mortgaged for value to the defendant. On a bill by the first mortgagee to set aside these deeds:—Held, that they were wholly void, and were decreed to be delivered up to be canceled. *Cecil v. Jeaffreson*, 2 Giff. 853.

So where, under the pretense that it was a

deed of covenant to produce title-deeds, a solicitor procured his client to execute a deed of mortgage to himself, to secure payment of a debt, the existence of which was not shown; the deed thus fraudulently procured to be executed:—Held, to be false and fictitious and wholly void. *Vorley v. Cooke*, 1 Giff. 280. But see *Hunter v. Walters*, 20 W. R. 218.

A., through a solicitor, borrowed money from B. upon a deposit of title-deeds. The solicitor obtained the deeds back, for the purpose, as he stated, of preparing a legal mortgage. Instead of this, he got A. to execute a legal mortgage to himself, instead of to B., and he afterwards raised money, on a transfer of this mortgage, and on the delivery of the title-deeds, from a creditor without notice:—Held, that the loss must fall on A., and that he was liable to pay both mortgages. *Idett v. Hives*, 33 Beav. 52; 9 Jur., N. S. 1063; 11 W. R. 1092.

Where a mortgage professes to be made in consideration of a sum down, and which is, by the deed, made immediately payable whereas the contract was for an annuity, and the consideration was not to be payable until after the death of a person named, such mortgage is fraudulent and void as against a mortgagor who joins therein as surety only. *Spraight v. Cowne*, 1 H. & M. 359.

When a mortgage was taken in part in respect of a sum for which the mortgagee represented himself to the mortgagor as being liable as a surety for the latter, and such representation was erroneous, to the knowledge of the mortgagee:—Held, that to that extent the security could not be supported. *Lake v. Brutton*, 8 De G., M. & G. 440.

When a solicitor and mortgagee took a conveyance from the mortgagor, a day laborer, who had no independent legal advice:—Held, that the deed was not valid unless the circumstances were all explained to the mortgagor, and that the onus of showing that this was done, lay on the solicitor. *Price v. Cooke*, 6 L. R., Ch. 645.

**Cancellation of deed.]**—Trustees placed money in the hands of their solicitors for investment, and the solicitors by means of a fraud practiced on A., induced him to execute a mortgage of property to the trustees, handed to them the deeds, and appropriated the money to their own use. No part of the consideration was paid to A. The solicitors became bankrupt. The trustees brought an action against A. on the covenant, who, in ignorance of the facts, allowed judgment to go by default. A bill was filed in equity for the delivery up of the deeds to be canceled:—Held, that A. was entitled to the relief prayed. *Wall v. Cockerell*, 9 Jur., N. S. 447; 32 L. J., Chanc. 276; 10 H. L. Cas. 229; 11 W. R. 442; 8 L. T., N. S. 1.

The onus of proving a case of acquiescence was on the mortgagee, and could not be discharged, except by proving that the mortgagor was aware of the time and manner in

which the mortgagee's money was deposited with the solicitors, and of the fact that no part of it had been applied for the use and benefit of the mortgagor. *Id.*

A., being requested by B. (in consequence of reports that he was paying improper attentions to a daughter of the latter) to discontinue visiting at his house, in order to lay B. under obligation to him, and so, by obtaining permission to continue his intercourse with B.'s family, to gain free access to the daughter, whom he had in fact secretly seduced, advanced to B. a sum of money on mortgage. Upon a bill by A. to foreclose, and by B. to set aside the deed:—Held, that, notwithstanding the pecuniary consideration, the immoral purpose vitiated the whole deed; and a decree was made for its cancellation, leaving A. to sue at law, if he thought fit, for the money lent. *Willyams v. Bullmore*, 32 Beav. 574; 33 L. J., Chanc. 461.

Purchase for value without notice is not an absolute defense to a suit to set aside on equitable grounds a mortgage of a fund in court; the court will determine the rights to the fund as between the parties, without waiting till it becomes distributable, and according to such determination will declare a deed under which the purchaser claims as mortgagee to be void as against one of the parties thereto whose property was thereby mortgaged. *Tabor v. Cunningham*, 24 W. R. 153.—V. C. H.

**Rectification of deed.**—B. applied to a bank for a loan upon the security of three houses in a parish, which he specified and pointed out to the bank manager, stating that he held them under a lease from L., dated the 25th of September, 1874, and that they were mortgaged to a building society by an indenture dated the 3d of October, 1874. The bank made the advance, and a memorandum of equitable mortgage, expressed to be subject to a mortgage to the society, of the 3d of October, 1874, was prepared by the bank manager and executed by B. In this instrument the parcels were described as three leasehold houses in the parish, held by a lease from L. to B., dated the 25th of September, 1874. Two of the houses agreed to be mortgaged were in fact held under a lease from L., dated the 31st of December, 1874, and were mortgaged to the building society by an indenture dated the 14th of January, 1875. The third house was held by a lease from L. dated the 18th of May, 1875, and was mortgaged to the building society by an indenture dated the 18th of May, 1875. At the date of the mortgage to the bank, B. possessed no houses comprised in any lease or mortgage of the dates therein referred to, but he had formerly owned a house exactly answering the whole description, which he had sold some months previously. B. having become a liquidating debtor, the trustee sold the first two houses, and applied to the court for a direction to complete the sale and deal with the proceeds without regard to a claim by

the bank to include these houses in their security:—Held, that the bank having advanced their money upon an agreement for the mortgage of these houses, would be entitled in equity to have the memorandum rectified so as to carry out that agreement, and that they must be treated by the Court of Bankruptcy as possessing a valid security upon the two houses. *Boulter, In re, National Provincial Bank of England, Ex parte*, 40 L. J., Bank. 11; 4 L. R., Ch. Div. 241; 25 W. R. 673; 35 L. T., N. S. 673—C. J. B.

## II. INTERPRETATION AND EFFECT; RIGHTS AND LIABILITIES OF THE PARTIES.

### 1. *Nature of the Relation between Mortgagor and Mortgagee; Title to and Possession of the Mortgaged Premises, Rents and Profits.*

**Title and possession of mortgagor; and rights of mortgagor in possession of premises.**—In a court of law a mortgagor, in the actual possession of the mortgaged premises, may properly be described as tenant of the mortgagee. *Partridge v. Bere*, 1 D. & R. 372; 5 B. & A. 604.

Where the mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, the latter is not tenant at will to the former, but at most tenant by sufferance only, and may be treated either as a tenant or a trespasser, at the election of the mortgagee. *Doe d. Roby v. Maisey*, 8 B. & C. 767; 3 M. & R. 107. S. P., *Doe d. Fisher v. Giles*, 5 Bing. 421; 2 M. & P. 749.

Land was mortgaged in fee, with a proviso for redemption, on payment of the principal in June, 1833; but it was agreed that the mortgagee should not call in the principal till 1840, if interest was regularly paid in the meantime, and that the mortgagor should hold the premises, and take the rents, issues and profits for his own use, until default should be made in payment of principal and interest:—Held, that although, by the first part of the deed, the fee was vested in the mortgagee, the subsequent part operated as a re-demise of the premises to the mortgagor until 5th December, 1840, provided the interest was regularly paid in the meantime. *Wilkinson v. Hall*, 4 Scott, 301; 3 Bing. N. C. 508; 3 Hodges, 56.

A mortgagor will never be permitted to dispute the title of his mortgagee. *Goodtitle d. Edwards v. Bailey*, Cowp. 601. S. P., *Doe d. Bristol v. Peyge*, 1 T. R. 760, n.; 4 Dougl. 309.

By indenture of mortgage A. released premises to the mortgagee in fee, and demised to him other premises for years, provided that if A., the mortgagor, should pay the mortgage money on the 5th October next, the deed should be void; but, if the mortgagor should not then pay, it should be lawful for the mortgagee, after giving one month's notice, as after mentioned, to enter, and, whether in or out of possession, to lease and sell. Cove-

nant by mortgagee not to sell or lease until he had given one month's notice demanding payment, and the mortgagor should have made default:—Held, that, inasmuch as after the 5th October, the time, if any, during which the mortgagor was to hold was uncertain, and there was no affirmative covenant that he should hold at all, this was a covenant only, and not a re-demise to the mortgagor; and, that, on default by the mortgagor, the mortgagee might, after that day, bring ejectment against him without notice. *Doe d. Parsley v. Day*, 2 G. & D. 757; 2 Q. B. 147; 6 Jur. 913; 12 L. J., Q. B. 86.

A deed, after the usual power of sale by public auction or private contract, in the event of the non-payment of the mortgage money, contained a proviso and covenant by the mortgagee that no sale or public notice or advertisement for any sale should be made or given, or any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor. There was likewise a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgagee, on payment of a yearly rent, by two equal half yearly payments, but no livery of seisin was made to the mortgagor:—Held, that the mortgagor was only tenant at will to the mortgagee, and that those clauses in the deed did not create in him a tenancy from year to year. *Doe d. Dixie v. Davis*, 7 Exch. 89; 16 Jur. 44; 21 L. J., Exch. 60.

A mortgage deed contained a provision by which the mortgagor "did attorn tenant to the mortgagee," at a rent "payable quarterly," to be recoverable by distress and sale, action of "debt and otherwise howsoever:"—Held, that, after default made in payment of the principal, the mortgagee might eject the mortgagor without any notice to quit. *Doe d. Snell v. Short or Thom*, 4 Q. B. 615; 8 G. & D. 637; 7 Jur. 847; 12 L. J., Q. B. 264.

In an ejectment by a mortgagee against a mortgagor, to recover a house, he gave in evidence the mortgage deed (which included the house and some other property), and judgment in ejectment for the mortgaged property obtained in 1847; and showed that a paper (suggested to have been the declaration in ejectment) was, in that year, served on the mortgagor, and that from 1847 the mortgagor, who had till then been in possession of all the property, only held the house:—Held, that there was no evidence of possession by the mortgagee, or of the creation of a new tenancy under him in 1847, so as to prevent the operation of the Statute of Limitations. *Thorp v. Facey*, 35 L. J., C. P. 349; 13 Jur., N. S. 741; 1 H. & R. 678.

It is a misapplication of words to call an equity of redemption an "estate" in the proper technical legal sense. *Puget v. Eide*, 80 L. T., N. S. 228; 18 L. R., Eq. 118; 22 W. R. 625; 43 L. J., Chanc. 571—V. C. B.

#### Rights of mortgagee to, and in possession

—A lease mortgaged tenants' fixtures, and afterwards surrendered his lease to the lessor who granted a fresh term to another party. —Held, that the mortgagee had a right to enter and seize the fixtures, it not being competent to the lessee to defeat his grant by subsequent voluntary act of surrender. *London Loan and Discount Company v. Drake*, C. B., N. S. 798; 28 L. J., C. P. 297.

A mortgagee in possession of business premises is entitled to carry on business for a reasonable time so as to enable him to sell as a going concern, and for that purpose to use the name of the mortgagor's firm. *Cook v. Thomas*, 24 W. R. 427—V. C. M.

**Leases by mortgagor.**—A mortgagor of leasehold premises granted an underlease. The original lease, by numerous mesne assignments, and by the assignment of the equity of redemption by the mortgagor, became absolutely vested in the plaintiff as the legal personal representative of the last assignee:—Held, first, that as the mortgagor had only the equity of redemption at the time of the grant, the underlease operated as a demise by estoppel only between the parties to it; and that, as the mortgagor never afterwards acquired any legal interest in the premises, he could not pass any legal interest in that contract. *Doe d. Prior v. Ongley*, 10 C. R. 25; 20 L. J., C. P. 26.

Held, secondly, that although some of the mesne assignments were made subject to the under-lease, yet any possible effect of this circumstance was confined to the parties to the deeds, and inasmuch as neither the defendant nor any person through whom he claimed, or with whom he had any legal privity, was a party to such assignments, the plaintiff was in no respect bound or affected by the under-lease. *Ib.*

Held, thirdly, that though payment of rent had been made in accordance with the terms of the underlease, yet by such payment and the other circumstances of the case, a tenancy from year to year only had been created, which was well determined by a regular notice to quit, served upon the attorney or the administratrix of the person who paid rent to the plaintiff, and under whom the defendant claimed. *Ib.*

A., after mortgaging in fee to B., demised to C. for years from Lady-day, at a quarterly rent. A. afterwards sold the equity of redemption in parcel of the mortgaged premises to B.; B. in August gave notice of the mortgage, and required C. to pay to himself and not to A. rents then due, or thereafter to become due, from C. in respect of the mortgaged premises. B. then entered upon the parcel sold. In December C. tendered to B. three quarters' rent, due upon the lease to Michaelmas, which B. refused to accept:—Held, that this notice was sufficient to establish the affirmative of an issue taken upon an allegation, that B. demised to C. for one year from the date of the notice. *Browne v. Sney*,

M. & G. 117; 1 Scott, N. R. 9; 4 Jur. 810. See *Doe d. Hughes v. Bucknell*, 8 C. & P. 567—Patteson.

The tenant of a mortgagor, whose tenancy was created after the mortgage, and has never been recognized by the mortgagee, cannot maintain trespass against the mortgagee for entering and distraining on the land under the powers of the mortgage. *Gibbs v. Cruikshank*, 8 L. R., C. P. 454; 28 L. T., N. S. 735; 21 W. R. 734.

A mortgagor made a lease of part of the mortgaged premises; the mortgagee, with notice of the lease, took from the mortgagor a conveyance of the equity of redemption, in such a way as that, instead of being kept distinct, it became united with the interest in the mortgage:—Held, that the mortgagee was bound by the lease. *O'Loughlin v. Fitzgerald*, 7 Ir. R., Eq. 483—V. C.

As to leases of mortgaged property, in general,—see LANDLORD AND TENANT.

**Right to receive rents and profits.]—**A mortgagee having given notice to the tenants holding the mortgaged premises, under leases granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards. *Pope v. Biggs*, 9 B. & C. 245; 4 M. & R. 193.

The deposit of title-deeds is a sufficient authority to the mortgagee to receive rents. *Garry v. Sharratt*, 10 B. & C. 716.

In an action for use and occupation by a mortgagee against a tenant, it appeared, that, on the 24th of February, 1841, during a subsisting tenancy of the defendant, from year to year, the mortgage deed was executed; subsequently, by an agreement between the mortgagor and the tenant, improvements were effected on the premises, for which the latter agreed to pay an increased rent. On the 18th of October, 1842, notice of the mortgage was given to the tenant by the mortgagee, with a demand of payment of all arrears and of all future rent; in the action, both arrears and subsequently-acquired rents were sought to be recovered:—Held, that the plaintiff was entitled to recover such arrears, as well as such subsequent rent, and also the amount of the improved rent; for that the mortgage, and the subsequent notice of its execution, operated as an attornment, within 4 Anne, c. 16, s. 9; and that the case was not affected by the circumstance of the defendant being a mere tenant from year to year, and not holding under a lease; and that the relative position of the defendant and the mortgagee was not altered by the new agreement between the former and the mortgagor. *Burrows v. Gradin*, 1 D. & L. 218; 7 Jur. 942; 12 L. J., Q. B. 333—B. C.—Wightman.

A mortgagee avowed for rent due to him from the plaintiff, by virtue of a demise to him for two years, ending on the 29th of September, 1842. The plaintiff was tenant of the mortgagor, and he, with other tenants, subsequently to the mortgage, on the 14th of Oc-

tober, 1842, attorned to the mortgagee. Opposite the plaintiff's name in the instrument of attornment was entered, "Rent 55*l.* from Michaelmas, 1840:—"—Held, that the avowry was well supported. *Gludman v. Plumer*, 10 Q. B. 478; 10 Jur. 109; 15 L. J., Q. B. 70.

A. was seized in fee of a house and two acres of land, which he had let to B. A. mortgaged this property to C. in fee, and it was arranged between A., B. and C., that B. should pay the amount of the interest on the mortgage to C., and the residue of the rent to A. After this, C. gave notice to A. to pay the whole rent to him. A. did so:—Held, that by reason of the arrangement A. was not justified in so doing; but if there had been no such arrangement, it would have been otherwise. *Whitmore v. Walker*, 2 C. & K. 615—Patteson.

A. was seized in fee of nine acres of land charged with legacies, for which there was a power of distraining. A. let the land to B., and the legatees assigned their legacies to C., who gave notice to B. to pay the rent to him:—Held, that B. was not justified in so doing upon a notice only, although he would have been under a threat of a distress. *Id.*

Where the lessor of premises, at a rent payable quarterly, had given a written authority to a mortgagee to receive rent from the lessee, and the mortgagee had given notice to the lessee to pay such rent to no one but him, and the lessee had paid the mortgagee such rent from time to time, and there was still an arrear of interest due from the lessor on the mortgage:—Held, that these facts furnished no defense, under non tenuit and riens in arrear, pleaded by the lessee to an avowry of the lessor in respect of a quarter's rent which the lessee had not paid to any one. *Wheeler v. Branscombe*, D. & M. 406; 5 Q. B. 373; 18 L. J., Q. B. 83.

Where a mortgage had been effected and then a lease granted by the mortgagor in possession, upon which rent had become due, but before payment the mortgagee had given notice of the mortgage to the tenant in possession, and claimed the rent in arrear:—Held, in an action for use and occupation, brought for such rent in arrear by the mortgagor against the tenant in possession, that an averment of such notice and claim by the mortgagee, without an accompanying averment of a consequent payment by the tenant, was no sufficient bar to the mortgagor's right of action. *Wilton v. Dunn*, 17 Q. B. 294; 15 Jur. 1104; 21 L. J., Q. B. 60.

**Right to distrain for rent.]—**Where a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in the receipt of the rent incident to that reversion, he during such permission is presumptively *jura* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name as his bailiff. *Trent v. Hunt*, 9 Exch. 14; 17 Jur. 390; 22 L. J., Exch. 318.

A mortgagor in possession distrained for

rent accruing due after the mortgage, but the notice of the distress described the rent as due to himself:—Held, that he could make cognizance as the bailiff of the mortgagee. *Id.*

P. and F. were in partnership as brick-makers, and they mortgaged lands which they used for their partnership purposes, and of which they were seized as tenants in common, and also each of them separately attorned as tenants to the mortgagees, in respect of a moiety of the property which was in their joint occupation and at a separate rent. Subsequently the mortgagees took out separate distresses against the mortgagors for six years' rent due from each for his one equal undivided moiety of the premises, and they seized chattels on the partnership premises. The mortgagors became bankrupt, and the receiver in the bankruptcy claimed the goods as against the mortgagees:—Held, that the mortgagees, having in both cases distrained on goods which were the joint partnership property of the bankrupts, had exceeded their rights, and that they could not distrain on goods in which the tenant and another person had an undivided interest. *Parke, Ex parte Potter, In re.* 43 L. J., Bank. 189; 18 L. R., Eq. 381; 22 W. R. 708; 30 L. T., N. S. 618—C. J. B.

As to distress by mortgagees, generally, — see DISTRESS.

**Right to maintain possessory actions.]—**A party having mortgaged his premises to the plaintiff in 1846, and being allowed to remain in possession, let them in 1848 to the defendant. In October, 1849, the plaintiff, without having been otherwise in possession, brought ejectment against the defendant, who gave his consent to a judge's order, dated the 31st October. The order directed proceedings to be stayed till the 15th of November then next, the tenant in possession undertaking on that day to give up possession to the plaintiff, and that in default the plaintiff should be at liberty to sign final judgment, and issue execution against the tenant for the costs of such judgment, execution, writ of possession, costs of levy, &c. On the 15th of November the plaintiff first entered into possession of the premises, and brought an action for mesne profits accrued between November, 1848, and the 15th of November, 1849:—Held, that the plaintiff, not having been in possession of the premises prior to the 15th of November, could not maintain the action, his entry on that day not having relation back to his title as mortgagee, and that the judge's order made no difference in the case. *Litchfield v. Ready*, 5 Exch. 939; 20 L. J., Exch. 51.

Trespass will not lie against the occupier of land by a mortgagee, who has never been in actual possession, or been seized of the land, and has not obtained judgment in ejectment, either by default or by verdict, and therefore he cannot waive the tort, and maintain an action of use and occupation. *Turner v.*

*Cameron's Coalbrook Steam Coal Company*, 3 Exch. 932; 20 L. J., Exch. 71.

In trespass quare clausum fregit, the plaintiff made title under a mortgage deed of 6th March, 1840, by which the mortgagor demised premises to the plaintiff thenceforth for a term, subject to a proviso that the demise should cease and be void if the mortgagor paid principal and interest by 6th March, 1841, and interest at stated periods in the meantime; and to another proviso empowering the plaintiff to sell (after three months' notice) if default should be made in payment of principal and interest at the times named. Then followed covenants by the mortgagor to the plaintiff for payment of principal and interest at the days appointed, and that, at any time after default made in such payment, it should be lawful for the plaintiff peaceably and quietly to enter upon the premises, and thenceforth, for the residue of the term, to hold the same and take the rents and profits without lawful interruption from the mortgagor or any other person. On pleadings, setting forth the deed, and showing that the plaintiff had entered upon the mortgaged premises after the execution of the deed, but before 6th March, 1841, and before default in payment, and raising the question whether or not he had a right so to enter:—Held, that the deed gave power to the mortgagee to enter before default, and before the day named for any payment. *Rogers v. Greenbrook*, 8 Q. B. 895.

Mortgagees entering on the mortgaged premises, and re letting them to the mortgagor, as tenant, the mortgagor cannot maintain trespass against them for distraining. *Dawson v. Johnson*, 1 F. & F. 656.

A tenant for years of a house demised it, by a deed, dated March 24th, to the mortgagee, to hold thenceforth for the residue of the term (less one day), subject to a proviso; and he also sold and transferred the fixtures and chattels therein to the mortgagee, to hold for his own use and benefit, but subject to the same proviso. The deed contained a proviso for re-conveyance, on payment of the mortgage money on the 24th of June then next, and also a proviso, that, on non-payment on that day, it should be lawful for the mortgagee to enter upon and receive and take the rents and profits of the leasehold and other premises, and if he should think proper, of his sole authority, to sell or under-let the premises, and to sell the fixtures and chattels:—Held, that the mortgagee's right to take possession did not attach until the 24th June, and that he could not maintain trespass for an entry, or for an asportation of the fixtures and chattels before that day by a stranger. *Wheeler v. Montefiore*, 1 G. & D. 493; 3 Q. B. 133; 6 Jur. 209.

The defendant held, as tenant from year to year to the plaintiff, two distinct holdings—one at a rent of 63*l.* and the other of 3*l.*—the gale days of both being the same; the plaintiff granted his estate by way of mortgage, but continued in possession and receipt



of the rents, and, afterwards, in his rent-books consolidated the two holdings into one, at an increased bulk rent of 103*l.*, which was paid by the defendant. The plaintiff served notice to quit in his own name alone, and brought an ejectment in his own name, without joining the mortgagee:—Held, that these facts afforded no evidence of the creation, after the mortgage, of a new tenancy, so as to estop the defendant from showing that the plaintiff's title had passed from him to the mortgagee. *Delmege v. Mullins*, 9 Ir. R., C. L. 209—Exch. Cham.

[By the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25, sub-s. 5), a mortgagee entitled for the time being to the possession or receipt of the rents or profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.]

As to ejectment by mortgagees, generally, —see EJECTMENT.

**Right of re-entry on breach of conditions in lease.**—A mortgagee and mortgagor demised leasehold premises to J. for a term of years, reserving to them, or either of them, a right of re-entry if J. should assign without consent of the mortgagee. After several assignments, made with the consent of the mortgagee, before 23 & 23 Vict. c. 35, s. 1, an assignee in a deed (to which the mortgagee was a party for the purpose of assenting thereto) covenanted with the mortgagee not to assign without his consent, and a condition of re-entry was reserved to the mortgagee in case of such assignment. An ejectment was brought by the mortgagee and mortgagor to recover possession upon a breach of the condition:—Held, first, that the mortgagee could not recover under the condition of re-entry in the original lease, as his right of re-entry was determined by the assignment with consent, prior to the 23 & 23 Vict. c. 35. *Saunders v. Merryweather*, 18 W. R. 814; 3 II. & C. 902.

Held, secondly, that the mortgagee could not recover upon the right of re-entry reserved in the assignment, because he had no legal interest in the reversion. *Ib.*

Held, thirdly, that as from the recitals in the assignment it appeared that the mortgagee had no legal estate in the reversion, the assignee was not estopped from setting up such want of legal title in the mortgagee as a defense to the action. *Ib.*

**Right to determine tenancy by notice to quit.**—A mortgagor remaining in possession after the day of default has passed, receiving the rents and giving receipts in his own name, cannot, by notice to quit signed by himself only, determine a tenancy which existed at the time of the execution of the

mortgage. *Miles v. Murphy*, 5 Ir. R., C. L. 882—Q. B.

A mortgage deed containing a power authorizing the mortgagor to grant leases of any part of the mortgaged premises that might be "out of lease," provided that the counterpart should be delivered to the mortgagee, does not enable the mortgagor to determine pre-existing tenancies. *Ib.*

**Rights of parties to mortgages of land taken for or injured by public works.**—An act of parliament authorized lessees of mines to make a railroad to a canal, through the intervening lands, on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railroad, and paying an annual rent. The mortgagee afterwards entered into possession, and received the rent for some time:—Held, that the mortgagee and all claiming under him were bound by the agreement. *Mold v. Wheatcroft*, 27 Beav. 510.

A railway company having given notice of its intention to take a portion of premises upon which a business was being carried on, and of which mortgagees were in possession, the amount of compensation to be paid for the lands taken, and for the damage which might be sustained by reason of severance, or by reason of the execution of the works, or of the exercise of the parliamentary powers of the company, was submitted to arbitration, and the amount awarded was 11,950*l.*, of which the arbitrator certified that 2,800*l.* was given in respect of trade profits. The mortgagees, whose debt exceeded the entire amount of compensation, were held entitled to the whole sum. *Pile v. Pile, Lambton, Es parte*, 45 L. J., Chanc. Div. 841; 8 L. R., Ch. Div. 36; 24 W. R. 1003; 35 L. T., N. S. 18—C. A.

**Statutory powers of mortgagee in respect of premises.**—[As to powers of mortgagees to sell, insure, obtain appointment of a receiver, and give receipts for purchase money, being made incident to his estate, as if conferred by the party creating the charge, see 23 & 24 Vict. c. 145, Part II. ss. 11–24.]

**Duty of mortgagee to restore premises in their entirety.**—A mortgagee who holds property in pledge is responsible for it in its integrity. *Wood v. Easton*, 2 Giff. 692; 2 Jur., N. S. 720.

If a mortgagee so deals with the mortgaged estate as to render it impossible for him to restore it on full payment, a court of equity will prevent him suing at law to recover the mortgage money. *Pulmer v. Hendrie*, 27 Beav. 549.

A mortgagee who has advanced money on the security of stock for a fixed period is bound, in the absence of expressed stipulation to the contrary, to return the identical stock pledged at the expiration of the loan, and for this purpose stock is as capable of identification as any other security. If he sells the stock in pledge during the currency of the loan, he is accountable to the mort-

gagor for any profit made by the sale. *Langton v. Waite*, 87 L. J., Chanc. 345; 6 L. R., Eq. 165. See *S. C.* on appeal, 4 L. R., Chanc. 402.

As to re-conveyance of premises after payment of mortgage,—see this title, VI., 2.

**Liabilities of mortgagee speculating with property.**—Where a mortgagee enters into possession of mortgaged property with a view to a sale of it, he is bound to act with the same care and prudence, and to use every effort which a prudent man should use, to have the sale conducted under circumstances of the greatest advantage. *Marriott v. Anchor Reversionary Company*, 2 Giff. 457; 7 Jur., N. S. 155; 30 L. J., Chanc. 122; 3 L. T., N. S. 538; affirmed on appeal, 7 Jur., N. S. 713; 30 L. J., Chanc. 571; 4 L. T., N. S. 590; 3 De G., F. & J. 177.

If a mortgagee takes possession of mortgaged property, and uses it for the purposes of speculation or adventure, and the speculation or adventure results in a loss, the mortgagee must himself bear such loss. *Id.*

**Liabilities of mortgagee to account in respect of rents, profits, &c.**—A mortgagee who takes possession of the mortgaged estate is bound to render an account of rents and profits received, and is also liable for all which he might have received but for his willful default; but where persons, who though in fact mortgagees, enter into possession of the rents and profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established. *Parkinson v. Hanbury*, 3 L. R., H. L. Cas. 1; 36 L. J., Chanc. 292; 15 W. R. 642; 16 L. T., N. S. 243.

A person who, under a mortgagee, becomes possessed of a property supposing himself to be its purchaser, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot, therefore, be so treated as to make him liable to render accounts as an ordinary mortgagee in possession. It is essential to the creation of such a liability that he should have known he was in possession as mortgagee. *Id.*

A mortgagee is entitled to be allowed, in account against the mortgagor, all expenses properly incurred for the recovery of the mortgage money. *Ellison v. Wright*, 8 Russ. 458.

If a mortgagee uses timber on the mortgaged premises, which has been furnished to the mortgagor, but not paid for, he will be liable, though he is afterwards evicted. *Williams v. Shaw*, 1 Esp. 93—Kenyon.

A mortgagee of leaseholds may take possession, even when there is no arrear of interest due, under circumstances which may not render him liable to account with annual rests, as when he enters in order to prevent a forfeiture for non-payment of ground rent or

for non-assurance. *Patch v. Will*, 30 Beav. 99; 7 Jur., N. S. 1181; 9 W. R. 844.

A mortgagee in possession of a business is accountable not only for what he has received, but for what he ought to have received. *Chaplin v. Young*, 33 Beav. 330.

The executor of a person with whom a lease was deposited by way of equitable mortgage, not having taken possession, is not liable for the arrears of rent, or specific performance of the covenants. *Moore v. Cheat*, 8 Sim. 506; 3 Jur. 220.

A mortgage deed contained a proviso for redemption, on payment of the debt, which was a sum advanced to redeem the lands from eviction; and also contained a stipulation that the sum of 100*l.* a year was to be allowed to the mortgagee, who had an immediate right to go into possession, for his trouble in managing the lands of which he should be in possession; the mortgagee went into possession on the execution of the mortgage, and, in a redemption suit:—Held, that the stipulation for 100*l.* a year was void, and the court refused to allow the mortgagee credit for it in taking the account. *Comyns v. Comyns*, 5 Ir. R., Eq. 583—R.

A mortgagee, who went into possession under a contract between himself and his mortgagor, made subsequently to the mortgage, is liable to be charged as a mortgagee in possession. *McKinlay, In re*, 7 Ir. R., Eq. 467.

Stipulations for commission on receipt of rents and conversion of arrears of interest into principal inserted by a solicitor mortgagee in a mortgage deed prepared by himself, and insisted upon by him as the condition of any further advance to his client, will not be enforced in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit. *Eyre v. Hughes*, 3 L. R., Ch. Div. 148; 45 L. J., Chanc. Div. 895; 24 W. R. 597; 24 L. T., N. S. 211—V. C.B.

A mortgagee of an equitable lifeinterest in leaseholds was put in receipt of the rents during the mortgagor's lifetime, by order of the court, in an administration suit. The mortgagor disappeared, and was absent more than seven years, the mortgagee remaining in possession. The court having assumed that the mortgagor must be presumed to be dead, and that on the facts her death must be taken to have happened shortly after her disappearance:—Held, that the mortgagee occupied no fiduciary position towards the persons entitled in remainder; but that the remainderman had been guilty of no laches in not disturbing the mortgagee's possession before the end of the seven years, and that, therefore, (in analogy to the legal remedy), an account of the rents received should be directed for the period of six years from the presentation of the remainderman's petition claiming an account, and not merely from the presentation of the petition. *Hickman v. Ussell*, 46 L. J., Chanc. Div. 245; 4 L. R., Ch. Div. 144; 25 W. R. 175; 35 L. T., N. S. 919—

C. A. See *S. C.*, 2 L. R., Ch. Div. 617; 24 W. R. 694—V. C. H.

The mortgagees of land, consisting of copses and of a farm which was let without the shooting or the timber, gave notice to the tenant of the farm to pay the rent to the mortgagees, and afterwards moved to restrain the mortgagors from cutting the timber:—Held, that though the mortgagees had become mortgagees in possession of the farm, they had not become mortgagees in possession of the shooting, the copses, or the timber, so as to be liable to account for default. *Simmins v. Shirley*, 6 L. R., Ch. Div. 173; 46 L. J., Chanc. Div. 875; 26 W. R. 25; 37 L. T., N. S. 121—Fry, J.

**Powers of equitable mortgagees in respect of premises.**—Trustees having power, during the minorities of tenants for life or in tail, to superintend the management of an estate, cut timber, erect, pull down and repair houses, and do various other things of a more or less similar character, "and generally to deal with the premises as they or he might do if they or he were the absolute beneficial owners or owner, without being answerable for any loss or damage which might happen thereby," deposited with a bank the title-deeds of the estate to secure an advance of money to be employed in the erection of buildings under the power:—Held, that the bank had no valid title under the power. *Broom v. Sheffield and Rotherham Bank*, 24 W. R. 948—R.

The deposit of title-deeds is a sufficient authority to the mortgagee to receive rents. *Garry v. Sharrutt*, 10 B. & C. 716.

As to extent of premises subject to equitable mortgage,—see this title, II., 8.

**Right to possession of title-deeds deposited by way of equitable mortgage.**—A. mortgaged to B. in fee, for value, the mortgage deed containing a stipulation that the deeds affecting the property should be deposited with the mortgagee. The mortgagor accordingly deposited with him two deeds, one of which was genuine and the other a forgery. Shortly afterwards C., without notice of the mortgage to B., advanced money to A., taking as security deeds, among which were two purporting to be the two former, but one only of which was genuine, and the other a forgery:—Held, that detinue lay by B. against C. to recover the genuine deed deposited with him. *Newton v. Beck*, 3 H. & N. 220; 4 Jur., N. S. 340; 37 L. J., Exch. 273.

An estate was conveyed in 1803 by B. to H., who in 1812 conveyed it to A. H., and he sold it in 1820 to the plaintiff. The original vendor did not deliver up the title-deeds. In 1824 he was sued by the then owner of the estate for the deeds, and a verdict was recovered against him, but the judgment was not docketed. He absconded, and in 1825 obtained a sum of money, as on a mortgage of the estate, from one of the defendants, with whom he deposited the deeds. On

trover brought in 1820 by a party claiming through the conveyance to H.:—Held, that the legal owner of the estate might recover the deeds from the mortgagee without tendering the mortgage money. *Harrington v. Price*, 3 B. & Ad. 170.

### 2. Attendant Terms.

**When satisfied, merged or otherwise extinguished.**—Two terms were created in the same manner, one of 500 years, in 1712, the other of 600 years, in 1768. In 1791, the latter was assigned to A., to secure a mortgage debt; and, by a deed of even date, the former was assigned to B., as a trustee for A. A. died, having appointed B., C. and D. his executors. In 1801, by a deed indorsed on the first assignment of 1791, and "made between B., C. and D. executors of A., of the one part, and E., of the other part," B., C. and D. assigned the premises, "and all the estate, right, title and interest" to E. for the residue of the term of 600 years, subject to the equity of redemption:—Held, that the term of 1712, being held by B. in what must be deemed his own right, did not pass by force of the words "and all the estate, right, title and interest," and was not merged. *Cooper v. Harrison*, 2 Kay & J. 86.

In 1838, H. mortgaged premises for 1000 years to D., and in 1839 conveyed the fee, subject to the mortgage term, to her daughter, the wife of the defendant; this conveyance was unknown to the parties to the subsequent deeds. In 1842, H. mortgaged the premises in fee to M., and in October, 1844, conveyed the equity of redemption to C. In October, 1844, M. assigned the mortgage of the fee to R. T., and the representatives of D. assigned the term of 1000 years to a trustee, to secure the mortgage money to, and afterwards to be reconveyed as C. should direct. In September, 1847, part of the premises being required for a railway, C. received the purchase-money from the company, and therewith paid off the mortgagees:—Held, that the term had not become attendant upon the inheritance by construction of law, so as to be determined by 8 & 9 Vict. c. 112, s. 2, and therefore C. was entitled to recover upon the demise of the trustees. *Doe d. Clay v. Jones*, 13 Q. B. 774; 13 Jur. 824; 18 L. J., Q. B. 260.

In 1829, A. died seized in fee of lands, of which his eldest son, B., was his tenant. B., supposing him to have died intestate, entered on the lands, claiming them as heir-at-law; and, in 1830, mortgaged them in fee, and levied a fine to confirm the mortgage; and, at the same time, an outstanding term of 500 years was, by his direction, assigned to a trustee for the mortgagee. In 1835, B. sold the estate to the defendant, who paid off the mortgage. The legal estate in the fee and the equity of redemption were conveyed to the defendant, and the term was assigned to a trustee for him, to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in

fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee to whom the term was assigned in 1835:—Held, that, by the operation of the 8 & 9 Vict. c. 112, the term had absolutely determined; and the plaintiff could not recover upon the demise laid in the name of the trustee. *Doe d. Cadwalader v. Price*, 10 M. & W. 603; 11 Jur. 131; 10 L. J., Exch. 159.

A term outstanding in a trustee for a mortgagor, and to attend, is not so merged by 8 & 9 Vict. c. 112, as to prevent the mortgagor assigning it to a trustee as a security for the mortgage debt. *Shaw v. Johnson*, 1 Drew. & Sm. 124; 7 Jur., N. S. 1005; 30 L. J., Chanc. 846; 9 W. R. 629; 4 L. T., N. S. 401.

A term attendant on the inheritance cannot be disannexed, except by one who has power to create a term, or deal with the inheritance; and therefore where such a term was, prior to the 31st December, 1845, assigned at the instance of a tenant for life to secure repayment of money advanced upon a pretended mortgage of the fee, and afterwards for the benefit of the tenant for life, and persons to whom he affected to grant the fee, the term continued to attend the inheritance of the rightful owners, and was either extinguished by 8 & 9 Vict. c. 112, s. 1, or at any rate could not be set up against them. *Plant v. Taylor*, 5 L. T., N. S. 318; 7 H. & N. 211; 8 Jur., N. S. 140; 31 L. J., Exch. 280.

A term was created in 1813, to secure repayment of a loan, which was repaid in 1837. In 1840 the land was demised for lives by the heir-at-law of the creator of the term. In 1843 the term was re-assigned by the satisfied creditor to a new incumbrancer, by direction of the heir-at-law of the creator of the term:—Held, that the term was not satisfied under 8 & 9 Vict. c. 112, so as to inure to the benefit of the lessee for lives. *Owen v. Owen*, 10 Jur., N. S. 884; 33 L. J., Exch. 237; 3 H. & C. 89; 11 L. T., N. S. 137.

A mortgage was made for a term of years, and subsequently the reversion was conveyed to a trustee for sale to secure a further advance and the prior advances:—Held, that the terms were not merged, though portions had been sold by the trustee with the concurrence of the mortgagee. *Locking v. Parker*, 43 L. J., Chanc. 257; 8 L. R., Ch. 30; 27 L. T., N. S. 635.

T. was beneficially entitled for his life to renewable leaseholds for three lives, held on trust to renew, and subject to certain charges. All the cestuis que vie having died, and T.'s right to renew being disputed by the reversioner, the trustee of the leaseholds, with the consent of the persons entitled to the charges, in order to facilitate the obtaining of a renewal, transferred the legal estate to T. by a deed which recited (though contrary to the fact) that the charges had been paid by T. Thereupon T. obtained a renewal (without prejudice to the question in dispute), and to avoid litigation, purchased the reversion in

fee. He subsequently paid off the charges and mortgaged the premises in fee. By his will, reciting that the charges were subsisting, he devised his interest in the premises to T. T., subject to the charges:—Held, that T. T. took the fee subject to the charges. *Trumper v. Trumper*, 43 L. J., Chanc. 411; 8 L. R., Ch. 870; 21 W. R. 692; 29 L. T., N. S. 86.

A lessee of land for ninety-nine years created a mortgage term which ultimately became vested in a trustee for a mortgage, and subsequently acquired the fee. He afterwards became bankrupt. In pursuance of an agreement between his assignees, himself, and the mortgagee, a deed was executed by which the mortgagee released the mortgage debt, and the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. It was intended that the wife of the mortgagor, who was married in 1832, should join in the deed for the purpose of releasing her dower, but she refused to execute it, and after his death she filed a bill to enforce her right to dower:—Held, that the mortgage debt was not extinguished, and that the term was not satisfied within the Satisfied Terms Act, 8 & 9 Vict. c. 112, s. 2, and that the term afforded the purchaser protection against the right of dower. *Anderson v. Pignet*, 8 L. R., Ch. 180; 42 L. J., Chanc. 310; 27 L. T., N. S. 740; 21 W. R. 150; reversing *S. C.*, 11 L. R., Eq. 329; 40 L. J., Chanc. 199; 23 L. T., N. S. 793; 19 W. R. 807—V. C. B.

A term does not become satisfied within the act, unless the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person. *Id.*

### 3. *Extent of Premises Mortgaged or Charged.*

**What lands included in mortgage, generally.]—A.**, being possessed of an undivided moiety of a messuage in Ratcliffe Highway, in fee, and having a lease of the other moiety with covenants to repair and to insure and not to assign without license, by a deed, reciting that he was seized in fee of the messuage in Ratcliffe Highway, and also of two leaseholds, one in Newgate Street, the other in Crawford Street,—granted to C., by way of mortgage in fee, all his estate and interest in the messuage in Ratcliffe Highway, in the most general words, and also granted to C. an underlease of the premises in Crawford Street, and covenanted to assign to her the premises in Newgate Street, to secure payment of a debt:—Held, that the undivided moiety in fee which A. had in the messuage in Ratcliffe Highway alone passed by this deed, and not his leasehold interest in the other moiety. *Francis v. Minton*, 3 L. R., C. P. 543; 36 L. J., C. P. 201; 16 L. T., N. S. 352.

A lord of a manor, which was situated in the parish of K., in the county of M., being entitled also to other real estate in K., not

parcel of the manor, mortgaged this last mentioned estate, not including the manor, to A. Afterwards, by a deed reciting that he was seized of or entitled to the messuages, lands, hereditaments and premises therein-after intended to be conveyed, subject to the mortgage to A., he conveyed to B., by way of mortgage, all the property comprised in the mortgage to A., "and all other the lands, tenements and hereditaments in the county of M., whereof or whereto the mortgagor is seized or entitled for any estate of inheritance."—Held, that the manor of K. was not included in this mortgage to B. *Brooks v. Kensington*, 2 Kay & J. 753; 2 Jur., N. S. 753; 25 L. J., Chanc. 795.

If a lord of a manor mortgages the manor in fee to A., and afterwards purchases copyholds held of the manor, and takes surrenders of them to himself in fee, they will accrue to the benefit of the mortgagee; and a settlement by the lord of all his estate mortgaged to A. will pass the equity of redemption of such surrendered copyholds. *Doe d. Gibbons v. Pott*, 2 Dougl. 710.

—*in equitable mortgages.*—A. being indebted to his bankers, sent them certain title-deeds, with a letter, in which he stated that he thereby pledged his grant of coal under a certain estate, which he specified, as a security for the money advanced, and also as a general cover for his banking account with them. There were other estates belonging to A., comprised in the deed sent:—Held, that the bankers could only claim a lien upon the estate specified. *Wylde v. Radford*, 9 Jur., N. S. 1169; 33 L. J., Chanc. 51; 12 W. R. 38; 9 L. T., N. S. 471—V. C. K.

A., by deed, mortgaged freeholds to B. At the same time the title-deeds not only of the freeholds but of leaseholds belonging to A. were delivered to B.:—Held, in the absence of proof to the contrary, that B. had no lien on the leaseholds for the money advanced. *Wardle v. Oakley*, 36 Beav. 27.

**When fixtures, machinery, furniture, &c., are included, in mortgages, generally.**—Two persons, carrying on business in copartnership as copper roller manufacturers, executed a mortgage of the land, mills or factories on which the business was carried on, and of which they were seized in fee, and all and singular the steam-engine, steam-boilers, mill-gear, millwright work and machinery then or thereafter to be fixed to the said lands, hereditaments and premises, together with all outhouses, edifices, fixtures, &c. The partners having become bankrupts:—Held, that the mortgagees were entitled, as against the assignees, to all machinery which was fixed to the freehold. *Mather v. Fraser*, 2 Kay & J. 536; 2 Jur., N. S. 900; 25 L. J., Chanc. 361.

A mortgage was executed of certain plots of land, and "also all that silk-mill then erected, or in the course of erection, and all other buildings then or thereafter to be

erected thereon, and also all those the steam-engines or steam-engine boilers, steam-pipes, main shafting, mill-gearing, millwrights-work, and other machinery and fixtures" whatsoever, then erected or set up, or standing or being, or which should at any time thereafter be erected or set up, or stand or be in or upon the land, mill and premises, or any part thereof:—Held, that all the machinery and fixtures used in the manufacturing of silk within the mill were included in the mortgage. *Huley v. Hummersley*, 7 Jur., N. S. 765; 30 L. J., Chanc. 771; 3 De G., F. & J. 587; 9 W. R. 562; 4 L. T., N. S. 209.

Mortgage of iron works and rolling-mills with the machinery specified in schedule, "and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the premises, whether in addition or substitution:—Held, that the words "fastened in or upon the premises," governed the sentence, and that subsequent additions, consisting of an engine for turning a lathe, a steam-hammer and an anvil, a boiler and a furnace, passed to the mortgagees; but that cutters, bed plate, straightening plate, and the metal flooring of the mill, did not. *Metropolitan Counties Insurance Society v. Brown*, 26 Beav. 454; 29 L. J., Chanc. 581; 5 Jur., N. S. 378; 7 W. R. 303.

A mortgagee, as against the assignees of the tenant of the mortgagor, is entitled to trade fixtures affixed to the freehold by such tenant subsequently to the date of the mortgage. *Cullwick v. Seindell*, 36 L. J., Chanc. 173; 3 L. R., Eq. 249; 15 W. R. 216—R.

In suits for redemption and foreclosure, F., a third mortgagee (who was also first mortgagee) attempted to impeach the security of B., the second mortgagee, on the ground of fraud, but at the hearing his bill was dismissed with costs in this respect, and an ordinary decree for foreclosure and redemption was made. On taking the accounts, F. attempted to raise the question whether B.'s security, which comprised leasehold premises and also trade fixtures, machinery and loose chattels, was not invalid, as to the trade fixtures, machinery and loose chattels, because it had not been registered under the Bills of Sale Act. F., who had registered his later security, contended that he was not bound to account as mortgagee in possession of the trade fixtures, machinery, and chattels, on the ground that his registration had been the means of preventing any claim on the part of the assignees in bankruptcy of the mortgagor:—Held, that this contention ought to have been raised at the hearing, and that it was too late to raise it afterwards, and consequently that the respective mortgages must be taken to comprise what was expressed to be included in them. *Debbie v. Fenwick, Fenwick v. Debbie*, 20 W. R. 67; 25 L. T., N. S. 441; 6 L. R., Ch. 869.

A mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant therein, described the chattels assigned as

being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto, and read and construed as forming part of these presents." The deed contained no mention of stock-in-trade. The inventory, which was signed by the mortgagors on the same day as the deed, extended over twenty-one pages. The first twenty pages contained a detailed description of the engines, and other chattels which were mentioned under general heads in the deed. At the bottom of page 20 was this clause: "The stock-in-trade consists of bolts, brass work, wrought and cast-iron work, brass and other work, both finished and in preparation." And at the top of page 21 were these words: "Also all cast and wrought iron, steel, timber, and all other stock-in-trade in and upon the before-mentioned foundry, workshops, and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." This was immediately followed by the signatures of the mortgagors:—Held, that the stock-in-trade was not included in the mortgage. *Jardine, Ex parte, McManus, In re*, 10 L. R., Ch. 322; 23 W. R. 736; 31 L. T., N. S. 802; 44 L. J., Bank. 58; affirming the decision of Bacon, V. C., 23 W. R. 382.

A mortgage of premises will pass the fixtures upon the premises. *Meuz v. Jacobs*, 7 L. R., H. L. Cas. 481; 44 L. J., Chanc. 481; 23 W. R. 526; 32 L. T., N. S. 171.

A mortgage of a lease made by the lessee will carry the fixtures of that property which is in lease, and the power to remove which fixtures was in the tenant. *Ib.*

Fixtures attached by the mortgagor to the property after the date of the mortgage, will also (unless under special stipulations) pass to the mortgagee. *Ib.*

There is no difference in this respect between a mortgage in fee by a freeholder and a mortgage by way of assignment of a term by a leaseholder. *Ib.*

— under equitable mortgages.]—A. deposited with B., as security for a debt, deeds of lease and release, by which a freehold house and household furniture therein were conveyed and assigned to A. The memorandum of deposit was as follows:—"Here-with I hand you the title-deeds of my Bognor estate, &c."—Held, that these words had reference only to the house, and did not comprehend the furniture. *Hunt, Ex parte*, 1 Mont., D. & D. 139; 4 Jur. 342.

Under an equitable mortgage by the simple deposit of a lease, unaccompanied by any memorandum, the tenant's fixtures will be included. *Williams v. Evans*, 23 Beav. 239.

As to right to fixtures, between mortgagor and mortgagee, in general, and independent of particular provisions of mortgages,—see **FIXTURES.**

**Increase or additions.]**—By an indenture

of mortgage made between B. and W., certain flocks of sheep and certain herds branded B., then depasturing on a station in the colony of Victoria, "together with all and singular the issue, increase and produce of the sheep and cattle respectively," were assigned by B. to W. by way of mortgage. By a subsequent indenture of mortgage reciting the former indenture, B. assigned "all the issue, increase and progeny of the sheep" on the station to P. and D., with a power of sale. Previously and subsequently to the latter indenture, B. purchased and brought upon the station large additions to the flock of sheep, and branded them with the letter B. B. also obtained a lease of the station, and deposited it with P. and D. as additional security:—Held, on a bill filed by W., after a sale by P. and D. both of the sheep and the lease, praying for payment of advances out of the proceeds of the sale of all the sheep and the lease, that by the words "increase of the sheep" in the first indenture was meant the natural increase or offspring of the original sheep mortgaged, and that such words did not include additions made to the flock by purchase. *Webster v. Power*, 37 L. J., P. C. 9; 2 L. R., P. C. 69; 5 Moore P. C. C., N. S. 92.

**Cases of several mortgages.]**—A person holding two mortgages, created by the same mortgagor, on two separate estates, by distinct deeds, may charge each estate with the aggregate of the two debts, even as against a person who purchased the equity of redemption in the estate first mortgaged before the second mortgage was got in. *Beevor v. Luck*, 36 L. J., Chanc. 865; 4 L. R., Eq. 537; 15 W. R. 1221—V. C. W.

#### 4. Money or Debt Secured.

**Extent of security, generally.]**—A executed a conveyance of all his estate and property to trustees for the benefit of his creditors. His lands were under mortgage, and the mortgagees were made assignees in trust under the deed, with the usual powers and provisions for the protection and in case of the trustees. The mortgagees, immediately after the execution of the creditors' deed, appointed W., one of their number, to be receiver, who paid in the amounts received by him to the bankers, to the account of the trustee mortgagees (by name), "as assignees in trust of A."—Held, that such entry showed W. to have received the rents as their agent, not in their character of mortgagees, but in their character of trustees, and that they could not add to their mortgage money and interest, and costs, charges and expenses properly incurred, the commission paid or allowed to A. upon the rents received by him. *Nicholson v. Tutin*, 3 Kay & J. 159; 3 Jur., N. S. 235.

By a deed made by K., the plaintiffs and the defendant, by which K. mortgaged to the plaintiffs the Kingston recovery estate, consisting of a number of small holdings and tithes, many of which were taken in kind, it was



reed that the defendant, an attorney practicing in London, should be appointed receiver with the usual powers. The deed provided for the application of the rents, &c., as follows, viz.:—that the defendant should, in the first place, pay all the costs, charges and expenses which he should bear, sustain, incur or be liable to in or about the collecting, receiving and compelling payment of the rents, &c., including therein all expenses of suit, action, process, distress and all other charges of management whatsoever." It provided that the interest upon the mortgages should be paid, and that the defendant should pay over to K. the residue of the rents, &c., after answering the purposes aforesaid, and deducting and detaining out of such residue for his own use so much and such sums of money as he should reasonably deserve, as a compensation for his care and pains, and trouble and expense in collecting, receiving and paying the rents, &c., for the time being received or collected:—Held, that the receiver was entitled to repay himself such sums as were reasonably expended by him in the collection of the rents (including a salary or percentage paid to a collector), before applying the rents, &c., to the satisfaction of arrears of interest due upon the mortgages. *Gilbert v. Dyneley*, 3 Scott, N. R. 364; 3 M. & G. 12; 5 Jur. 843.

A. gave an undertaking to pay C. 35*l.* upon the execution of a mortgage from S. to B. S. conveyed to B. the property intended to be the subject of the mortgages, by assigning it to him in trust to sell it, and for B. to pay himself the sum advanced, and to pay 22*l.* to C. as part of his claim, and, after other payments, which were specified, to pay the surplus to S. C. was not only aware of this arrangement, but was at one time intended to have been a trustee under the deed of assignment:—Held, that this conveyance was a mortgage within the meaning of the undertaking, but that C. could not recover, in an action upon the undertaking, the 22*l.* mentioned in the deed, as he had allowed that to become a subject of the trusts. *Crook v. Beelham*, 6 C. & P. 761—Tindal.

A person having devised estates, A. and B. deposited the title-deeds of A. with his bankers to secure any balance that might be due from him, and being largely indebted and unable to satisfy the debt, and requiring further small advances, deposited with the bank the title-deeds of B. The debt remaining due at his death:—Held, that the amount due up to the time of the second deposit was payable out of A.; and the amount accrued subsequently out of A. and B. ratably; the value of A. to be computed after payment of the previous mortgage. *De Rochefort v. Daves*, 12 L. R., Eq. 540; 40 L. J., Chanc. 625; 25 L. T., N. S. 456—V. C. W.

As to when payment of interest is secured by mortgage,—see this title, VI., 1, b.

Further advances.]—A mortgagee having advanced to the mortgagor a further sum

upon his bond:—Held, that the bond, though obscurely worded, was evidence of an agreement for a further charge upon the mortgaged premises. *Hearn, Ex parte*, Buck, 165.

Where there is a mortgage for present and future advances, and a subsequent mortgage of the same description, further advances made by the prior mortgagee, with notice of the subsequent mortgage, have no priority over antecedent advances made by the subsequent mortgagee. *Rolt v. Hopkinson*, 3 De G. & J. 177; 4 Jur., N. S. 1110; 23 L. J., Chanc. 41.

An equitable mortgage by deposit of deeds may be extended beyond the original purpose, to advances after the alteration of the firm, by implication or parol. *Kensington, Ex parte*, 2 Ves. & B. 70; 2 Rose, 138.

A further debt, agreed to be secured by pledge of property equitably mortgaged, is also tantamount to a further equitable mortgage; and possession of the deeds by the first mortgagee is a possession by the second. *Factor v. Philpott*, 12 Price, 107.

But a mortgage to secure future advances will not operate as a security for costs subsequently incurred. *Shaw v. Neale*, 6 H. L. Cas. 581; 4 Jur., N. S. 653; 27 L. J., Chanc. 444.

A. gave his acceptance to B. for 18,700*l.*, payable (six months after date) on the 5th of February, 1867, and it was discounted by a bank. A. mortgaged a station, and also mortgaged the stock upon it to B. to secure the repayment of 18,700*l.*, with interest at 12½ per cent., on the day above mentioned, and to secure the payment of any bill which the mortgagee might receive, take, make or indorse by way of renewal or in substitution for the acceptance, or on account of all or any part of the sum therein mentioned, or on any other account incidental thereto. It was also stipulated in the mortgage of the stock that if default should be made in payment by the mortgagor of the license fees, or rent, charges, fines, penalties, and other charges which should become payable in respect of the station or run, or the stock thereon, or in relation thereto, the mortgagee might pay it, and the run, stock, &c., should be chargeable therewith. The bill was renewed from time to time, B. paying the discounts to the bank on A.'s behalf, and debiting A. with the amount in an account current rendered to A., in which he charged A. with interest and mercantile commissions:—Held, that, notwithstanding this mode of keeping the accounts, the amount of the advances for discounts was secured by the mortgage. *Fenton v. Blackwood*, 5 L. R., P. C. 167; 22 W. R. 502.

Held, also, that advances for payment of government rent due and for scab licenses for sheep might be charged to the mortgage, but that sheep-wash could not. *Id.*

Covenants to pay; merger of simple contract debts.]—Three persons were owners of property, and they employed the plaintiff to

let it for them, and two of them executed a mortgage-deed, securing to him the amount of his bill; in an action against the three for the amount of the bill:—Held, that the action would lie, as the specialty not being co-extensive with the simple contract liability, the latter was not merged in the former. *Sharp v. Gibbs*, 16 C. B., N. S. 527; 12 W. R. 711.

A debtor covenanted to execute a mortgage of some property to secure a debt, and covenanted that the deed should contain all the covenants usually inserted in a mortgage. The instrument of charge was under seal:—Held, that as a covenant to pay is a usual covenant in a mortgage-deed, the debt became a specialty debt. *Saunders v. Milsome*, 2 L. R., Eq. 573; 15 W. R. 2; 14 L. T., N. S. 788.

**Provisos in nature of penalty; relief against in equity.**—Where a mortgage to secure an existing debt, payable by installments, with interest to the times of payment, contained a proviso that, in the event of the debt not being punctually paid by installments as specified in the deed, the full amount of the debt should immediately become payable:—Held, that the proviso was not in the nature of a penalty, and that relief in equity could not be granted to the mortgagor against it. *Sterne v. Beck*, 32 L. J., Chanc. 682; 1 De G., J. & S. 595; 11 W. R. 791.

A creditor having agreed with his debtor to remit part of the debt upon having a mortgage to secure the payment of the balance within two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time, the debtor executed a mortgage for such balance, containing a proviso that if the mortgage debt was not paid within the two years, the whole of the original debt should be recovered. The debt was not paid within the two years:—Held, that the proviso was of the nature of a penalty, from which the mortgagor was entitled to be relieved in equity, and that the mortgagee could only recover the smaller sum. *Thompson v. Hulson*, 2 L. R., Eq. 612.

As to payment of money secured by mortgage,—see this title, VI., 1; remedies for recovery,—see this title, VII.

### III. ASSIGNMENT AND TRANSFER OF MORTGAGES.

**What mortgages assignable.**—Where a debtor deposits a title-deed with his creditor, as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person. *Llobson v. Mellond*, 2 M. & Rob. 349—Rolfe.

**Sufficiency of consideration.**—On the transfer of a mortgage of 10,000*l.*, with an additional advance of 4,000*l.*, it was proved that the 10,000*l.* were paid in bank notes by the transferee to the original mortgagee, and the 4,000*l.* by a check to the mortgagor, as to which there was no proof that it was honored:

—Held, that the payment of the 10,000*l.* was a sufficient consideration as against one claiming under a voluntary settlement. *Doe d. Barnes v. Doe*, 6 Scott, 523; 4 Bing. N. C. 737.

**Notice to the mortgagor of an assignment of the mortgage is not necessary.** *Jones v. Gibbons*, 9 Ves. 411.

**Rights of assignee.**—The assignee of a mortgage cannot stand in any different character, or hold any different position, from that of the mortgagee himself, although the mortgagor may not have been a party to the assignment. *Walker v. Jones*, 1 L. R., P. C. 50; 12 Jur., N. S. 881; 35 L. J., P. C. C. 39; 14 W. R. 484; 14 L. T., N. S. 686.

A. obtained a mortgage of real and personal estate from B., without consideration. It was afterwards deposited with C. as a security, who had no notice of the circumstances under which it had been obtained:—Held, that C. could stand in no better position than A., and the deed being void as against A., was equally void as against C. *Parker v. Clarke*, 30 Beav. 54; 7 Jur., N. S. 1367; 9 W. R. 877.

Where, under a lease from A. to B. for twenty-one years, at the rent of 50*l.*, B. by indenture assigned the lease to C., to secure money previously advanced to him by C., a great part of which was laid out by B. in repairing and improving the premises demised; and C. registered the assignment, but did not take the indenture of lease from B., who afterwards gave up the indenture to A., in consideration of receiving a further advance from him of 200*l.*, to be expended in further improvements; and A. granted him a new lease at the increased rent of 70*l.* per year; and B. afterwards again gave up that lease, on having another advance made to him of 200*l.* more by A., and took a third lease from him at a rent of 90*l.*:—Held, that C. was not, under the circumstances, precluded, by the neglect to take from B. the indenture of lease, from availing himself of the assignment against A. *Bailey v. Fernor*, 9 Price, 263. But see *Goodtitle d. Norris v. Morgan*, 1 T. R. 755.

A mortgage deed, dated the 15th of June, 1825, contained a covenant to pay the mortgage debt twelve months after date, with a power of sale in case of default. A transfer of the mortgage, dated the 2d of July, 1830, recited that the old power of sale had not been and was not intended to be exercised, and contained a covenant to pay the mortgage debt seven years after that date, with a power of sale in case of default, and also assigned the debt and all powers and remedies for recovering the same and all the benefit of the previous mortgage:—Held, that the old power was not extinguished. *Boyd v. Petrie*, 41 L. J., Chanc. 878; 7 L. R., Ch. 335; 20 W. R. 513; 25 L. T., N. S. 460; reversing *S. C.*, 10 L. R., Eq. 482; 29 L. J., Chanc. 412—R.

A bona fide transferee for value of a mortgage, where the mortgagor does not join in the transfer, takes subject to equities of ac-

ment between the mortgagor and mortgagee, it not necessarily subject to any equity existing between the mortgagor and mortgagee under which the original security might be impeached. *Judd v. Green*, 45 L. J., Chanc. Div. 108; 33 L. T., N. S. 597—V. C. B.

Although the transferee of a mortgage, without the mortgagor's concurrence, takes it subject to the equities affecting the account between the mortgagor and the mortgagee, and can claim on his security no more than is justly due from the mortgagor, yet, if the transfer is for value, and without notice of equitable grounds which render the security impeachable by the mortgagor as against the mortgagee, then, as between the mortgagor and transferee, the latter has the better equity, and is entitled to what is due to him on his security. *Nant-y-glo and Blaina Ironworks Company v. Tamplin*, 83 L. T., N. S. 125—V. C. B.

As to priorities after assignment of mortgages,—see this title, V.

#### IV. CONVEYANCE OR ASSIGNMENT OF EQUITY OF REDEMPTION.

An agreement to convey an equity of redemption is not binding unless in writing. *Massey v. Johnson*, 1 Exch. 241; 17 L. J., Exch. 182.

Rights of assignees or grantees.]—A., having demised land to a tenant for years, mortgaged it, and afterwards assigned his equity of redemption to the defendant. The defendant paid off the incumbrance, but, before a transfer was executed, distrained in the name of the mortgagee for rent in arrear:—Held, that he had the same implied authority to do so as a mortgagor in possession. *Snell v. Finch*, 13 C. B., N. S. 651; 9 Jur., N. S. 333; 82 L. J., C. P. 117; 7 L. T., N. S. 747.

If a mortgagor of lands, who retains only an equity of redemption, leases by deed, and afterwards assigns his interest in the land by words large enough to convey a legal estate, the assignee may, as assignee of the reversion, sue the tenant for waste in breach of the covenant in the lease, for the tenant is estopped from denying that his lessor had a legal reversion capable of being assigned. *Cuthbertson v. Irving*, 4 H. & N. 742; 5 Jur., N. S. 740; 28 L. J., Exch. 306; affirmed on appeal. 6 H. & N. 135; 6 Jur., N. S. 1211; 29 L. J., Exch. 495; 8 W. R. 704; 3 L. T., N. S. 335—Exch. Cham.

The assignee of a mortgagor who has let a tenant into possession after the mortgage can sue such tenant for use and occupation, notwithstanding notice from the mortgagee to pay rent. *Hickman v. Machin*, 4 H. & N. 716; 5 Jur., N. S. 576; 28 L. J., Exch. 310.

As to right of redemption, in general,—see this title, VI., 3.

Liability of mortgagee joining to pass legal estate.]—A mortgagee joining for the sake of passing the legal estate only is to be held as strictly to his covenants as any other

covenantor. *Clifford v. Hoare*, 30 L. T., N. S. 403; 22 W. R. 828—C. P.

#### V. PRIORITY OF OR BETWEEN MORTGAGES; PACKING; CONSOLIDATION.

##### 1. Priority, in General.

Between different mortgages, and between mortgages and other liens, charges and incumbrances, generally.]—A first mortgage of real estate was made to A. in fee. A second mortgage was then made to B. of the same estate, together with other real estate, by release and conveyance of the respective premises to C., as a trustee for B., with power for sale. B. afterwards advanced a further sum to the mortgagor on the security of the same estates, but gave no notice of the advances to C. or A. Subsequently C. (after inquiry of A. whether he had notice of any incumbrance other than his own, and that of which C. was trustee for B.) advanced a further sum to the mortgagor on the same security, and gave notice of his mortgage to A.:—Held, that the several mortgages took effect with regard to the different estates, according to the order of time at which they were respectively created, and that their priorities were not affected by the giving or the omitting to give notice to the party in whom the legal estate was vested. *Wilmot v. Pike*, 5 Haro, 14.

By an act for building a bridge, the commissioners were empowered to raise money by mortgage, and to convey, as a security, "the bridge and the toll-houses, and all the tolls, and all right, title and interest to the same," according to a form contained in the act, to hold till the money borrowed, with interest, should be paid and satisfied. The act contained no clause as to ejectment. To an ejectment brought against the clerk of the commissioners by one who was not the first mortgagee, to recover possession of the bridge, toll-houses and tolls:—Held, that the commissioners were estopped by their own deed from putting in a prior subsisting mortgage to defeat the ejectment, by showing that all the legal estate had passed to the prior mortgagee; and this, notwithstanding that, as commissioners, they were not acting for their own benefit, but in a public capacity. *Doe d. Levy v. Horne*, 3 G. & D. 239; 3 Q. B. 757; 7 Jur. 38; 12 L. J., Q. B. 72.

A mortgagor induced his second mortgagee to release the mortgaged estate in consideration of the substitution of other securities; and then created a third mortgage on the estate so released. Afterwards he created a fourth mortgage on the estate. This mortgage was made with the concurrence of the third mortgagees, who joined to postpone their security, and who received part of the money raised on the security of the fourth mortgage in part discharge of the moneys due to them upon their own security. The mortgagor afterwards died, and it was for the first time discovered that the securities

substituted in the hands of the second mortgagee, and which were the consideration for the release executed by him, were forgeries. The fourth mortgagees sold the mortgaged estate, and after paying off the first mortgage retained the surplus in part discharge of the moneys due to them on their security. The net value of the estate after payment off of the first mortgage having been thus ascertained, the second mortgagees filed a bill against the third mortgagees seeking to recover the amount of that net value from them, they having received, as already mentioned, part of the moneys raised on the security of the fourth mortgage to an amount exceeding the net value of the estate:—Held, that he was not entitled to such relief. *Eyre v. Burnester*, 4 De G., J. & S. 435.

A., first mortgagee, after an order for foreclosure against the mortgagor, purchased from C., the trustee in bankruptcy of his mortgagor, the equity of redemption in the mortgaged premises. N. was a second mortgagee of the same, besides other property. The deed of assignment contained recitals that C. had agreed to sell to A., subject to the claim of N., at the price of 1,400*l.*, and that 1,380*l.*, the first mortgage debt, should be retained by A. out of the purchase-money, and it was thereby witnessed that, in consideration of the sum of 1,380*l.*, so retained, in full satisfaction of the mortgage debt of 1,380*l.*, which sum A. did thereby declare to be fully satisfied, and also in consideration of 20*l.* paid to C. by A., the receipt whereof making, with the 1,380*l.* so retained, the purchase-money of 1,400*l.*, he, C., did grant, bargain, &c. all those hereditaments, . . . subject to the claim of N.:—Held, that upon the deed itself there was no intention shown on the part of the first mortgagee to postpone his own mortgage debt. *Adams v. Angell*, 25 W. R. 139—V. C. II.

When a purchase deed contained a recital that the purchase-money had been paid or accounted for, but there was no receipt for the purchase-money on the back of the deed:—Held, that the vendor, in respect of his lien for unpaid purchase-money, was entitled to priority over a mortgagee of the purchaser. *Bowen v. Cobb*, 19 W. R. 614—L. J.; S. C., 18 W. R. 911—V. C. M.

A publican on commencing business executed a mortgage of his public-house to a brewer to secure a sum then due and further advances, which were not to exceed a specified amount. On the same day the publican charged the same property with the payment of a sum due to a distiller, subject only to the security already given by him to the brewer:—Held, that the distiller's charge was entitled to priority over further advances made by the brewer, after notice of the distiller's charge; notwithstanding an alleged custom of the trade of brewers and distillers to the contrary. *Manzies v. Lightfoot*, 24 L. T., N. S. 695; 19 W. R. 578; 11 L. R., Eq. 459; 40 L. J., Chanc. 561—R.

By a marriage settlement, executed in 1834,

trust funds were vested in three trustees, for the wife for her life, without power of participation, and (in the event, which happened) as she should by deed or will appoint. In 1843, the husband joined with his wife in appointing part of the trust funds to secure a debt due from him to D., and notice of that appointment was given to the two then surviving trustees of the settlement. In 1848, the then surviving trustee of it was released from the trusts, and three new trustees appointed. The two survivors of those trustees, and afterwards the sole survivor of them, joined with the wife in various dealings with the trust funds. In 1867, the wife appointed a portion of the funds to the sole surviving trustee of the settlement, by way of indemnity to him, and the estate of the other trustee who had dealt with the funds at her request. There were other subsequent dealings with the funds. Bills were filed to administer the trusts of the settlement, and ascertain the priorities of the various incumbrancers. The sole surviving trustee of the settlement alleged that he had had no notice of the appointment of 1843:—Held, that the appointees under that deed were entitled in priority to all other incumbrancers on the funds. *Phipps v. Lee-grove*, *Prosser v. Phipps*, 42 L. J., Chanc. 289; 21 W. R. 590.

Held, also, on the facts, that there was no ground for making the sole surviving trustee of the settlement liable for a breach of trust. *Id.*

In cases of equitable mortgages, generally.]

—An equitable mortgagee of lands is entitled in equity to enforce his charge in priority to a creditor of the mortgagor, who, without notice of the equitable mortgage, has subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the lands by an ekegit and an attornment of the tenants. *Whitworth v. Gaugain*, 1 Ph. 728; 10 Jur. 531; 15 L. J., Chanc. 423.

A., in whom a lease was vested, deposited it with his bankers by way of equitable mortgage. The bankers afterwards received notice (as the fact was) that he was a mere trustee of the leasehold, but they subsequently obtained from him a formal mortgage of the legal estate:—Held, that the cestuis que trust had priority over the bankers. *Baillie v. McKean*, 35 Beav. 177.

A vendor conveyed without receiving his purchase-money; the receipt of it was indorsed on the deed, and the title-deeds delivered to the purchaser. The purchaser then made a mortgage by deposit, and absconded:—Held, as between the vendor's lien for his unpaid purchase-money and the right of the mortgagee, that the possession of the title-deeds and the fact of the indorsement of the receipt on the deed gave the mortgagee the better equity. *Rice v. Rice*, 2 Drew. 73; 23 L. J., Chanc. 289.

P., having a term of years in a house, made a mortgage thereof to M. by way of under-lease, retaining in himself a reversion of two days. He subsequently made an equitable mortgage by way of written memorandum to

He again made a third mortgage to S., and assigned to S. the original term, including the reversion of two days. S. had no notice of the equitable mortgage to P., and *Alins. V. C.*, held, that the equities being equal, S. had a legal estate by virtue of the assignment to him of the original term, and the reversion of two days, which entitled him to priority over P. On appeal, the Lords Justices expressed themselves not prepared to affirm this view, and therefore desired a further question of fact to be argued; but the case was compromised before any judgment was given. *Russell Road Purchase Money, In re*, 40 L. J., Chanc. 673; 13 L. R., Eq. 78; 19 W. R. 520, 709; 23 L. T., N. S. 880.

An equitable deposit, with memorandum of charge by a devisee, is an alienation which *pro tanto* prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 8 & 4 Will. 4, c. 104. *British Mutual Investment Company v. Smart*, 10 L. R., Ch. 567; 44 L. J., Chanc. 695; 23 W. R. 800; 83 L. T., N. S. 849; reversing the decision of Hall, V. C., 23 W. R. 724.

When a person seized in trust for himself and another in common in fee retains the entire rents, the debt arising in favor of the co-tenant will not be charged on the trustee's beneficial interest as against a purchaser without notice from him. *Id.*

Semble, that an equitable mortgage by deposit of title-deeds made by an heir-at-law or a devisee of a legal estate would be good as against creditors of the ancestor or testator who had not obtained any judgment or decree binding the land before the mortgage was made. *Id.*

## 2. Notice of Prior Incumbrance; Effect of Negligence, Laches, Fraud, &c.

Effect of notice to postpone or invalidate priority; what amounts to notice, or constructive notice; and who chargeable with notice.—A party taking an equitable mortgage, with notice of a prior equitable mortgage, cannot, by assignment to another without notice, give him a better title. *Mord v. White*, 10 Beav. 120.

A second incumbrancer of an equitable interest, by giving notice of his incumbrance to the trustees in whom is vested the legal estate, obtains priority over a previous incumbrancer who has not given such notice. *Foster v. Cockerell*, 3 O. & F. 456.

If a subsequent purchaser or a mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term prior to both, in order to get a preference. *Willoughby v. Willoughby*, 1 T. R. 763.

But if he had no notice of such prior purchase or incumbrance, and, having the first and best right to call for the legal estate, gets an assignment of it, a court of equity will not deprive him of his advantage. *Id.*

A mortgagee of leasehold property lent the

lease to the mortgagor for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow the money that he had a prior charge. The mortgagor borrowed money from his bankers upon the security of a deposit of the lease without giving them notice of the mortgage.—Held, that the mortgage must be postponed to that of the bankers. *Briggs v. Jones*, 10 L. R., Eq. 92; 23 L. T., N. S. 212—R.

A first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances made by him after notice of the second mortgage. *Hopkinson v. Rolt*, 9 H. L. Cas. 514; 34 L. J., Chanc. 408.

Transferees of mortgagees in fee were represented in the transaction by their ordinary solicitors, who delegated to another solicitor, who was the solicitor of one of the mortgagors, the duty of obtaining the execution of the transfer by the mortgagors. The second solicitor had, at the date of the transfer, notice of the existence of a judgment debt against the mortgagors subsequent in point of date to the securities transferred, but did not disclose the fact to the transferees. The transferees afterwards made a further advance to the mortgagors without actual notice of the judgment debt.—Held, that the second solicitor was not the solicitor of the transferees in the matter of the transfer, so as to require the application of the doctrine of constructive notice. *Wyllie v. Pollen*, 8 De G., J. & S. 596.

Semble, that if he had been, the transferees would not have been affected with constructive notice of the judgment debt, the fact of its existence being immaterial to the matter of the transfer, and the solicitor consequently under no obligation to disclose it. *Id.*

The doctrine of constructive notice should not be extended. *Id.*

The plaintiff, in 1865, entered into partnership with L., the terms being that L. should bring in as capital, the business premises, to be taken at a valuation, and so much money as might be required to make up 6,000*l.*, and that the plaintiff should bring in 6,000*l.* and pay a premium to L. C. acted as solicitor for L. in this transaction, and furnished the valuer with the particulars of his interest in the business premises. Four years afterwards L. became bankrupt, having drawn all his capital out of the partnership, and being in debt to it at the time; and C. then informed the plaintiff that he and his brother held a mortgage on L.'s interest in the business premises for 850*l.*, the sum advanced being trust money. This mortgage had been created before the partnership was agreed upon, and neither C. nor L. had ever mentioned it to the plaintiff, nor was it noticed in the particulars furnished to the valuer, and the interest had been paid upon it by L. in cash, or by checks on his private account.—Held, that C. was bound to make good to the plaintiff the amount of the mortgage and any

interest which he might have to pay on it, and that he must pay the costs of the suit. *Storry v. Combs*, 40 L. J., Chanc. 595; 25 L. T., N. S. 10; 19 W. R. 964—R.

The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee of the settlement afterwards reconveyed part of the property to the mortgagor on payment of part of the mortgage money, which he appropriated. The mortgagor then conveyed that part of the property to new mortgagees, concealing, with the connivance of the trustee, both the prior mortgage and the reconveyance. When the fraud was discovered, the cestuis que trust under the settlement filed a bill against the new mortgagees, claiming priority:—Held, that the court would not interfere to take away the legal estate which passed to the new mortgagees under the reconveyance. *Filcher v. Rawlins*, 7 L. R., Ch. 259; 41 L. J., Chanc. 485; 20 W. R. 281; 25 L. T., N. S. 921; reversing *S. C.*, 11 L. R., Eq. 53; 23 L. T., N. S. 756.

The trustees of a settlement advanced the trust money on the security of real property which was conveyed to them by the mortgagor, the mortgage deed noticing the trust. The surviving trustee afterwards induced the mortgagor to execute a deed by which the mortgaged property purported to be conveyed to the trustee as on a purchase by him, though no money in fact passed. The trustee then, concealing the prior mortgage, and showing title under the pretended purchase deed, conveyed the property to a mortgagee without notice:—Held, that the court would not interfere to take away the legal estate from the mortgagee. *Ib.*

C. and B., tenants in common in fee, in equal shares, of a messuage and premises, entered into partnership, and it was agreed by the articles that this property should be partnership assets; and it became the place where the business of the firm was carried on. After this B. made a legal mortgage in fee of one moiety to secure his private debt to a person who knew that the property was the place of business of the firm. Some years afterwards, B. absconded, and C. was obliged to pay the debts of the firm, all of which had been contracted since the mortgage, and a large balance thus became due to him:—Held, that as the mortgagee, when he took his security, knew that the firm was in possession of the property, he had constructive notice of the title of the partnership, and that his claim must be postponed to that of C., and that the circumstance of the debts paid by C. having been incurred since the mortgage did not affect the case. *Cavander v. Bulteel*, 9 L. R., Ch. 79; 29 L. T., N. S. 710; 22 W. R. 177; 43 L. J., Chanc. 370; reversing the decision of *Wickens v. C.*, 21 W. R. 647; 28 L. T., N. S. 620.

The owner of real estate deposited the title-docs with his bankers to secure the

balance of his account current, and executed a memorandum whereby he agreed, at their request, to execute any deed or deeds necessary for legally carrying out the security. Afterwards, being about to be married, he agreed to settle the property. Two days before the marriage the solicitor of the intended wife, having only then received instructions to prepare articles of settlement, inquired of the owner whether he had the title-docs in his possession unincumbered; he replied that he had, but that they were at his bankers. The solicitor made no further inquiry, and prepared articles of settlement, which were executed. After the marriage the husband conveyed the property to the trustee of the articles upon the trusts therein contained, being for the benefit of the wife and issue of the marriage. A suit was afterwards instituted by the bankers for foreclosure; and the wife claimed to be a purchaser for value without notice:—Held, that the solicitor had not made sufficient inquiry, and that the wife must be taken to have had constructive notice of the mortgage. *Maxfield v. Burton*, 17 L. R., Eq. 15—R.

Held, also, that the husband, having contracted to execute a legal mortgage to his bankers, could not deprive them of priority by conveying the property to a party with whom he had entered into a subsequent contract for value, even although such party was a purchaser without notice. *Ib.*

A solicitor mortgaged property A. to a client, retaining the deeds in his own possession. He then fraudulently deposited the deeds by way of equitable mortgage with another person, and on the same day executed a demise of property B. by way of further securing the sum due to his client on property A. The demise was never communicated to the client, but remained in the solicitor's possession until his death. Some years after the execution of the demise the solicitor executed a legal mortgage in fee of property B. to a third set of mortgagees:—Held, that the demise of property B. was voluntary, and was avoided under 27 Eliz. c. 4, by the subsequent mortgage in fee. *Darker, In re, Jones v. Bygott, Bygott v. Holland*, 23 W. R. 944; 44 L. J., Chanc. 487—R.

Held, also, that the first mortgagee of property A. had no constructive notice of the demise by reason of the fact that the person making it was his solicitor; and that, even if he had constructive notice, such notice would not alter the voluntary character of the demise, inasmuch as notice must be acted upon before consideration can arise out of it. *Ib.*

W., the acting trustee of a marriage settlement, advanced 2,000l., part of the trust funds, upon mortgage of real estate, of which he took a conveyance to himself and his co-trustee, and obtained possession of the title-docs. C., the mortgagor, was a client of W., who was a solicitor. Afterwards W. fraudulently handed over all the deeds to C. C. suppressed the mortgage deeds, and deposited



re rest, in March, 1865, with a bank to secure its current account. The manager of the bank requiring a certificate of title, C. referred him to W., who signed a certificate, in the manager's handwriting, at the foot of the memorandum of deposit; "I hereby certify that Mr. C. has a good title to the above properties;" for which the bank paid him a fee. In 1868 W. became bankrupt, whereupon the fact of the deposit with the bank was discovered by the co-trustee and the beneficiaries; and the bank was informed of the trustees' claim. In 1869 C. died, and the mortgage deeds could not be found. In 1878 W. died. On a bill by the beneficiaries and surviving trustee of the settlement against the bank, praying for a declaration that they were first mortgagees, and for delivery up of the title-deeds:—Held, that by reason of the fraud of W. notice of the first mortgage could not be imputed through him to the bank, and that the bank was a mortgagee for value without notice of the prior mortgage; and a decree was made against the bank for foreclosure simply, without any order for delivery up of the title-deeds. *Waddy v. Gray*, 20 L. R., Eq. 238; 44 L. J., Chanc. 894; 32 L. T., N. S. 531; 23 W. R. 876—V. O. B.

Held, also, that drafts produced from the proper custody and bearing indorsement in the handwriting of W., showing that the deeds were engrossed from them, and were duly executed and stamped, and the diary of a deceased clerk, containing entries in his handwriting, made in the regular course of his business, and showing that he had drawn the drafts, and had attended the execution and stamping of the deeds, were good secondary evidence of the mortgages. *Ib.*

When money is lent on an equitable mortgage without notice of a prior equitable agreement, the lender gains no priority over the owner of the prior equitable interest by getting in the legal estate after he has had notice that his mortgagor has made himself a trustee for the owner of the prior equity. *Mumford v. Stohwasser*, 18 L. R., Eq. 556; 23 W. R. 833; 43 L. J., Chanc. 694; 30 L. T., N. S. 859—R.

A builder entered into a building agreement under which leases of plots of land were to be granted on completion of houses on them. He built a house on one plot, and verbally agreed on getting his lease to grant an under-lease to M., who gave valuable consideration for the under-lease, and entered into possession. Subsequently the builder, without the knowledge of M., obtained a lease of the house, and deposited it with the defendant to secure an advance made without notice of M.'s title. After this the builder, as agent for the plaintiff (who claimed under M.'s will), let the house to a tenant. Subsequently the builder granted to the defendant a legal mortgage to secure the previous advance. The suit was instituted for specific performance of the agreement for an under-lease:—Held, that the tenancy gave the defendant constructive notice at the time of taking the legal mort-

gage that the builder was a trustee for M., and that the legal estate was no protection to the defendant against the prior equity; and a decree was made for specific performance, but, having regard to the negligence of M., without costs. *Ib.*

The assignee in insolvency of a person entitled to a reversionary fund vested in trustees, one of whom at the time of the insolvency had notice of a prior assignment, is affected with notice of the assignment, so that if he delays making inquiry until, through changes in the body of trustees, none remain who have notice of the assignment, want of actual notice and circumstances of subsequent diligence on his part will not entitle him to the fund as against the prior assignee. *Bird v. Blyth*, *Bird v. Bird*, 24 W. R. 856—V. C. H.

A., being entitled to a reversionary fund under a will in 1844, assigned it for value to C., who gave notice in writing of the assignment to the sole trustee of the will. In 1848, C. assigned the reversion to L., who gave notice of his assignment to H. and R., two of the then trustees, but not to the remaining trustee, B. In 1852, A. became insolvent. The official assignee in whom his property vested made no inquiry of either H. or of R. respecting the charges on the fund, and was not aware of the assignment. The survivor of H. and R. died in 1870. The fund being administered by the court, and having become payable in 1874, an order was made upon an affidavit by B. that he had no notice of any charge except the insolvency, and in the absence of L., who had no notice of the proceedings, directing payment to the official assignee:—Held, that the original priorities had not been varied, and that the fund belonged to L. *Ib.*

**Priority affected or postponed by negligence or laches.**—In order to postpone an incumbrancer prior in point of date to a subsequent incumbrancer, who has got the title-deeds, the latter must show not only his own possession, but that the former was guilty of gross negligence in not having obtained them, and the onus is on the subsequent mortgagee to show this. *Carter v. Carter*, 3 Kay & J. 617; 4 Jur., N. S. 67; 27 L. J., Chanc. 75. But compare *Picher v. Rasolins*, 7 L. R., Ch. 259; 41 L. J., Chanc. 485; 25 L. T., N. S. 921; 20 W. R. 281; *Monckton v. Bradlell*, 6 Ir. R., Eq. 252, 361; and see *Mumford v. Stohwasser*, 23 W. R. 833, 834; 18 L. R., Eq. 556; 43 L. J., Chanc. 694; 30 L. T., N. S. 859.

Making no inquiry concerning title-deeds is gross negligence. But where a party takes a mortgage of an undivided share, it is not gross negligence in the mortgagee to suffer the deeds to remain in the hands of the mortgagor as the agent for the other tenants in common. *Ib.*

A solicitor borrowed money from a client upon a mortgage of two properties, A. and B., and handed over to him a quantity of title-deeds in a parcel bearing a label stating it to contain the deeds relating to both proper-

ties. It, in fact, contained only the deeds relating to property A., but the client, relying on the solicitor, never opened it. Shortly afterwards the solicitor sold property B. to the defendant, who completed his purchase without any notice of the mortgage, and, upon completion, the title-deeds were handed over to him. Several years afterwards the solicitor absconded, and the mortgagee, for the first time, discovered that the deeds had not been delivered to him, and that the purchaser claimed a title to the property:—Held, that the mortgagee had not been guilty of such negligence as to postpone his title to that of the purchaser. *Hunt v. Elmes*, 2 De G., F. & J. 578; 30 L. J., Chanc. 255.

A first mortgagee allowed the title-deeds to remain in the possession of the mortgagor to enable him to give another limited security. The mortgagor then made several mortgages beyond the one contemplated, these mortgagees having no notice of the first mortgage:—Held, that the first mortgagee must be postponed to them, and that notice of the first charge ought to have been indorsed on the purchased deed. *Herrick v. Attwood*, 25 Beav. 205; affirmed on appeal, 2 De G. & J. 21; 4 Jur., N. S. 101; 27 L. J., Chanc. 121.

A., an articulated clerk to B., a solicitor, and also his stepson, lent him 1,500l., on the promise of a security on lands. He asked for the title-deeds, but omitted to require possession of them before advancing the money, on the mortgagee's stating he should have them, but could not immediately lay his hands upon them; afterwards, finding the mortgagee embarrassed, he pressed for and obtained an assignment. The property was afterwards found to be under equitable mortgage to C.:—Held, that B.'s knowledge did not affect A. with constructive notice, and that the circumstances were not such as to amount to fraudulent negligence in A., so as to postpone him to C. *Espin v. Pemberton*, 4 Drew. 383; 5 Jur., N. S. 55; 28 L. J., Chanc. 303; affirmed on appeal, 5 Jur., N. S. 157; 28 L. J., Chanc. 311; 3 De G. & J. 547.

A first mortgagee having the legal title is not to be postponed to a second, merely because he has not possessed himself of the title-deeds of the estate; he can only be postponed where he has been guilty of fraud or gross negligence. *Colyer v. Finch*, 5 H. L. Cas. 905; 3 Jur., N. S. 25; 26 L. J., Chanc. 65.

A mortgage given by B. in 1832 to an insurance company, from which he had obtained a loan of money, recited a previous deed, dated in 1823, executed by A. and B., for the settlement of certain family estates, and for the payment of some of A.'s debts, and recited that in that deed a sum of 3,200l. was due to D., as trustee for an infirmity, on a judgment against A. and B.; that that money, with interest, had been paid off, and that it was intended to enter satisfaction on that and all other judgments affecting the mortgaged lands. There were separate judgments, at the suit of D., against A. and against B., dated in 1810 and 1812; but a warrant of

attorney, given by D. in 1819, authorized satisfaction to be entered on the roll as to them. There was no judgment against them jointly for the sum stated in the mortgage. The mortgagee caused satisfaction to be entered on the roll as to the separate judgments of 1810 and 1812, but made no farther inquiries:—Held, that as the mortgage itself had recited a joint judgment for a specific sum, the mortgagee had been guilty of negligence in not looking farther into the matter, and must therefore be taken to have had a proper notice of the unsatisfied claim under the deed of 1823. *Montefiore v. Brown*, 7 H. L. Cas. 241.

A lady lent money to her solicitor upon a deposit of title-deeds, with a written memorandum. The deeds thus deposited did not comprise the later title-deeds, and so did not show that the depositor had any interest in the estate. The solicitor afterwards deposited the remaining deeds with his bankers to secure the balance of his account:—Held, that the lady had not, in omitting to call for the other deeds, been guilty of such gross negligence as to postpone her security to that of the bankers. *Roberts v. Croft*, 2 De G. & J. 1; 27 L. J., Chanc. 220.

An equitable mortgagee, with whom some of the title-deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, filed a bill to establish his priority over a subsequent legal mortgagee, whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed, and purported to contain all the title-deeds, but contained only the earlier deeds:—Held, that there was not such willful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge, so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee. *Ratcliffe v. Barnard*, 6 L. R., Ch. 652; 40 L. J., Chanc. 777; 19 W. R. 704; affirming 40 L. J., Chanc. 147; 24 L. T., N. S. 215; 19 W. R. 340—R.

C., a second mortgagee, with a power of sale, was fraudulently induced by his confidential solicitor to join with the first mortgagee in executing a conveyance upon a pretended sale to the solicitor, and to sign a receipt for the purchase-money; but no money was paid to him, the solicitor representing that it was a mere matter of form, and that the mortgages would remain as before. The solicitor afterwards deposited the deeds with C. by way of equitable mortgage:—Held, that the second mortgagee having by his negligence enabled the solicitor to commit the fraud, C.'s equitable mortgage was entitled to priority. *Hunter v. Walters*, *Curling v. Walters*, *Darnell v. Hunter*, 41 L. J., Chanc. 175; 7 L. R., Ch. 75; 20 W. R. 218; 25 L. T., N. S. 765; affirming *S. C.*, 11 L. R., Eq. 202; 24 L. T., N. S. 276—V. C. M.

A mortgagee advancing money on the security of a considerable estate, and omitting to investigate the title to a particular portion

of it, will not be affected with notice of equities affecting the residue of the estate, which upon such investigation he might possibly have discovered. *Ib.*

The owner in fee of a farm deposited deeds of conveyance of the farm, dated 1774, by way of security for money due, writing at the same time a letter which stated that the deeds were the title-deeds of the farm, and were to be a security. He afterwards deposited the subsequent title-deeds of the farm, the earliest being dated 1787, with his bankers, by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge:—Held, that the letter created an equitable charge on the farm, and that, under the circumstances, credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title-deeds; and that the owner of the prior charge had therefore not been guilty of negligence so as to deprive herself of her priority. *Dizon v. Muckleston*, 8 L. R., Ch. 155; 42 L. J., Chanc. 210; 21 W. R. 178; 27 L. T., N. S. 804. See *S. C.*, 26 L. T., N. S. 752; 20 W. R. 610—R.

L. having deposited the title-deeds of an estate with his bankers to secure the balance of his account, and having signed an agreement to execute a legal mortgage when required, afterwards conveyed the legal estate to a trustee in pursuance of articles before marriage, suppressing the fact of the equitable mortgage. On the occasion of the articles the wife's solicitor asked L. where the title-deeds were, and being told that they were at his bankers for safe custody made no further inquiry. In a suit for foreclosure:—Held, that the wife's defense of purchaser for value without notice was displaced by this want of due diligence on the part of her solicitor. *Maxfield v. Burton*, 22 W. R. 148; 29 L. T., N. S. 571—R.

As to effect of fraud, misrepresentation or concealment in respect of prior mortgages or incumbrances,—see this title, I, 6.

### 3. Registration.

**Effect to give priority; and what mortgages may be registered; in Middlesex and Yorkshire.]**—A memorandum charging a leasehold estate in Middlesex with payment of a sum of money, retains its priority over a subsequent mortgage, duly registered under 7 Anne, c. 20. *Wright v. Stangfield*, 5 Jur., N. S. 5; 27 L. J., Chanc. 8; 28 L. J., Chanc. 183.

A second mortgagee, who registers his mortgage in Middlesex, is entitled to priority over a memorandum of further charge of prior date given by the mortgagor to the first mortgagee, who omitted to register the same in Middlesex. *Moore v. Culverhouse*, 6 Jur., N. S. 115; 29 L. J., Chanc. 419; 27 Beav. 639.

A memorandum not under seal, accompanying a deposit by way of equitable mortgage of deeds relating to lands in Middlesex, requires registration. *Neve v. Pennell*, 33 L. J., Chanc. 10; 2 H. & M. 170; 11 W. R. 986; 9 L. T., N. S. 285.

According to the memorandum of registration indorsed on two mortgage securities of different dates, brought to the Middlesex registry, they were both registered on the same day and at the same hour; but one was numbered 764, the other 768:—Held, that the security numbered 764 must be regarded as having been registered first. *Ib.*

A devisee of lands, within the limits of the East Riding Registry Act, 6 Anne, c. 35, loses his priority as against a subsequent registered mortgagee or purchaser for value, unless he registers a memorial of the will, or a memorial of the impediment which prevents such registration, within six months of the decease of the devisor, even although he is ignorant of the existence of the will until after the expiration of six months. *Chadwick v. Turner*, 11 Jur., N. S. 333; 34 L. J., Chanc. 356; 34 Beav. 634; affirmed, 35 L. J., Chanc. 349.

Property in Middlesex was mortgaged to A., and afterwards to B., and subsequently to C., with notice of B.'s incumbrance. C. registered before B., and afterwards assigned to D., who had no notice of B.'s mortgage:—Held, that the interests being equitable, D. had no priority over B. *Ford v. White*, 16 Beav. 120.

Where B. deposited with C., to secure advances, the title deeds relating to leasehold property in Middlesex, together with a memorandum of deposit (which was never registered), and afterwards sub-demised the property to D. and M. by an indenture, which was duly registered, but D. and M., on taking such demise, neglected to inquire after or require the production of the title-deeds:—Held, that they were bound by constructive notice of the deposit of the deeds with C., who had, therefore, priority over their claim. *Wormald v. Maitland*, 13 W. R. 832; 12 L. T., N. S. 535; 35 L. J., Chanc. 60. But see *Agra Bank v. Darry*, 7 L. R., H. L. Cas. 135.

A mortgagor registered with an indefeasible title made three successive mortgages, all of which were entered on the register of incumbrances; the first mortgagee sold under his power of sale, and conveyed the estate to a purchaser:—Held, that the purchaser was entitled to be registered with an indefeasible title, although the second and third mortgages remained on the register of incumbrances. *Richardson, In re*, 12 L. R., Eq. 398; 40 L. J., Chanc. 616; 25 L. T., N. S. 12; 19 W. R. 1048—R. See *S. C.*, 20 W. R. 163; and 13 L. R., Eq. 142; 41 L. J., Chanc. 221.

A solicitor induced a client to advance money for A., on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the

existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered:—Held, that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority. *Rollan v. Hart*, 6 L. R., Ch. 678; 40 L. J., Chanc. 701; 25 L. T., N. S. 191; 19 W. R. 902.

A further charge in favor of the first mortgagee of land in the West Riding of Yorkshire requires registration, and in the absence of registration will be postponed to a subsequent registered mortgage taken without notice of the further charge; and notice of the first mortgage does not impose on the subsequent incumbrancer the duty of making inquiry of the first mortgagee, and so affect him with notice of the further charge. *Credland v. Potter*, 10 L. R., Ch. 8; 44 L. J., Chanc. 169; 31 L. T., N. S. 522; 23 W. R. 36; affirming *S. C.*, 43 L. J., Chanc. 484; 18 L. R., Eq. 350; 23 W. R. 611; 30 L. T., N. S. 356—V. C. B.

A. executed a legal mortgage of property in Yorkshire to B., for 700*l.*; at the same time he borrowed 100*l.* from C., and signed a memorandum agreeing to give C. a second mortgage on the property to secure that amount. A. subsequently executed another mortgage of the property for 500*l.* to D. The first and third mortgages were registered at Wakefield, but not the second:—Held, the third mortgage had priority over the second. *Wight or Wright, In re*, 16 L. R., Eq. 41; 43 L. J., Chanc. 66; 21 W. R. 667; 26 L. T., N. S. 491—V. C. M.

The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice, therefore, to the principal or his agent, and of fraud, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title-deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from inquiry. *Lee v. Clutton*, 45 L. J., Chanc. Div. 43; 33 L. T., N. S. 717; 24 W. R. 106—R.; affirmed on appeal, 46 L. J., Chanc. Div. 48; 35 L. T., N. S. 84; 24 W. R. 942—C. A.

A firm of solicitors took an equitable charge by a memorandum and deposit of title-deeds, from their client, A., upon premises in Middlesex, which they omitted to register. A. subsequently sold the premises to the defendant, who duly registered the conveyance. The solicitors filed a bill claiming priority for their charge, alleging that the defendant, when he took his conveyance, knew that the deeds were in their hands, and made no inquiry:—Held, that the facts alleged amounted only to constructive notice, and that in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shown that the purchaser or his agent had actual notice of the prior charge. *Ib.*

[By 37 & 38 Vict. c. 78 (*The Vendor and Purchaser Act*, 1874), s. 8, *where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devise or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.*]

—in Ireland.]—When the owner of an estate in Ireland had already created an equitable mortgage upon it by depositing the title-deeds with a creditor (which equitable mortgage was not registered), and afterwards on being asked for them by a solicitor who was about to prepare for another creditor a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents, and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered:—Held, that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds. *Agra Bank v. Barry*, 7 L. R., H. L. Cas. 135.

The non-production, in Ireland, of title-deeds to the solicitor instructed to prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case. *Ib.*

As to registration of deeds, generally,—see DEED.

#### 4. Tacking; Consolidation.

**When allowed, in general.**—A legal mortgagee, acquiring a subsequent equitable interest, is entitled to tack the subsequent equitable interest to the legal mortgage, so as to exclude an intermediate equitable charge, if he had not notice of that intermediate equitable charge. *Lloyd v. Atwood*, 20 L. J., Chanc. 97; 3 De G. & J. 614; 5 Jur., N. S. 1322.

A mortgagee may tack simple contract debts to his mortgage as against the heir, where the property descended is assets in his hands for payment of simple contract debts; and consequently, since the 8 & 4 Will. 4. c. 104, a mortgagee of freeholds may tack his simple contract debts as against the heir. *Thomas v. Thomas*, 23 Beav. 341; 25 L. J., Chanc. 391.

Or his devisee. *Rolfe v. Chester*, 20 Beav. 610; 25 L. J., Chanc. 244.

—particular instances.]—A. having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances; part of the purchase-money was to be paid down, and the rest on completion of the pur-

chase. During the investigation of the title, A. induced C., who was ignorant of the mortgages, to make further payments on account of the purchase-money, and having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mortgage, became insolvent and absconded. A. thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due, and E., to secure himself, took an assignment of B.'s mortgage. But the balance of the purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B.:—Held, that E. was not entitled to tack his security to B.'s mortgage, first, because his security was not a security on the estate, but only on the purchase-money; and secondly, because, although E., at the time he advanced his money, had no notice of any particular incumbrance on the estate except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject, and therefore the equities of D. and E. were not equal. *Lacey v. Ingle*, 2 Ph. 413.

A mortgage in fee, made in compliance with an agreement to charge a sum of money upon an estate, the deeds of which were deposited with the equitable mortgagee at the date of the agreement, will give him and all persons taking an assignment of his debt, and the securities, a right to tack to his mortgage in fee all sums advanced to the mortgagor between the date of the agreement and the conveyance in fee, if they are made bona fide, and without notice of advances made by other persons. *Cooke v. Wilton*, 29 Beav. 100; 7 Jur., N. S. 280; 30 L. J., Chanc. 467; 9 W. R. 220.

Two estates, subject to distinct first mortgages, vested in different mortgagees, were both again mortgaged to the same second mortgagee; afterwards the two first mortgages were transferred to one person, with notice of the second mortgage:—Held, that the transferee was, in a foreclosure suit by him instituted against the second mortgagee, entitled to tack the two first mortgages together. *Vint v. Padgett*, 2 De G. & J. 611; 4 Jur., N. S. 1122; 28 L. J., Chanc. 21.

Two sums were due to A. from B., one on mortgage of lands, and the other by covenant. A. having brought an action for both sums, B. paid the amount due on the mortgage into court. A. took this sum out of court, and he proceeded in the action and recovered judgment on the covenant:—Held, that the mortgage having been satisfied before the judgment had been obtained, A. had no right to tack his judgment. *Brecon (Mayor, &c.) v. Seymour*, 26 Beav. 548; 5 Jur., N. S. 1060; 28 L. J., Chanc. 606.

Mortgage of two funds to A. with a covenant by a surety. Second mortgage of one of the funds to B.; B.'s fund having been

exhausted in part payment of A.'s debt, and A.'s mortgage having been transferred to the surety on payment by him of the balance:—Held, that B. had a right to marshal the securities as against the surety. *South v. Blozham*, 2 H. & M. 457; 11 Jur., N. S. 819; 34 L. J., Chanc. 269; 11 L. T., N. S. 264.

Held, also, that the surety could not tack, as against B., the costs of a defense to an action on his covenant, from which B. derived no benefit, but that he might charge, as against B., all costs incurred for the common benefit of the persons interested in the estate after the first mortgage. *Id.*

A., having previously mortgaged property to B., entered into an agreement with his bankers for a second mortgage to secure an overdrawn balance. The original mortgage, after several transfers, became vested in C. C. transferred to D., who at the same time advanced a further sum. C.'s son acted as his solicitor in the transfer to C., and as the solicitor of C. and D. in the transfer to D. At the time of the transfer to C. notice was given to his son of the second mortgage:—Held, that, inasmuch as he did not acquire his knowledge while acting as D.'s solicitor, D. was not bound by notice and was entitled to tack his further charge to his first mortgage. *Bulpett v. Sturges*, 18 W. R. 796; 22 L. T., N. S. 739—R.

The owner of freehold property mortgaged it and died insolvent, having devised his real and personal estate to trustees for payment of debts. In a suit for the administration of his estate the mortgagee consented to an order directing the property to be sold and the proceeds to be carried to a separate account, the order being expressly without prejudice to his right to have simple contract debts due to him from the mortgagor satisfied out of the proceeds.—Held, that he had no right to tack simple contract debts to the proceeds of other creditors, and that the proceeds were not to be regarded as sale moneys in his hands so as to give him a right of retainer in respect of such debts; and consequently that the balance left after payment of the mortgage debt must be carried to the account of the general estate. *Pile v. Pile*, 23 W. R. 440—V. C. II.

The right of a first mortgagee of two separately-mortgaged estates belonging to one mortgagor, to consolidate his mortgages as against a second mortgagee of one of the estates, does not extend to a case in which the mortgage of the other estate is subsequent in date to such second mortgage. *Baker v. Gray*, 45 L. J., Chanc. Div. 165; 1 L. R., Ch. Div. 105; 33 L. T., N. S. 721; 24 W. R. 171—V. C. II.

G., the owner of two estates, mortgaged one of them to O., and afterwards to second and third mortgagees, who gave due notices of their mortgages to O. Subsequently to these second and third mortgages, G. mortgaged the other estate to B., who then took a transfer of O.'s mortgage:—Held, that B. was not entitled to consolidate his two mort-

gages as against the second and third mortgagees. 16.

**Provisions of The Vendor and Purchaser Act, 1874.**—[By 37 & 38 Vict. c. 78, s. 7, after the commencement of that act (by s. 1, 31st day of December, 1874), no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right or interest being protected by or tacked to any legal or other estate or interest in such land; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice: Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of the act.]

#### VI. PAYMENT AND SATISFACTION OF DEBT; RECONVEYANCE OF PREMISES; REDEMPTION.

##### 1. Payment and Satisfaction.

###### (a) The Mortgage Debt.

**To whom payment should be made; and title to mortgage money.**—The executor, not the heir of a mortgagee in fee, is entitled to the money secured by the mortgage. *Thornborough v. Baker*, 3 Swans. 628.

Money due on a mortgage in fee, paid to the heir of the mortgagee, was recovered from him by the executor. *Tabor v. Tabor*, 3 Swans. 636.

Where a mortgage is made to several persons jointly, they are in equity tenants in common of the mortgage money. *Vickers v. Conwell*, 1 Beav. 529; 3 Jur. 864.

When an equitable charge is vested in two persons even as joint tenants, the money cannot be paid to one without special authority from the other, so as to discharge the estate which forms the security. *Matson v. Dennis*, 4 De G., J. & S. 345.

###### **Notice to pay off; and other proceedings.]**

—The rule that, in case of default of payment by the mortgagor, six months' notice or interest must be given, applies when the mortgagee has required payment on a particular day and the money is not then paid. *Bartlett v. Franklin*, 15 W. R. 1077; 17 L. T., N. S. 100; 36 L. J., Chanc. 671.

If a mortgagee consents to the sale of the mortgaged property, such consent amounts to an acceptance by him of notice to pay off; and if the property is sold, he is not entitled to six months' interest in lieu of notice, but only interest for the period which intervenes between the actual payment off and the expiration of the six months from the time of such consent being given. *Day v. Day*, 8 Jur., N. S. 1166; 31 Beav. 270; 31 L. J., Chanc. 806.

Action on a deed, whereby the plaintiff, in consideration of money lent to him by the defendant, assigned to the defendant goods,

subject to a proviso for redemption on repayment on the 5th of March, 1870, "or at such earlier day or time as the defendant should appoint for payment by notice in writing," with liberty on default in payment to seize and sell the goods. Breach, that the defendant, without giving the plaintiff notice of an appointment of any reasonable earlier day than the 5th of March, 1870, for payment of the money, and before any default in payment, seized and sold the goods. Plea, that before seizing and selling the goods, to wit, on the 30th April, 1861, the defendant, in pursuance of and under the provisions in the deed, duly gave the plaintiff a notice in writing, appointing an earlier day than the 5th March, 1870, for payment of the money, to wit, at two o'clock of the afternoon of the 30th April, 1861, but the plaintiff did not pay the same:—Held, that the plea was bad, inasmuch as a notice for payment on the same day the notice was given was insufficient; and also that it was consistent with the plea that the seizure and sale were before default in payment at the time mentioned in the notice. *Rogers v. Mutton*, 7 H. & N. 733; 31 L. J., Exch. 275.

A bill of sale contained a covenant by the grantor to pay, immediately on a demand in writing, signed by or on behalf of the grantees, being given to him or left at his last known place of abode, and if the grantor did not immediately upon such demand pay, the grantees were authorized to enter, and seize and sell the goods. Until default in payment, the grantor was to remain in possession of the goods. A written demand, made by the grantees' attorneys on their behalf, was sent by a bailiff to the grantor, who received it, but did not pay, whereupon the bailiff seized immediately:—Held, that there was no default in the grantor, as he had not a reasonable time, under the circumstances, to procure the money. *Toms v. Wilson*, 32 L. J., Q. B. 883; 4 B. & S. 455; 11 W. R. 952; 38 L. T., N. S. 798—Exch. Cham. S. P., *Brighty v. Norton*, 3 B. & S. 805; 32 L. J., Q. B. 38.

An act empowered commissioners to borrow money upon the security of the rates for the purposes of local improvements, and provided that they should every year pay off 100% at the least of the moneys so borrowed to such of the mortgagees of the rates as should be selected by ballot. All interest upon the mortgages was duly paid, and the prescribed mode of payment of the annual installments was observed. The mortgagees gave the commissioners notice requiring them to pay off their mortgage in six months. The commissioners refused to do so, and the mortgagees filed a bill to establish their right to be paid off and for a receiver of the rates:—Held, that they had no right to have their mortgage debt paid off, except under the provisions of the act, and that the court had no jurisdiction to appoint a receiver of parish rates, and the bill was dismissed. *Preston v. Great Yarmouth (Mayor, &c.)*, 41 L. J., Chanc. 310; 26 L. T., N. S. 233—V. C. B.



irmed on appeal, 41 L. J., Chanc. 760; 7 R., Ch. 655.

When a mortgagee becomes of unsound mind, and the mortgagor desires to pay off the mortgage debt, and presents a petition to obtain a vesting order, he must pay the whole of the mortgage debt and interest into court, and will not be allowed the costs of his petition, nor will he have to pay the mortgagee's costs. *Sparks, In re*, 37 L. T., N. S. 801—C. A.

**Waiver of default.**—Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion within the two years, interest was not paid on the day, and the mortgagee shortly afterwards, after giving notice that he was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—Held, a waiver of the default; and an injunction was granted in equity to restrain an ejectment brought within the two years. *Langridge v. Payne*, 2 Johns. & H. 423; 10 W. R. 726; 7 L. T., N. S. 23.

**Satisfaction or release without payment.**—A delivery up of mortgage deeds does not cancel the debt. *Hurst v. Beach*, 5 Madd. 351.

E. was holder of a mortgage on lands given him by S., who was largely his debtor. S. afterwards mortgaged these lands to the directors of a banking company as security for existing debts and for some fresh advances. Before these advances were actually made, the solicitor for the directors discovered that the lands had been previously mortgaged to E. The directors refused to complete the transaction with S., unless E.'s interest in the lands was released. S. represented to them that it would be easy to procure the release, as E.'s mortgage was only a collateral security; he applied to E., who consented to give the release on getting proper securities in substitution for the mortgage. By deeds duly executed between E. and S., the latter pretended to give substituted securities, railway shares, and a promissory note. The release was executed by E. The substituted securities, the shares, and the note, proved to be forgeries:—Held, that E. had not, by executing the release, lost his right against the mortgaged lands, the release having been obtained from him by fraud; that even if S. had conveyed the released lands to the directors, they could only have claimed under him against E.; and that the release, valid against S. and those who claimed under him, was invalid as against E., who claimed not only under S., but against him by title paramount. *Eyre v. Burmester*, 10 H. L. Cas. 90; 8 Jur., N. S. 1019; 6 L. T., N. S. 898.

As to amount secured by mortgage,—see this title, II., 4.

#### (b) Interest.

**When allowed; and rate and amount.**—A mortgage deed made no provision for in-

terest, and the mortgagee thereby agreed, upon payment of the principal, to reconvey:—Held, that the mortgage carried no interest. *Thompson v. Drew*, 29 Beav. 40.

A mortgagor, who was liable to pay interest at the rate of 5l. per cent. unless paid within a certain time after it became due, when it was to be reduced to 4l. per cent., frequently paid interest to the executor of the mortgagee at the rate of 4l. per cent. after the time limited for the lesser rate of interest:—Held, that the executor was justified in receiving the lesser rate. *Booth v. Alington*, 8 Jur., N. S. 40; 26 L. J., Chanc. 138—C.

Where a mortgage deed had been mislaid for many years, and interest had been paid and received at a lower rate than that reserved by the deed, the payment having been made during a portion of the time under a decree in an administration suit on an erroneous affidavit as to the contents of the missing deed:—Held (the case not being one to which the Statute of Limitations applied), that a tenant for life of the interest on the mortgage debt, who was not shown to have agreed to take less than the reserved interest, was entitled to the difference since she became tenant for life. *Gregory v. Pilkington*, 8 De G., M. & G. 616; 26 L. J., Chanc. 177.

A correspondence took place between a mortgagee and a mortgagor, extending over a series of years, in which the mortgagee stated his intention, if the interest upon the mortgage debt was not paid, to add it to the principal, and to charge the same interest upon the amount as the mortgage bore. The mortgagor replied from time to time that he could not pay the interest, and that it must be added to the claim of the mortgagee:—Held, that it did not amount to an agreement to pay compound interest; and the claim of the mortgagee was not allowed. *Tompson v. Leith*, 4 Jur., N. S. 1091—R.

A., to whom his son-in-law had mortgaged some property, declined to receive the interest, and afterwards, to induce his son-in-law not to sell and reside on the mortgaged property, he had promised to allow him to live there rent free. The son-in-law acted on the promise until A.'s death:—Held, that, in equity, no interest was payable until that time. *Yeomans v. Williams*, 35 Beav. 180.

Upon a mortgage from B. to A., the deed, dated the 13th February, 1834, recited, that, as an inducement to A. to advance the money, B. had agreed to covenant for the payment of the interest. B. covenanted to pay the principal and interest for the same, after the rate of 5l. per cent., on the 13th February, 1835; and C. covenanted that B. and C., or one of them, would, during the continuance of the security, pay the interest to become due in respect of the principal, after the rate of 5l. per cent. per annum, by two even half-yearly payments, on the 13th August and the 13th February. The deed contained a power of sale, on six months' notice, in default of payment of principal and interest, with authority to A., out of the pro-

ceeds, to pay herself the principal and interest, or so much thereof as should be due:—Held, that C.'s covenant was not limited to the payment of the first two half-year's interest, but was a covenant for payment of the interest so long as the principal remained unpaid. *King v. Greenhill*, 6 M. & G. 59; 6 Scott, N. R. 869; 7 Jur. 604; 12 L. J., C. P. 333.

If deeds are deposited by way of equitable mortgage to secure a simple contract debt, the debt bears interest from the date of the deposit, and by reason of it, though there is no express contract for interest. *Carey v. Doyme*, 5 Ir. Chanc. Rep. 104.

A company borrowed from a bank a sum of money, to be repaid with interest, and deposited a lease as a security. Afterwards a document was drawn up by the company, stating that the lease had been deposited as a security for the loan, without mentioning the interest. The bank refused to give up the deed until the whole of the interest as well as the loan had been repaid:—Held, in an action of detinue for the lease, that the written document was not conclusive against the bank as to the terms of the loan, and that parol evidence was rightly admitted to show that the lease had been intended as a security for the interest as well as the principal. *Pentreguinny Fuel Company v. Young*, 12 Jur., N. S. 56—C. P.

When a mortgagee's costs are ordered to be added to his security, and to be a charge on the mortgaged estate, the amount so charged carries interest. It makes no difference that the mortgage is by grant of a redeemable annuity. *Lippard v. Ricketts*, 41 L. J., Chanc. 595; 20 W. R. 898—V. C. B.

A son, in 1855, mortgaged a reversionary interest to which he was entitled under his father's will, and died in March, 1869, intestate, and there was no legal personal representative. The mortgagee, having filed a bill for the administration of the father's estate, was, on behalf of a surety of the mortgagor, paid the principal and interest due on the mortgage security and a sum for costs of suit. On motion to dismiss the bill:—Held, that he was not entitled to six months' interest in lieu of notice, but that he was entitled to the costs of the motion, as he had been paid off in a summary way. *Letts v. Hutchins*, 13 L. R., Eq. 176—V. C. W.

The interest on a mortgage debt being in arrear, the mortgagee ordered the mortgaged estate to be put up for sale. To avert the sale, the defendant was induced to agree to take a transfer of the mortgage, and, pending the negotiations for the transfer, he paid the amount due for arrears of interest. The deed of transfer did not contain any reference to the arrears of interest paid by him, but merely purported to transfer the principal debt and the interest due at the date of the transfer. By a contemporaneous deed, the owner of the equity of redemption (who was a trustee) purported to capitalize the arrears of interest which had been paid by the transferee, and to

charge them with interest upon the mortgaged estate:—Held, that, although the deed purporting to charge the arrears of interest upon the mortgaged estate was inoperative, inasmuch as the trustee had no power to create such a charge, yet the transferee was entitled to charge the amount paid by him for arrears of interest against the estate, as money paid by way of salvage to prevent the sale, but without interest thereon. *Cottrell v. Piazg*, 30 L. T., N. S. 733; 43 L. J., Chanc. 562; 9 L. R., Ch. 541.

**Barred by lapse of time.**—Where there is a mortgage with a covenant to pay principal and interest, the existence of such a covenant does not entitle the mortgagee to recover more than six years' interest as against the land. *Shaw v. Johnson*, 1 Drew. & Sm. 419; 7 Jur., N. S. 1005; 30 L. J., Chanc. 846; 9 W. R. 620; 4 L. T., N. S. 461.

Where a term is created for the express purpose of a trust to secure principal and interest in a mortgage, s. 43 of the 3 & 4 Will. 4, c. 27, does not operate as a bar to the recovery by the mortgagee of interest beyond six years. *Id.*

The case is not altered where the term, though in 1819 a dry satisfied term, was in that year clothed with an express trust, and assigned for the benefit of the mortgagee. *Id.*

The six years' limitation fixed by 3 & 4 Will. 4, c. 27, s. 43, for the recovery by suits of arrears of interest on a mortgage debt, applies only to the case of a suit instituted by the mortgagee, by which interest is actually sought to be recovered, and not to any legal proceedings by a mortgagor who holds the proceeds of sale, nor to a suit by the mortgagor to recover the surplus of such proceeds, after satisfaction of principal and interest. *Edmunds v. Waugh*, 1 L. R., Eq. 418; 12 Jur., N. S. 826; 35 L. J., Chanc. 234; 14 W. R. 257; 13 L. T., N. S. 739—V. C. K.

When money is secured by an ordinary mortgage by covenant and bond, the mortgagee, in a suit to foreclose, can only recover six years' arrears of interest, but the case is different when there is a trust to secure it. *Round v. Bell*, 30 Beav. 121; 31 L. J., Chanc. 127. But compare *Mellish v. Brook*, 3 Beav. 22; *Hodges v. Croydon Canal Company*, 3 Beav. 86; *Sinclair v. Jackson*, 17 Beav. 405; *Du Vigier v. Lee*, 2 Hare, 326; 7 Jur. 299; 13 L. J., Chanc. 345. See also *Mason v. Broadbent*, 33 Beav. 296; *Stead, In re*, 2 L. R., Ch. Div. 713; 45 L. J., Chanc. Div. 634; 35 L. T., N. S. 465; 24 W. R. 693.

In 1850, B. took an assignment of a mortgage, dated May, 1831. The devise of the mortgagor was a party to the assignment, in which there was a recital, that there remained due on account of the principal 404*l.* 7*s.*, and 302*l.* 15*s.* 6*d.* for interest; and the deed witnessed, that in consideration of the principal, and all interest due, the estate was assigned to B., subject to the equity of redemption. On a bill for an account of what was due, and

payment of principal and interest, or for encroachment, an objection was taken that B. was only entitled to six years' interest to the end of the bill:—Held, that there was no sufficient acknowledgment in the deed of 1856 to entitle B. to the arrears of interest. *Bolding v. Lane*, 1 De G., J. & S. 122; 9 Jur., N. S. 506; 32 L. J., Chanc. 219; 11 W. R. 386. The words in 3 & 4 Will. 4, c. 27, s. 42, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears might be enforced. *Ib.*

As to limitation of actions upon mortgages, generally,—see LIMITATION OF ACTIONS AND SUITS.

**Payment and receipt.**—P., a solicitor employed both by a mortgagor and mortgagee, received the interest on the mortgage debt regularly. After a time he fraudulently obtained from the mortgagor a portion of the principal. At first the mortgagee received his interest regularly from P. at his office; but ultimately P. allowed the interest to fall into arrear, till a large sum became due to the mortgagee. During this time the mortgagee made no application to the mortgagor in consequence of the irregularity in payment. In September, 1853, the mortgagor paid the mortgagee a sum, as a half-year's interest on the principal remaining due; that led to an explanation and the discovery of the fraudulent receipt of the principal by P. The mortgagee did not repudiate the payment at the time. On the 24th of February the mortgagor wrote to inquire in what way he should pay the half-year's interest just due, expressing his fear that P. would not be able to make good his defalcations to the mortgagee. On the 26th the mortgagee wrote, requesting payment by check; and on the 4th March the mortgagee again wrote, saying that he believed that P. was hopelessly involved, and suggesting that the loss should be divided between them:—Held, that P. was the agent of the mortgagee to receive the interest, but not the principal; and that, in order to bind the mortgagee by the acts of P. in receiving the principal, it was necessary to show either that what he did was with the intention of adopting the acts of P., or that the position of the mortgagor was altered. *Kent v. Thomas*, 1 H. & N. 473.

A. lent to B. 1,000*l.* upon the security of a deed, which contained a covenant by him to surrender copyhold premises to A.'s use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, and the title-deeds were delivered to him, and he prepared and delivered to B., but without A.'s knowledge, a schedule of the deeds, at the foot of which was a memorandum, signed by D., acknowledging the receipt of the deeds, and undertaking to deliver them up on payment of the principal money and interest. The mortgage deed remained in D.'s possession, and he from time

to time received the interest, and paid it over to A. The principal money was paid to D., who appropriated it to his own use, and died insolvent:—Held, first, that D.'s receipt for the principal, and the memorandum signed by him, were admissible in evidence for A. *Wilkinson v. Candlish*, 5 Exch. 91; 19 L. J., Exch. 166.

Held, secondly, that neither the possession of the mortgage deed, nor the receipt of the interest, was any evidence of an authority to D. to receive the principal, and consequently A. was entitled to recover it from B. *Ib.*

As to interest generally,—see INTEREST OF MONEY.

## 2. Reconveyance.

### Right to, upon payment of debt, generally.]

—Every mortgagor has the right to have a reconveyance of the mortgaged property upon payment of the money due upon the mortgage, and the mortgagee is charged with the duty of making such reconveyance upon such payment being made. *Walker v. Jones*, 1 L. R., P. C. 50; 12 Jur., N. S., 381; 35 L. J., P. C. C. 30; 14 W. R. 484; 14 L. T., N. S. 686.

Where, therefore, a mortgagee, having, besides the property mortgaged, certain promissory notes made by the mortgagor as collateral security for his debt, transferred the mortgage without assigning the collateral securities:—Held, that he was not entitled so to sever the debt from the security. *Ib.*

A mortgagee cannot be compelled to place another person in his stead as mortgagee, and he may therefore refuse to convey the mortgaged premises to any person who should become mortgagee by that conveyance. In the absence of contract, he can only be called upon to reconvey to the mortgagor or his assignee. *Colyer v. Colyer*, 3 De G., J. & S. 676; 11 W. R. 587, 1051; 9 L. T., N. S. 214—L. J.

A court of common law has no power to compel a reconveyance of a mortgaged estate after payment of the mortgage debt, interest, and costs. *Gorely v. Gorely*, 1 H. & N. 144.

A mortgagee is not bound to convey the legal estate in the mortgaged property and to deliver up the title-deeds to a person from whom he has accepted payment of principal, interest and costs, if that person has only contracted to purchase a part of the mortgaged estate and has not accepted the title. *Pearce v. Morris*, 5 L. R., Ch. 227; 39 L. J., Chanc. 342; 21 L. T., N. S. 190.

On tender by a person having a partial interest giving a right to redeem, the mortgagee is bound to convey, but the conveyance should reserve the equities of the other persons interested. *Ib.*

A mortgage was made of estate A. for 300*l.*, in which sureties joined to secure the debt. Another mortgage of estate B. was made by the mortgagor to the mortgagee to secure 1,500*l.*, and the title-deeds of other property belonging to the mortgagor's wife were deposited as collateral security for 800*l.*, part of the 1,500*l.* The first 800*l.* was paid off.

partly by the sureties. Afterwards, the other principal security was realized, and the 1,500*l.* paid off. The mortgagee resisted the delivery of the deposited deeds on the ground that the sureties might have an equity against them, and the sureties were made parties to a suit for delivery of the deeds. The sureties did not assert any claim in the suit:—Held, that the mortgagor was entitled to a decree for delivery of the deeds, and to the costs of the suit against the mortgagee, and that the principle of consolidating securities did not apply to a mere bailment of deeds to secure one of the debts. *Crickmore v. Freeston*, 40 L. J., Chanc. 187.

In such a case the proper remedy is by interpleader. *Id.*

Stock was sold out and advanced on mortgage, on the condition that at a certain time the mortgagor should replace in the name of the mortgagees a similar amount. The stock was not replaced, but the mortgage was allowed to continue:—Held, that though the funds had fallen, the mortgagee was only entitled to have the stock replaced. *Blyth v. Carpenter*, 2 L. R., Eq. 501; 13 Jur., N. S. 898; 35 L. J., Chanc. 823; 15 W. R. 3; 15 L. T., N. S. 154.

— upon payment of debt and costs, after action brought. ]—[By 7 Geo. 2, c. 20, s. 1, where any action shall be brought on any bond for payment of the money secured by such mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be brought in any superior court by any mortgagees or mortgagees, his, her or their executors, administrators or assigns, for the recovery of the possession of any mortgaged lands, tenements or hereditaments, and no suit shall be then depending in any court of equity for or touching the foreclosing or redeeming of such mortgaged lands, tenements or hereditaments; if the person or persons having right to redeem such mortgaged lands, tenements or hereditaments, and who shall appear and become defendant or defendants in such action, shall at any time pending such action pay unto such mortgagees or mortgagees, or in case of his, her or their refusal, shall bring into court where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest and costs to be ascertained and computed by the court where such action is or shall be depending, or by the proper officer by such court appointed for that purpose), the moneys so paid to such mortgagees or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgage or defendant of and from the same accordingly; and shall and may by rule or rules compel such mortgagees or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender or remove such mortgaged lands, tenements and hereditaments, and such estate and interest as such mort-

gages or mortgagees hath or have therein, and deliver up all deeds, evidences and writings in his, her or their custody, relating to the title of such mortgaged lands, tenements and hereditaments, unto such mortgagor or mortgagors, who shall have paid or brought such moneys into the court, his, her or their heirs, executors or administrators, or to such other person as he, she or they shall for that purpose nominate and appoint.

By s. 3, the act shall not extend to any case where the person or persons against whom the redemption is or shall be prayed, shall (by writing under his, her or their hands, or the hand of his, her or their attorney, agent or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist, either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different sums than what appears on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands, tenements and premises in question in any cause or suit, shall be controverted or questioned by or between different defendants in the same cause or suit, nor shall be any prejudice to any subsequent mortgagees or mortgagees, or subsequent incumbrancers.

15 & 16 Vict. c. 76, Common Law Procedure Act of 1852, s. 219, contains similar provisions.]

Where an action is brought on the covenant for payment in the mortgage deed, the case is within the act, and an order may be made for the delivery up of deeds. *Smecton v. Collier*, 5 D. & L. 184; 1 Exch. 457; 17 L. J., C. P. 57.

The order may be made at chambers. *Id.*

Where a mortgagee, by notice to the mortgagor, under 7 Geo. 2, c. 20, s. 3, seeks to deprive the latter of taking advantage of an application to a court of common law, such notice should contain sufficient to enable the court to form an opinion as to the nature of the objection upon which the right to redeem is disputed, and whether or not a case for the exercise of its jurisdiction exists. *See d. Harrison v. Louch*, 6 D. & L. 270; 14 Jur. 853; 18 L. J., Q. B. 278—B. C.—Coleridge.

If such a notice contains a mere statement that the mortgagee insists that the mortgagor has no right to redeem, by reason of the mortgaged premises being chargeable with other principal sums than those appearing on the face of the mortgaged deed, or admitted by the mortgagor to be due, it is insufficient. *Id.*

To a rule calling upon the mortgagee to show cause why, upon payment of principal and interest, he should not reconvey the mortgaged premises, and deliver up the deeds, it is an answer that the mortgagee has delivered a notice in writing, that he disputes the right of the mortgagor to redeem, although the delivery of such notice has been since the rule was obtained. *Filbe v. Hopkins*, 6 D. & L. 264—B. C.—Patterson.

The 7 Geo. 2, c. 20, s. 1, applies only to cases in which the mortgagee is not in possession, and in which he has not attempted to exercise the right of sale. *Sutton v. Rawlings*, 8 Exch. 407; 6 D. & L. 673; 18 L. J., Exch. 249.

Therefore, where a mortgagee, in pursuance of a power of sale, attempted to dispose of the property, but without success, the court refused to compel him to reconvey the premises and deliver up the deeds, except on payment of the costs of the abortive attempt at sale, and of showing cause against the rule. *Id.*

A first mortgagee brought an action on the covenant in the mortgage deed, having received a notice from a second mortgagee not to deliver up the deeds. The mortgagor applied to the court to compel the plaintiff, under the 7 Geo. 2, c. 20, to reconvey the premises upon payment of the principal, interest and costs; and the court held it to be a case within the statute, and made the order. *Dixon v. Wigram*, 2 C. & J. 613.

A mortgagor, in order to entitle himself to the benefit, in a court of law, of the 7 Geo. 2, c. 20, s. 1, must become a defendant in the action of ejectment. Where he is not such defendant the court will not interfere. *Doe d. Hurst v. Clifton*, 4 A. & E. 814; 3 H. & W. 285.

On an application to stay proceedings in an action on a bond securing the principal and interest payable on a mortgage, if the mortgagee seeks to obtain interest for the interval between granting the rule and the actual payment of the principal into his hands, he must make his claim to it at the time of discussing the rule, for he cannot afterwards sustain it. *Jordan v. Chowns*, 8 D. P. C. 709—B. C.—Coleridge.

In taxing costs under 7 Geo. 2, c. 20, in an ejectment by a mortgagee for the recovery of the mortgaged premises, costs are to be allowed as between party and party, and not as between attorney and client. *Doe d. Capps v. Capps*, 5 D. P. C. 184; 3 Bing. N. C. 768; 4 Scott, 468; 8 Hodges, 136; 1 Jur. 357.

In ejectment by a mortgagee, the court, or a judge, can include as a condition of an order for a stay of proceedings, the payment of the costs of an abortive attempt at a sale under a power. *Dowle v. Neale*, 10 W. R. 627—Exch.

After a reconveyance by a mortgagee to the mortgagor, the attorney of the mortgagee cannot retain the deeds against the mortgagor as a security for the expenses of the transaction, due from the mortgagee to the attorney. *Wakefield v. Newbon*, 6 Q. B. 276; 8 Jur. 735; 13 L. J., Q. B. 258.

The costs of preparing a mortgage deed, claimed by a firm of solicitors (one of whom was the mortgagee), are not mortgagee's costs; they are not covered by the security, and will not prevent the mortgagor from obtaining a reconveyance of the estate, or give the mortgagee any lien upon the title-deeds.

*Gregg v. Slater*, 2 Jur., N. S. 246; 25 L. J., Chanc. 440; 23 Beav. 314.

When a mortgagor who is being sued at law for the mortgage debt obtains an order under 7 Geo. 2, c. 20, for payment into court of the money due from him, and pays such money into court accordingly, such payment operates as a complete discharge from the mortgage debt, and the mortgagor is not bound to see to the application of the money. *Bourton v. Williams*, 30 L. J., Chanc. 800; 5 L. R., Ch. 655; 18 W. R. 1039.

As to the action for recovery of mortgage money,—see this title, VII., 2, a.

**Reconveyance by personal representatives of mortgagee.**—[By 37 & 38 Vict. c. 77 (The Vendor and Purchaser Act, 1874), s. 4, *the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgages shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust.*]

**Transfer of mortgage.**—[The 37 & 38 Vict. c. 78, Vendor and Purchaser Act, 1874, s. 4, does not enable the legal personal representative of a mortgagee to convey the legal estate of the mortgaged property to a transferee of the mortgage. The operation of the section is confined to cases where the mortgage is paid off and the estate re-conveyed. *Brooke, In re*, 46 L. J., Chanc. Div. 865; 25 W. R. 841—R.

### 3. Redemption.

**Right of, in general; and as to what mortgages and between what parties allowed.**—Upon the death of an administrator, who had mortgaged the leasehold estate of his intestate, reserving the equity of redemption to himself, his executors, administrators, and assigns, the equity of redemption vests in the personal representative of the administrator, and not in the administrator de bonis non of the intestate; the rule being, that the persons entitled to redeem in equity are those who, within the time limited by the mortgage deed, would have been entitled to redeem at law. *Skeffington v. Whitehurst*, 3 Y. & C. 1.

Where there are two or more mortgages, the Court of Chancery will not compel a redemption of one without the rest. *Rosd. Kaye v. Soley*, 2 W. Bl. 726.

A second mortgagee buying under a power of sale contained in the first mortgage is not subject to redemption by the mortgagor. *Kirkwood v. Thompson*, 2 H. & M. 302; 34 L. J., Chanc. 305, 501.

H. advanced money to P., and by agreement was to receive the whole amount due from P. in acceptances of the D. Company to C.'s drafts at six, twelve, and eighteen months, "but if not sufficient bills at such dates are received from the D. Company, then the balance to be made up in similar bills at twelve, twenty-four, and thirty-six months, upon

which 10% per cent. interest shall be payable, such last-mentioned bills to be redeemable at any time:"—Held, that the word "redeemable" implied that the debtor P. might take up the last-mentioned bills at any time, irrespective of the other debts due by him to H. *Hills v. Parker*, 14 L. T., N. S. 107—H. L.

Where two mortgages of different estates were assigned to one mortgagee as a security for one gross sum:—Held, that the purchaser of the equity of redemption of both estates could not redeem one without redeeming both. *Vint v. Padgett*, 1 Giff. 446; affirmed on appeal, 3 De G. & J. 611; 28 L. J., Chanc. 21.

The plaintiff was transferee of a mortgage on the defendant's property, the original mortgage deed containing a personal covenant by the mortgagee not to proceed for the recovery of the mortgage money until the expiration of a notice. After the transfer the plaintiff made a further advance to the defendant on the security of a deed further charging the same property, the defendant agreeing that it should not be redeemable until the payment of the whole amount due to the plaintiff. On a bill by the plaintiff, who had not given the notice, praying for an account of what was due on his securities, and for payment or foreclosure:—Held, that assuming the covenant as to notice to affect the right to foreclose the original mortgage, it did not affect the plaintiff's rights under the subsequent mortgage; and that as the defendant had precluded himself by his agreement from being admitted to redeem the subsequent without also redeeming the prior mortgage, the plaintiff was entitled to the relief which he asked for. *Haywood v. Gregg*, 24 W. R. 157—R.

When a mortgagee has consolidated several mortgages of different properties made by the same mortgagor, who has conveyed away the respective equities of redemption to different purchasers upon foreclosure by the mortgagee, the earliest purchaser of any part in point of time, or a subsequent purchaser of that part from him who stands in his shoes, will have the first right of redeeming the whole; and if he does not do so, then the purchasers of other parts will be entitled successively in order of date to redeem the whole. *Loveday v. Chapman*, 32 L. T., N. S. 689—V. C. H.

If the first purchaser of a part has bought that part subject to a mortgage debt, he, or whoever stands in his place at the time of the consolidation and redemption, must pay that mortgage debt. *Id.*

When a wife joins in a mortgage of her property, her equity of redemption is not released, if there is no express contract on her part to do so. *Betton or Belton, In re*, 12 L. R., Eq. 553; 19 W. R. 1052; 25 L. T., N. S. 404—V. C. W.

**Time to redeem.**—A mortgagor cannot compel a mortgagee to reconvey the premises prior to the period fixed in the proviso for redemption for repayment of the mortgage

money, although the mortgagor tenders the principal and full amount of interest which would be due at that period. *Brown v. Cole*, 9 Jur. 200; 14 L. J., Chanc. 167.

**Amount to be paid.**—The heir of a mortgagor, who has covenanted for himself and his heirs to pay the mortgage debt and interest, cannot redeem without paying arrears of interest to the extent of twenty years, the mortgagee being entitled to tack the arrears of interest to the debt as against the heir. *Eley v. Norwood*, 5 De G. & S. 240; 16 Jur. 493; 21 L. J., Chanc. 716.

A man twenty-six years of age, entitled to a reversion of 600*l.*, but wholly without present means, applied to a money lender, who advanced him 85*l.* on a mortgage of the reversion for 100*l.*, with a provision that if default should be made in payment of the 100*l.*, the 100*l.* should bear interest at five per cent per month. Twelve years afterwards the reversion fell into possession, and on a bill filed by the personal representative of the mortgagor, a decree was made for redemption on payment of the sum borrowed and simple interest at five per cent. *Beynon v. Cook*, 10 L. R., Ch. 389; 23 W. R. 591.

As to amount secured by mortgage, generally,—see this title, II., 4; payment, generally,—see this title, VI., 1.

**Compromises of suits for redemption.**—A mortgagee in fee who had been in possession for more than twenty years died in 1805, leaving a will by which he devised the property to his eldest son in tail, with divers remainders over; and appointed him executor and residuary legatee. In 1812, the persons claiming under the will of the mortgagor filled a bill against the son to redeem, and the suit was compromised in 1814 on the terms of his paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, and without having done any act to bar the entail created by his father's will:—Held, that his heir-at-law was entitled to the equitable fee, and that the remaindermen under his father's will had no title in equity. *Peddleton v. Rooth*, 1 De G., F. & J. 81; 29 L. J., Chanc. 265; 6 Jur., N. S. 183; 8 W. R. 101.

In a redemption suit against the mortgagee in possession of business premises, a compromise was agreed upon, under which the mortgagor was to pay a fixed sum upon a certain day, and the mortgagee was to carry on the business in the meantime and give up possession on payment, and all proceedings in the suit were to be stayed. The mortgagor failed to pay the money at the time appointed:—Held, that the agreement for compromise could not be enforced on motion in the suit, but a fresh bill must be filed for specific performance. *Pryer v. Griddle*, 10 L. R., Ch. 534; 44 L. J., Chanc. 676; 32 L. T., N. S. 238.

As to assignments of equity of redemption,—see this title, IV.



# VII. PROCEEDINGS TO RECOVER MORTGAGE MONEY.

## 1. By Sale of Premises under Power of Sale.

**Exercise of the power; conduct and validity of the sale.**—A condition of sale on a sale by a mortgagee under a power of sale, entitling the vendor to rescind the contract in case he should be unwilling or unable to answer any requisition, is depreciatory in a sense, but not so depreciatory as to be improper, being one that a prudent owner would introduce, and therefore binding on the mortgagor. *Falkner or Faulkner v. Equitable Reversionary Society*, 4 Drew. 352; 4 Jur., N. S. 1214; 28 L. J., Chanc. 132.

A mortgagee with a power of sale, either by public auction or private contract, and a proviso that all arrangements, sales, conveyances, acts, matters and things made and done by him should be as valid without as if made with the concurrence of the mortgagor, sold by private contract, and agreed that a part of the purchase-money might remain on a mortgage of the property sold.—Held, that the sale was not invalidated by the want of a previous attempt to sell by auction, or by the stipulation as to the purchase-money remaining on mortgage, but was good as regarded both the purchaser and the mortgagee. *Davy v. Durrant*, 1 De G. & J. 535; 26 L. J., Chanc. 830.

A mortgage in fee contained a power of sale to the mortgagee, his heirs, executors, administrators or assigns. The mortgage was transferred, and the transferee died intestate. The administrator of the transferee contracted to sell the estate, and procured a conveyance of the legal estate from the heir of the intestate, upon trust for the personal representatives for the time being of the intestate, and to be disposed of as they should direct.—Held, that the vendor could make a good title. *Salway v. Strawbridge*, 1 Jur., N. S. 1194; 25 L. J., Chanc. 121—L. J.

To trespass quare clausum fregit, by a mortgagor of a customary tenement, a justification under an entry by the mortgage trustee, who had by the mortgage deed an express power to sell on non-payment of the mortgage money, if the mortgagee requested him to do so, is not sufficient, unless it alleges that such a request was made, and that the entry was for the purposes of the mortgage trusts, though there is also in the deed a covenant by the mortgagor for the quiet enjoyment of the trustee, for that can only be intended to be in accordance with the trusts. *Watson v. Waltham*, 4 N. & M. 537; 2 A. & E. 485; 1 H. & W. 24.

A power given to a trustee in a mortgage deed, to sell, if the mortgagee requests, does not necessarily imply a right to enter upon the premises. *Id.*

The lessee of premises mortgaged them to the defendant, the mortgage deed containing a power of sale in the event of the non-payment of the mortgage money. Upon

default of payment, the defendant contracted to sell the premises to B., but in carrying out the arrangement it was agreed that the greater part of the purchase-money should remain on mortgage.—Held, in the absence of any proof that the contract of sale to B. was not bona fide, that the defendant had duly executed his power of sale, and that he was not bound to have disposed of the premises for ready money only. *Thurlow v. Mackeson*, 19 L. T., N. S. 448; 38 L. J., Q. B. 57; 4 L. R., Q. B. 97; 17 W. R. 280.

A mortgagee, who has bona fide contracted to sell according to the power of sale in his mortgage deed, may allow part of the purchase-money to remain outstanding on a mortgage of the property, though the power of sale makes no mention of any such privilege. *Id.*

The 23 & 24 Vict. c. 145, s. 15, gives power to a mortgagee of leaseholds by underlease to sell the whole of the original term. *Liatt v. Millman*, 19 W. R. 694—R.

A mortgagee contracted to sell together two properties mortgaged to him by different persons; and on the purchaser objecting to the title, the mortgagors, some of whom were married women, verbally promised to concur. The purchaser, however, refused to complete, and before a final order for specific performance could be obtained, some of the mortgagors died, leaving infants interested in the equity of redemption.—Held, that the willingness of the mortgagors to concur covered the defect in the title. *Id.*

The mortgagors had so mortgaged the property that the distinct powers of sale could not be exercised separately without selling undivided shares.—Held, that under the circumstances they would be benefited by a joint exercise of the powers, and must be bound by it. *Id.*

A mortgagee of freeholds, with power of sale, may, under 25 & 26 Vict. c. 108, sell the minerals separately from the land, though there are subsequent mortgagees who have not consented. *Beaumont, In re*, 19 W. R. 767; 40 L. J., Chanc. 400; 13 L. R., Eq. 86.

Mortgagees of real property, except the minerals, were allowed upon petition to exercise their power of sale by selling apart from the minerals, although a bill for foreclosure had been filed by them, and subsequent incumbrancers and persons interested in the equity of redemption opposed the petition. *Wilkinson, In re*, 41 L. J., Chanc. 392; 13 L. R., Eq. 634—V. C. W.

A mortgage contained a covenant by the mortgagor not to redeem for eight years, and, five years being yet unexpired, the mortgagor presented a petition for sale in the usual form.—Held, that the covenant was cause against making an absolute order for sale. *Hone, In re*, 8 Ir. R., Eq. 65.

A mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire

whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagee purported to exercise the power in favor of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would show that the security was satisfied at the time of the sale:—Held, that the sale, having been made to a bona fide purchaser without notice, was valid, even if the security should prove to have been satisfied. *Dicker v. Angerstein*, 8 L. R., Ch. Div. 600; 45 L. J., Chanc. Div. 754; 21 W. R. 844—R.

As to validity of powers of sale in mortgages,—see this title, I, 1; effect of assignments,—see this title, III.

**Rights of purchasers.**—There is no rule in equity which precludes a puisne mortgagee from purchasing the mortgaged property on the occasion of the exercise by a prior mortgagee of his power of sale, and a puisne mortgagee so purchasing acquires as against the mortgagor an absolute irredeemable title. *Shaw v. Bunny*, 11 Jur., N. S. 99; 84 L. J., Chanc. 257; 33 Beav. 494.

Where a first mortgagee sells in exercise of his power of sale, and a second mortgagee purchases, he has the same absolute right against the mortgagor as a stranger would have. *Id.*

A mortgagee, if he is not redeemed, is entitled to every possible security for his title, and has a right to buy in an anterior mortgage at any price he pleases. *Kirkwood v. Thompson*, 11 Jur., N. S. 385; 84 L. J., Chanc. 305; 18 W. R. 495; 12 L. T., N. S. 446; affirmed on appeal, 13 W. R. 1053; 12 L. T., N. S. 811; 2 De G., J. & S. 613; 84 L. J., Chanc. 501.

When the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, under the Transfer of Land Act, 25 & 26 Vict. c. 53, subject to a mortgage, and the mortgagee afterwards exercises his power of sale, and conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, and all entries relating thereto, removed from the register without the consent of the mortgagor. *Winter, In re*, 15 L. R., Eq. 156; 21 W. R. 320; 27 L. T., N. S. 842—R.

**Application of purchase-moneys.**—Preparatory to a contemplated sale under a trust for sale in a mortgage deed, an ejectment was brought by the first and second mortgagees against the heir of the mortgagor, and compromised upon the terms that he should give up possession on the 29th day of September following, and, if required, release to the mortgagees all his right, claim, and in-

terest, if any, in the premises. The sale did not take place; the heir was not required to execute any release, and he did not give up possession of the premises. Twelve years afterwards, the mortgaged property was sold under the trust for sale for considerably more than enough to pay principal, interest, and costs:—Held, that the mortgagees were not entitled under the compromise to retain the surplus purchase-moneys for their own use. *Rushbrook v. Lawrence*, 39 L. J., Chanc. 48—C.

A mortgagee in possession, who sells part of the mortgaged property under his power of sale in the mortgage, must apply the proceeds of sale, first, in payment of interest and costs, and then either pay the balance to the mortgagor or apply it in reduction of the principal due on the mortgage; and, in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgages are held by the same person, who sells one of the mortgaged estates. *Thompson v. Hudson*, 10 L. R., Eq. 497; 40 L. J., Chanc. 28; 18 W. R. 1081; 23 L. T., N. S. 278—R.

W. intrusted to P., his solicitor, 7,700*l.*, and verbally arranged with a clerk of P. for its investment on a mortgage of leaseholds at C., which investment P., by letter, informed him had been made as arranged with the clerk. P. having died insolvent, it was found that no mortgage in favor of W. existed, but that P. had advanced upwards of 100,000*l.* in his own name on mortgage of the property at C. Of this sum considerably more than 7,700*l.* had been advanced by P. between the date at which W. had intrusted that amount to him, and the date of the letter informing W. of the investment. Under an order of the court in a suit for the administration of the estate of P., the mortgage property was sold, and the proceeds carried to a separate account:—Held, that the advances made by P. on mortgage of the property at C. included the moneys intrusted to him by W., and that W. was entitled to repayment of such moneys out of the fund in court. *Middleton v. Pollock, Wetherall, Ex parte*, 25 W. R. 94—R.

A solicitor invested money of a client on an improper security (a fourth mortgage). It being supposed that the security was worthless, and the solicitor having absconded, the client received a composition of 5*s.* in the pound from the estate of a deceased partner of the solicitor, under a general scheme of compromise between the executors and creditors of such deceased partner. The mortgaged estate having subsequently proved sufficient to pay the fourth mortgage:—Held, that the amount received under the composition must be repaid to the partner's estate, and did not inure to the benefit of subsequent incum-

brancers on the mortgaged property. *Sawyer v. Goodwin*, 45 L. J., Chanc. Div. 289; 1 L. R., Ch. Div. 851; 24 W. R. 498; 34 L. T., N. S. 635—C. A.

## 2. By Actions or Suits.

### (a) At Law.

When action lies; nature and form; and what remedies available.]—When a mortgage deed contains no covenant for repayment, so that no action can be maintained on the deed, an action for money lent will lie. *Yates v. Aston*, 3 G. & D. 851; 4 Q. B. 182; 7 Jur. 88; 12 L. J., Q. B. 160.

The plaintiff was mortgagee under a mortgage from the defendant to him, with a power of sale in the event of non-payment of a sum of money, which was further secured by a bond given by the defendant to him. The property was afterwards sold by the plaintiff under the power, but did not produce sufficient to discharge the debt. An account was then stated between the plaintiff and the defendant, charging the defendant with the full amount of the principal and interest, and giving him credit for the net proceeds of the sale. The defendant admitted the correctness of the account, and promised to pay the balance, to recover which the plaintiff brought an action for money lent and due on an account stated:—Held, that the debt having been secured by specialty, the action could not be maintained, except upon the deed. *Middleditch v. Ellis*, 2 Exch. 623; 17 L. J., Exch. 865.

A devisee in trust of mortgaged premises, for sale and payment of the debts of the mortgagor, borrowed 200*l.* of the plaintiff, for the purpose of paying off a portion of the debts of the mortgagor; and by deed between him and the plaintiff, reciting these facts, charged the premises with the payment of that amount, and covenanted that he and his heirs should, out of the money that should come to his hands as such trustee, or out of the personal estate, if any, of the mortgagor, pay to the plaintiff the principal and interest secured by the deed:—Held, that the plaintiff was not entitled to sue the devisee in an action for money lent, but that his remedy was upon the covenant contained in the deed. *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J., Exch. 150.

A deed of mortgage, and conditional sale, contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld, though the mortgagor received the mortgage money:—Held, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest on the money advanced. *Raja Oodit Purkash Singh v. Martindell*, 4 Moore Ind. App. 444.

There were cross covenants in a mortgage deed, and the mortgagees did not execute it:—Held, that they might nevertheless bring their action against the mortgagor, who did

execute. *Morgan v. Piko*, 14 C. B. 473; 2 C. L. R. 696; 23 L. J., C. P. 64.

A party having a mortgage, and also a bond as a security for the same debt, may arrest the defendant on the bond pending a suit in equity for a foreclosure. *Burnell v. Martin*, 2 Dougl. 417.

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security. *Davis v. Battine*, 2 Russ. & Mylne, 76.

After foreclosure and sale, the mortgagee may bring an action for the residue. *Tooke v. Hartley*, 2 Bro. C. C. 125. See *Perry v. Barker*, 8 Ves. 527.

A mortgagee having filed a bill of foreclosure, and having proceeded to execution in ejectment, and being in possession of the rents and profits under an ejectment, and having brought an action for the mortgage money, and obtained execution, the court refused to discharge the defendant out of execution; for a mortgagee has a right to his remedy on all his securities. *Colby v. Gibson*, 3 Smith, 516.

After foreclosure a mortgagee fairly sold the estate for less than what was due to him:—Held, that he could not afterwards recover from the mortgagor upon his collateral personal securities the amount still remaining unpaid. *Lockhart v. Hardy*, 9 Beav. 349; 10 Jur. 532; 15 L. J., Chanc. 847.

When action at law will be restrained in equity.]—The circumstance that a mortgagee, with power of sale, has entered into a contract to sell a portion of the property comprised in the security for a sum greater than the amount due on the mortgage, is not a sufficient ground for restraining him from prosecuting an action upon the covenant for payment contained in the mortgage deed. *Willes v. Levett*, 1 De G. & S. 392.

A mortgagor having transferred the equity of redemption, the transferee and mortgagee joined in a partial alienation of the property, but the money was received by the transferee alone:—Held, that the mortgagee could not afterwards sue the mortgagor on his covenant to pay. *Palmer v. Hendrie*, 27 Beav. 349.

When, default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired, an injunction will be refused except on the terms of the amount recovered being paid into court, since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter-of course, have made the not calling in of the principal, conditional on the punctual

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Solicitors for the Plaintiff

**Plaintiff's Case.**—The plaintiff, a widow, was the executrix of the will of G. A., who died on 31st June, 1840, and was owing a large sum of money to the plaintiff. The plaintiff claimed the sum of 2,800*l.* and interest, first, because it did not appear that only one year's interest was due on the 31st June, 1840; secondly, because, if the sum was repaid as surplusage, it was a sum entered for the excess. *Sumner v. Wood, D. & M. 355; 5 Q. B. 170.*

The plaintiff also claimed the sum of 2,800*l.* and interest, first, because it did not appear that only one year's interest was due on the 31st June, 1840; secondly, because, if the sum was repaid as surplusage, it was a sum entered for the excess. *Sumner v. Wood, D. & M. 355; 5 Q. B. 170.*

A declaration was filed by a bill between the plaintiff, the defendant's executrix, and W., the testator, for a sum of 2,800*l.* and interest. By the deed, it appeared that the plaintiff mortgaged premises to W., with a proviso, that if the plaintiff, six months after demand in writing, should pay the 1,200*l.* to W., W. would recover; that the plaintiff made a subsequent mortgage to the testator, subject to the mortgage to W., and to the payment to him of the 1,200*l.* There was the general covenant (which was declared on) for the payment, by the testator, to W., of the 1,200*l.* The plea alleged that no demand, in writing, of payment of the 1,200*l.* had been made on the plaintiff;—Held, that the declaration was bad; since, as no demand of payment had been made by W. on the plaintiff, the money was not due, and the defendant was not liable. *Trott v. Smith, 10 M. & W. 453; 13 L. J., Exch. 186.*

In an action on a covenant which was for the payment of interest by half-yearly payments, the declaration alleged six half-yearly sums to be due, without setting out what the half years were, or over how much time they amounted. Held, sufficiently certain. *King v. Greenhill, 6 M. & G. 59; 6 Scott, N. R. 409; 7 Jur. 604; 13 L. J., C. P. 833.*

In a count on a deed, dated 21st June, 1839, for payment of 900*l.*, and interest at five per cent., on 21st June next, the action was commenced, and the declaration dated,

in July 1842. Breach, non-payment of the sum and interest on 21st June, 1840, and that there was due and owing a large sum of money to the plaintiff. Held, good, on motion in arrest of judgment, first, because it did not appear that only one year's interest was due on the 31st June, 1840; secondly, because, if the sum was repaid as surplusage, it was a sum entered for the excess. *Sumner v. Wood, D. & M. 355; 5 Q. B. 170.*

After an account in a mortgage deed of S. A. the defendant's testatrix) and H. A. in payment of 2,800*l.*, and interest, first, on equitable grounds, setting out the deed, which recited the will of G. A., whereby he bequeathed his furniture, plate, books, pictures, &c., subject to the payment of his debts to S. A. for life, and after her decease to H. A. The deed also recited a decree of the Court of Chancery, by which it was ordered that the furniture and other articles be sold, and the proceeds paid to S. A. and H. A. The deed also recited that the books and pictures had been valued at 2,950*l.*, at which sum H. A. had agreed to purchase them, and that to enable him to do so, the plaintiff had agreed to lend him 2,800*l.*, and a further sum of 200*l.* to secure the security of the joint and several bequest of S. A. and H. A., and as bequest of the furniture, &c. The deed then recited that S. A. and H. A. assigned the furniture, plate, pictures, and books to the plaintiff as a security for 2,800*l.*, with a power of sale in default of payment; the plaintiff sold the proceeds of the sale in trust to pay the expenses, and then to apply the moneys in satisfaction of the principal and interest due. The plea then averred that the plaintiff and the furniture, &c., and pictures were being sold to have applied accordingly. The plaintiff, on equitable grounds, claimed that the valuation of the plate and furniture was not complete at the time of the execution of the deed, and that they were afterwards valued at 706*l.* 8*s.*, at which sum H. A. agreed to purchase them; that, by an indenture between H. A. and the plaintiff after reciting that 2,800*l.* and interest were due to the plaintiff, that S. A. had died, and that, in order to enable H. A. to purchase the plate and furniture, the plaintiff had agreed to lend him 600*l.*, H. A. assigned to the plaintiff all the property mentioned in the deed, to secure the 2,800*l.* and interest, and the 600*l.* and interest, together with a power of sale. The replication then stated that the plaintiff sold the plate and furniture, and, after the expenses, realized 1,127*l.* 15*s.*, and that there was due under the indenture, in respect of the 600*l.* and interest, 638*l.* 5*s.* 6*d.*; that H. A. not having paid into the Court of Chancery the 706*l.* 8*s.* for the purchase of the plate and furniture, the plaintiff, in order to pay the same, retained out of the money realized by the sale 706*l.* 8*s.*, and that the sums of 638*l.* 5*s.* 6*d.* and

706*l.* 8*s.* being deducted from the proceeds of the sale, the plaintiff never realized more than 2,035*l.* 18*s.* 4*d.*, which was only sufficient to pay a part of the plaintiff's claim:—Held, that, in taking the account in equity, the plaintiff was not entitled to deduct from the amount for which the property sold the 600*l.* and interest, for that would in effect be to tack the mortgage of 2,800*l.* to the mortgage of 600*l.*, which could not be done, since the equity of redemption was in different persons; but that the plaintiff was entitled to deduct the 706*l.* 8*s.*, since the whole property was not in his possession, and the defendant had no right to sell it until the sum of 706*l.* 8*s.* was paid into court. *Marcon v. Bloxam*, 11 Exch. 586; 25 L. J., Exch. 193.

**Right of mortgagee to sue on non-payment of mortgage money.**—To a declaration on a mortgagor's covenant to pay the debt, the action being brought to recover the balance due to the mortgagee, after giving credit for the money realized on the sale of the property, the defendant pleaded, by way of equitable defense, a plea which showed that the plaintiff had taken possession of the property, and had sold it under the power of sale contained in the mortgage, and had thereby, as the plea alleged, deprived the defendant of his right to have such property conveyed to him upon payment of the money and interest due on the mortgage. This plea was pleaded under a master's order, which gave the plaintiff liberty to reply and demur thereto. Instead of demurring, the plaintiff applied for and obtained an order from a judge to strike the plea out:—Held, that such order was rightly made, as the plea was clearly bad, since it did not show that sufficient had been realized by the sale to satisfy the debt. *Rudge v. Richens*, 42 L. J., C. P. 127; 8 L. R., C. P. 127; 28 L. T., N. S. 537.

#### (b) In Equity.

**Foreclosure and sale.**—[By 7 Geo. 2, c. 20, s. 2, on bills to foreclose, the court, on the defendant's request, may proceed to a decree before a regular hearing; and all parties shall be bound thereby as if the cause had been regularly heard.

By s. 3, the act does not extend to cases where the right of redemption is controverted, or the money due not adjusted.

By 15 & 16 Vict. c. 86, s. 48, a court of equity may direct a sale of the mortgaged property instead of a foreclosure.]

A person entitled to part only of a sum of money, due on mortgage, cannot file a bill for a foreclosure of the same part of the mortgaged estate. *Palmer v. Carlisle*, 1 Sim. & Stu. 428.

Upon a bill of foreclosure, the mortgagee having been robbed of the title-deeds, payment of the mortgage money within a limited time was decreed; and on payment of the same a reconveyance was directed, with a bond of indemnity. *Shelbourn v. Harrop*, 6 Madd. 89.

Although a foreclosure suit is pending the court will allow the property to which it relates to be sold without the control of the court, provided all parties interested are sui juris and consent; but the purchase-money will be ordered to be paid into court, at least if there is any question as to priority of incumbrances. *Ralph v. Horton*, 19 W. R. 220—R.

When A. and B., jointly interested in a policy of assurance, agreed to keep it up for their mutual benefit, paying the premium in certain proportions, and B. ceasing to pay his portion of the premium, the whole was paid by A.:—Held, that he was entitled to a foreclosure decree against B. *Parker v. Angelsea*, 25 L. T., N. S. 482; 20 W. R. 102—R.

A purchaser who, in a suit to realize a mortgage security, has paid the purchase-money of the mortgaged property into court, is entitled, before its distribution, to the delivery of the title-deeds. *Fowler v. Scott*, 25 L. T., N. S. 784; 20 W. R. 109—V. C. W.

A foreclosure decree being a decree in personam depriving the mortgagor of his personal right to redeem, the court has jurisdiction to make such a decree in respect of a mortgage, between an English mortgagor and mortgagee, of land in one of the colonies. *Paget v. Eds.*, 18 L. R., Eq. 118; 43 L. J., Chanc. 571; 22 W. R. 625; 30 L. T., N. S. 228.

The rule that the dismissal of the bill in a redemption suit operates as a foreclosure of the mortgage does not apply to an equitable mortgage by deposit of title-deeds. *Marshall v. Shrewsbury*, 10 L. R., Ch. 250; 32 L. T., N. S. 418; 44 L. J., Chanc. 302; 23 W. R. 808.

A mortgagor filed a bill for the redemption of a legal mortgage. The mortgagee, by his answer, alleged that he had advanced another sum of money on the deposit of the title-deeds of another estate, and he claimed to hold both estates till both debts were paid. The plaintiff amended his bill by stating the allegations made by the defendant, but before the bill came to a hearing he obtained an order, ex parte, dismissing the bill with costs. The mortgagee afterwards contracted to sell both estates, and then filed a bill for the administration of the estate of the mortgagor, who was dead, praying for permission to carry out the sale, and for payment of his whole debt out of the mortgagor's estate:—Held, that the equitable mortgage was not foreclosed, and that the plaintiff was entitled to the relief prayed for. 1*b.*

The proper remedy for an equitable mortgagee with a deposit of title-deeds is by a decree for foreclosure, and not a sale. *James v. James*, 42 L. J., Chanc. 380; 16 L. R., Eq. 153; 21 W. R. 522.

The doctrine that an equitable mortgagee by deposit of title-deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels. *Carter v. Waka*, 4 L. R., Ch. Div. 605; 46 L. J., Chanc. Div. 841—R.

A. deposited with B. certain Canada rail-

way bonds as security for a debt. On bill filed by B. for foreclosure or sale:—Held, that B. was entitled to an order for sale only. *Id.*

A mortgagee having instituted an action for foreclosure of a mortgage against the mortgagor, making a second mortgagee party, during the pendency of the action purchased the equity of redemption:—Held, that the intention being apparent upon the deeds not to let in the second mortgagee as first mortgagee, such second mortgagee could only foreclose on terms of paying off the amount secured by the first mortgage. *Adams v. Angell*, 46 L. J., Chanc. Div. 54—V. C. H.; affirmed on appeal, 46 L. J., Chanc. Div. 352; 5 L. R., Ch. Div. 634; 36 L. T., N. S. 334.

**Payment of mortgage debts of decedent out of real or personal estate.**—[By 17 & 18 Vict. c. 113, s. 1, *when any person shall, after 31st December, 1854, die seized of or entitled to any estate or interest in any lands or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will, or deed or other document, have signified any contrary or other intention, the heir or devisee, to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:*

*Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise; or the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made before the 1st of January, 1855.*

But by 30 & 31 Vict. c. 69, s. 1, in the construction of the will of any person who may die after 31st December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the 17 & 18 Vict. c. 113, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. See *Nelson v. Page*, 17 W. R. 27.

By s. 2, in the construction of both acts, the word mortgage shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator. See

*Barnwell v. Ironmonger*, 1 Drew. & S. 253; *Hood v. Hood*, 26 L. J., Chanc. 616.]

A mortgagor devised his real and personal estate to his wife. She died without paying off the mortgage:—Held, in a case not falling within the 17 & 18 Vict. c. 113, that her heir was not entitled to have the mortgage paid out of the personal estate of the mortgagor. *Swainson v. Swainson*, 6 De G., M. & G. 648; 8 Jur., N. S. 145; 26 L. J., Chanc. 119.

In a suit by legal mortgagees of real estate for sale of the mortgaged property, and for the general administration of the mortgagor's estate, the proceeds of the mortgaged property will be applied in payment to the mortgagees of their principal, interest and costs, in priority to the payment to devisees or executors, who had been made parties, of their costs of the suit. *Pincharl v. Fellows*, 43 L. J., Chanc. 227; 23 W. R. 612; 29 L. T., N. S. 882—V. C. B.

A tenant for life under a settlement executed a deed, by which—reciting an agreement by O. to lend him 150*l.* on a bill of sale or transfer of a diamond necklace, and a desire to settle it as a heirloom—he assigned it in trust for O., subject to a proviso for cesser of the trust on repayment of the principal and interest, and, after repayment in trust for himself for life, and, after his death, as an heirloom, with the estates limited by the settlement; and he covenanted to pay the money with interest, and that, in default of payment, O. should possess and sell the necklace, and pay the surplus proceeds to the donor:—Held, that, as between the remainder-man and the personal representative of the donor, the necklace was primarily liable for the payment of the debt. *Owen v. Braddell*, 7 Ir. R., Eq. 358—V. C.

## Mortis Causa.

See WILL.

## Mortmain.

- I. OPERATION OF THE STATUTE OF MORTMAIN, GENERALLY, 9299.
- II. WHAT LANDS OR INTERESTS IN LANDS, AND WHAT INVESTMENTS IN LANDS, ARE WITHIN THE STATUTE, 9300.
- III. WHAT CHARITIES AND CHARITABLE USES ARE WITHIN THE STATUTE, 9305.
- IV. WHAT DEEDS AND TRANSFERS ARE WITHIN THE STATUTE; CONVEYANCES TO DEFEAT THE STATUTE, 9307.
- V. INTERPRETATION AND EFFECT OF TESTAMENTARY GIFTS TO CHARITABLE USES, IN GENERAL. See WILL.
- VI. EFFECT OF INVALIDITY OF TESTAMENTARY PROVISIONS. See WILL.



# OPERATION OF THE STATUTE OF MORTMAIN, GENERALLY.

**Statutes.]**—[By 9 Geo. 2, c. 36, s. 1, *no anns, lands, tenements, rents, advowsons or her hereditaments, corporeal or incorporeal, or any sum of money, goods, chattels, stock, securities for money, or any other personal state whatsoever, to be laid out in the purchase of lands, tenements or hereditaments, can be given for charitable uses, unless by deed indented and executed before two witnesses, twelve months before the death of the donor, and enrolled within six months after execution.*

By s. 2, *it is not to extend to purchases or transfers made for valuable considerations.*

By 9 Geo. 4, c. 85, s. 1, *deeds relating to the purchase of lands for charitable purposes, where the consideration has been actually paid for the same, are to be valid, although formalities prescribed by previous statute have not been duly performed.*

*These acts were amended by 24 & 25 Vict. c. 9, 25 & 26 Vict. c. 17, 27 Vict. c. 13, and 29 & 30 Vict. c. 57, and the time and mode for the enrollment of deeds for charitable objects extended.*

By 27 Vict. c. 13, s. 4, *every full and bona fide valuable consideration, within section 1 of the 24 & 25 Vict. c. 9, which shall consist, either wholly or partly, of a rent or other annual payment reserved or made payable to the vendor or grantor, or to any other person, shall, for the purposes of the 9 Geo. 2, c. 36, be as valid and have the same force and effect as if such consideration had been a sum of money actually paid at or before the making of such conveyance without fraud or collusion.*

By 26 & 27 Vict. c. 106, *every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall, for all the purposes of the 9 Geo. 2, c. 36, 24 & 25 Vict. c. 9, and 25 & 26 Vict. c. 17, be deemed to have been made to take effect for the charitable use thereby intended immediately from the making thereof, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance.*

By 34 Vict. c. 13, *The Public Parks, Schools and Museums Act, 1871, s. 4, all gifts and assurances of land of any tenure, and whether made by deed or by will, or codicil, for the purposes only of a school-house for an elementary school, and all bequests of personal estate, to be applied in or towards the purchase of land for all or any of the same purposes only, shall be valid notwithstanding the statute of 9 Geo. 2, c. 36, and other statutes commonly known as the Statutes of Mortmain.]*

**In the colonies.]**—The statute does not extend to the colonies. *Whicker v. Hume*, 7 H. L. Cas. 124; 4 Jur., N. S. 933; 28 L. J., Chanc. 396.

**Interpretation and application of the statute in cases of charitable gifts, generally.]**—In

the administration of charitable bequests it is the duty of the court to ascertain from the words of the will, by the ordinary rules of construction, the true meaning and intention of the testator, both as to the bequest itself and the mode of carrying it into effect, without in the first instance adverting to the existence of the Statute of Mortmain, 9 Geo. 2, c. 36. *Tatham v. Drummond*, 4 De G., J. & S. 484.

When the intention of the testator has been ascertained, inquiry is to be made whether the whole or any part of that intention is contrary to the provisions of the statute. But no secondary interpretation ought to be adopted, nor ought the court to resort to any different mode of administration from that indicated by the testator, even though it may be reasonable in itself, for the purpose of escaping from the operation of the statute. *Id.*

As to the effect of the statute to invalidate bequests and devises to charitable uses,—see this title, II.—IV.; and as to the effect of such invalidity upon other provisions of the will,—see WILL.

## II. WHAT LANDS OR INTERESTS IN LANDS, AND WHAT INVESTMENTS IN LANDS, ARE WITHIN THE STATUTES.

**Lands, in general.]**—Where lands are already in mortmain, being vested in an ecclesiastical corporation, a lease of such lands to charitable uses is not within the 9 Geo. 2, c. 36. *Walker v. Richardson*, 2 M. & W. 882; M. & H. 251.

A conveyance of copyhold land to charitable uses in the lifetime of the party is equally within the 9 Geo. 2, c. 36, as freeholds, and must, therefore, be executed with the formalities required by that statute. *Doe d. Houson v. Waterton*, 3 B. & A. 149.

A grant by the crown of the right to lay chains in part of the Thames to moor ships is an interest in land, and within the Statute of Mortmain. *Negus v. Coulter*, Amb. 367.

**Legacies charged on lands; interests in proceeds of lands sold; impure personality.]**—An interest in the proceeds of land directed to be sold is not an interest in land, even though the land is in fact unconverted, by reason of a preceding tenant for life, entitled to enjoy it as land, being still living. *Marsh v. Att. Gen.*, 2 Johns. & H. 61; 7 Jur., N. S. 184; 9 W. R. 179; 3 L. T., N. S. 615.

A legacy of money, by another testator's will, directed to be paid out of the purchase-money of lands, the time for sale not having arrived, is an interest in land within 9 Geo. 2, c. 36, s. 3, and cannot be bequeathed for charitable purposes. *Brook v. Badley*, 36 L. J., Chanc. 741; 16 L. T., N. S. 762.

A mine was granted, to be paid for by installments, by equal half-yearly payments, at 750*l.* per acre worked:—Held, that an unpaid installment was not an interest in land. *Id.*

A testator directed all the rest, residue,

and remainder of his personal estate which might be legally applied for such purposes to be paid unto and equally between six hospitals therein named (two of which had power by law to take and hold land notwithstanding 9 Geo. 2, c. 36, while the other four had not), and he directed that his estate should be so marshaled and administered as to give the fullest possible effect to the bequests in favor of charitable institutions thereinbefore contained; and he gave his residuary real estate and all the residue of his personal estate which should not be applicable to and applied in the trusts and purposes aforesaid unto the Middlesex Hospital, that institution being empowered by law to receive the same:—Held, that the bequest to the six hospitals included impure personality, and that such impure personality must be applied as far as possible in payment of the shares of those of the six hospitals which had power to take and hold land. *Wigg v. Nicholl*, 14 L. R., Eq. 92; 26 L. T., N. S. 985; 20 W. R. 738—R.

A domiciled Scotchman, having real and personal estate in India, devised and bequeathed it to trustees, to realize and out of the free proceeds to pay 10,000*l.* to three persons whom he appointed executors of his Scotch estates, and he directed such persons to employ the same in founding an hospital in Scotland. He died a few days after executing his will, leaving personal estate in India more than sufficient to pay this legacy:—Held, that the personal estate in India being sufficient to pay the 10,000*l.*, the charitable bequest of that amount was valid, and that the law of marshaling did not apply. *Macdonald v. Macdonald*, 26 L. T., N. S. 685—V. C. B.

**Mortgages, and other liens and charges on lands.**—Arrears of interest on a mortgage of real estate are within the Statute of Mortmain, and cannot be bequeathed to a charity. *Alexander v. Brans*, 30 Beav. 153; 7 Jur., N. S. 889; 9 W. R. 719.

Debts due on bond, accompanied with a deposit of title-deeds of real estate, and an agreement to execute a legal mortgage when required, are within the statute. *Id.*

So debentures of the commissioners of a dock made under an act of parliament, and in the form of an assignment of the duties arising by virtue of the act, are within the statute. *Id.*

An act for improving a town, and supplying the inhabitants with water, vested in the commissioners thereunder the works and the soil, and authorized them to purchase land, to construct and carry on waterworks and gas-works, and to make rates upon occupiers of lands, and recover them by distress. Mortgages were made by the commissioners, whereby, under the borrowing powers conferred by the act, they granted and assigned the "works, rents, and rates," authorized by the act, to the lender until the sum borrowed should be repaid:—Held, to confer upon the lender an

interest in land within the Statute of Mortmain. *Chandler v. Howell*, 4 L. R., Ch. Div. 651; 46 L. J., Chanc. Div. 25; 35 L. T., N. S. 592; 25 W. R. 55—V. C. H.

A lady, long before her death, had granted the lease of a house for thirty-one years at a low rent, with a premium of 600*l.*, which had not been paid:—Held, that the unpaid premium, being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity. *Shepherd v. Beetham*, 6 L. R., Ch. Div. 597; 46 L. J., Chanc. Div. 763; 36 L. T., N. S. 909—V. C. M.

**Shares and debentures of companies.**—Mortgages of turnpike tolls and of railway undertakings are interests in land within the 9 Geo. 2, c. 36. But railway debentures (not being mortgages), shares in railway, canal, waterworks and banking companies and scrip shares in projected railway companies, are not. *Ashton v. Langdale*, 4 De G. & S. 402; 15 Jur. 868; 20 L. J., Chanc. 234.

Neither are shares in an incorporated company an estate or an interest in land, nor does it make any difference that the act incorporating the company does not contain a clause declaring the shares to be personal estate. *Edwards v. Hall*, 6 De G., M. & G. 74; 25 L. J., Chanc. 82; 1 Jur., N. S. 1189.

So shares in a banking company established under 7 Geo. 4, c. 46, and having an interest in freehold and other lands vested in the trustees of the company, are not within the act. *Myers v. Perigal*, 11 C. B. 90; 16 Jur. 1118; 21 L. J., C. P. 217; S. C., 2 De G., Mac. & G. 599; 17 Jur. 145; 22 L. J., Chanc. 431.

Shares in a land company, the business of which was purchasing and improving lands and selling or letting the same, and in a land society, established for raising by subscription a fund out of which any member should receive the amount of his share for the erection or purchase of a dwelling-house, or other real or leasehold estate, are not interests in land within 9 Geo. 2, c. 36. *Entwistle v. Dinw*, 4 L. R., Eq. 272; 36 L. J., Chanc. 835—V. C. W.

Where land is purchased and held by a public company for the purposes of trade, it is a settled principle that the interest which a share-holder of the company possesses in the land is not within the operation of the 9 Geo. 2, c. 36. *Taylor v. Linley*, 5 Jur., N. S. 701; S. C., nom. *Linley v. Taylor*, 1 Giff. 67; 28 L. J., Chanc. 686; affirmed on appeal, 2 De G., F. & J. 84; 29 L. J., Chanc. 534; 8 W. R. 735.

Where a trading company which holds the land has demised that land to another trading company, the rule is the same. *Id.*

But a bequest of shares in a iron company, a partnership, not incorporated, formed for working mines, which possessed freehold and other estates of considerable extent and value, and derived large profits from letting

tion of the same, is void. *Morris v. Glynn*, 1 Jur., N. S. 1047; 27 Beav. 218.

A gift of Metropolitan Board of Works free and a-half consolidated stock to a charity is void under the Mortmain Act, 9 Geo. 2, c. 36. *Cluff v. Cluff*, 2 L. R., Ch. Div. 222; 24 W. R. 632—V. C. H.

But a debenture of a waterworks company, in the form provided by Schedule C. to the Companies Clauses Act, 1845, by which the undertaking, including the town rates, is charged with the repayment of the sum advanced, is not an interest in land within the Mortmain Act. *Holdsworth v. Davenport*, 8 L. R., Ch. Div. 185; 25 W. R. 20; 46 L. J., Chanc. Div. 20; 35 L. T., N. S. 319—V. C. M.

And a railway debenture, which is in the form given in Schedule C. to the Companies Clauses Consolidation Act, 1845, is pure personality, and therefore not within the mischief of the Mortmain Act. *Mitchell v. Moberly*, 37 L. T., N. S. 145; 25 W. R. 903; 6 L. R., Ch. Div. 655—V. C. B.

But debenture stock, the nature of which is regulated by the Companies Clauses Act, 1845, is an interest in land within the Mortmain Act. *Attres v. Howe*, 37 L. T., N. S. 399—V. C. H.

**What are gifts to be laid out in the purchase of lands, &c., void within the statute.]**

—B. devised a piece of land in N. to S. By the will he gave a large sum of money to the trustees of his will (S. being one) to erect almshouses and found a charity, "if any person should within twelve months after his decease, at his or her expense, purchase or give a suitable piece of land in N. aforesaid as a site." Within the twelve months S. conveyed the piece of land so devised to him to four trustees, upon trust to apply it to the purposes directed in the will of B. In case his wishes should not be fulfilled, the testator gave the same sum to the trustees of St. George's Hospital:—Held, that the first bequest was not within the provisions of the 9 Geo. 2, c. 36, and was therefore not void. *Philpott v. St. George's Hospital*, 6 H. L. Cas. 338; 8 Jur., N. S. 1260; 27 L. J., Chanc. 70.

A lady, during her illness, gave a sum of money to trustees to establish a fever hospital. The money was invested in their names, and they executed a trust deed declaring that they held the money for the purpose of establishing (after the decease of the donor) a fever hospital. The donor, who knew nothing of the execution of the deed, died a fortnight after giving the money:—Held, that the gift came within 9 Geo. 2, c. 36, and was void. *Hawkins v. Allen*, 10 L. R., Eq. 246; 40 L. J., Chanc. 23; 18 W. R. 748; 23 L. T., N. S. 465—V. C. M.

A gift for the endowment of a future church is not void under the Mortmain Act, 9 Geo. 2, c. 36. *Sinnett v. Herbert*, 7 L. R., Ch. 283; 41 L. J., Chanc. 888; reversing *S. C.*,

12 L. R., Eq. 201; 40 L. J., Chanc. 509—V. C. M.

A testatrix gave the residue of her personal estate to trustees upon trust to be by them applied in aid of erecting or endowing an additional church at A.:—Held, that the gift was not intended to be confined to a church to be erected or commenced before her death, but was applicable to any future church. *Ib.*

An inquiry was directed whether the residuary personal estate could be employed in aid of erecting or endowing an additional church at A. *Ib.*

When pure and impure personality is given to trustees to erect or endow a church, they are entitled, under 43 Geo. 3, c. 108, to 500*l.* out of the impure personality, in addition to the whole of the pure personality. *Ib.*

A bequest of 1,000*l.* to be applied towards building a church at Newark, near Northgate, in connection with the established church; but if it should not be commenced during the testator's lifetime, or before two years after his death, or if not erected at Northgate, then the legacy not to be payable, and notice of the conditions to be given to the legatees, is void. *Pratt v. Harvey*, 12 L. R., Eq. 544; 25 L. T., N. S. 200; 19 W. R. 950—V. C. W.

To be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land. *Ib.*

A bequest of pure personality to an existing charity, the application of the funds of which rests in the absolute discretion of the trustees, is good, although some of the objects of the charity may involve the acquisition of land. *Wilkinson v. Barber*, 14 L. R., Eq. 96; 41 L. J., Chanc. 721; 20 W. R. 763; 26 L. T., N. S. 937—R.

The legacy duty on a charitable legacy, given free of duty, cannot be paid out of impure personality. *Ib.*

Next of kin appearing in opposition to a charitable bequest, and failing, are not entitled to costs as between solicitor and client. *Ib.*

A lady, "feeling that she was doing right in returning her money in charity to God who gave it," bequeathed all her residuary personal estate to be applied in building almshouses "when land should be given for the purpose:"—Held, to be a good charitable gift. *Chamberlayne v. Brockett*, 42 L. J., Chanc. 868; 8 L. R., Ch. 206; 21 W. R. 299; 28 L. T., N. S. 248; reversing *S. C.*, 41 L. J., Chanc. 789—R.

A bequest to a church diocesan building society towards building and endowing a church, but without referring to an existing site or expressly excluding the application of the money to the acquisition of land, is void, except to the extent of 500*l.* *Lee, In re*, 27 L. T., N. S. 808; 21 W. R. 108—V. C. B.

As to what are gifts to charitable uses within the statute,—see this title, III.

**Extent and effect of invalidity of prohibited gifts.]**—Where there was a bequest to a man and his heirs, to hold to the use of him and his heirs, with a desire that he would convey to some charitable uses, and the will afterwards contained a bequest to him of an estate for life:—Held, that the whole of the former devise, and not merely the trust, was void, because the 9 Geo. 2, c. 36, makes void the legal estate given, as well as the trust. *Doe d. Burdett v. Wright*, 2 B. & A. 710.

A. devised houses to trustees for sale, and to apply the proceeds to pay legacies of 50*l.* to each of three charitable and religious institutions. He also gave legacies to other persons, and made his brother residuary legatee:—Held, that the trust estate was not avoided by the Statute of Mortmain, though the houses went to the heir-at-law, and not to the charitable uses. *Doe d. Cudgey v. Harris*, 16 M. & W. 517; 16 L. J., Exch. 190.

When a sum of money was given to a corporation, as to part for building an hospital, and as to the remainder for endowing it:—Held, that the gift for building was void, although the corporation already held lands in mortmain suitable for building purposes, and that the gift for endowment was consequently void also. *Cox, In re, Cox v. Davie*, 26 W. R. 74; 37 L. T., N. S. 457—V. C. B.

As to effect of invalidity of devise or bequest upon other provisions of the will, and effect of partial invalidity,—see WILL.

### III. WHAT CHARITIES AND CHARITABLE USES ARE WITHIN THE STATUTE.

**In general.]**—A. devised to B., preacher of the meeting-house of C., for life, on condition that he should convey the premises to trustees, to take place after B.'s death, for the use and support of the preaching the word of God at the meeting-house forever, and in case the preaching there should be discontinued, then over to a charity-school:—Held, that B. took an estate for life, though the devise over after his death would be void by 9 Geo. 2, c. 36. *Doe d. Phillips v. Aldridge*, 4 T. R. 264.

A devise to trustees of a reversion in land (after payment of debts, which were found to be paid), to be applied by them and their successors, and the officiating ministers for the time being of a Methodist congregation, as they should from time to time think fit to apply the same, is not a devise to charitable uses within 9 Geo. 2, c. 36. *Doe d. Toone v. Copstake*, 6 East, 328; 2 Smith, 495.

A gift to The Society for the Prevention of Cruelty to Animals, to be applied as the committee should "think best towards the establishment in the neighborhood of London and Westminster of slaughter-houses away from the densely-populated places in which they are now situated, and for the relief of and protection from cruelty to the animals taken to be slaughtered," is void, as being within the Statute of Mortmain. *Tatham v. Drummond*, 4 De G., J. & S. 484.

**Exemptions.]**—A bequest of residue of personal estate (which included impure personality) to trustees, upon trust to divide the same among such charities in England as they in their sole and uncontrolled discretion shall think proper, is equivalent (as to the impure personality) to a gift to charities exempt from the Mortmain Act, to be selected by the trustees, and therefore a valid gift. *Lewis v. Allenby*, 10 L. R., Eq. 668; 18 W. R. 1127—V. C. S.

A charity, by its statute of incorporation authorized to receive money "paid, given, devised, or bequeathed" to it, and with license in mortmain "to take, receive, hold and enjoy" any lands or interest in lands, for the purposes of the charity, cannot take by bequest money secured on lands. *Nethercole v. Indigent Blind School*, 40 L. J., Chanc. 26; 11 L. R., Eq. 1; 23 L. T., N. S. 723; 19 W. R. 174—R.

By a private act the Indigent Blind School was incorporated and empowered to have, hold, receive and retain any sums of money, paid, given, devised, or bequeathed by any person for the charitable purposes in the act mentioned; and also to purchase, take, or receive, and thenceforth hold and enjoy, any lands, tenements, and hereditaments, in the whole not exceeding two acres, without incurring any of the penalties for forfeitures of the Statutes of Mortmain. The surplus funds of the corporation were also permitted to be invested on mortgage, and the lands, when released or foreclosed, might be held by the corporation for a period not exceeding two years. The Female Orphan Asylum was incorporated by an act containing a similar clause. By another act the Deaf and Dumb Asylum was rendered capable to obtain, acquire, hold, and retain, for the purposes of the institution, any moneys and other personal estate and property, including moneys secured by mortgage of, or charged upon, or to arise from the sale of any hereditaments; with a proviso that nothing therein contained should make valid any grant which would be void or impeachable under 9 Geo. 2, c. 36:—Held, that bequests of debts secured to the testator's estate by equitable mortgage of leaseholds to these charities were void. *Chester v. Chester*, 12 L. R., Eq. 444; 19 W. R. 946—V. C. B.

A hospital was empowered by an act of parliament by which it was incorporated, by will, gift, purchase or otherwise, to obtain, acquire, hold and retain land for the purposes of the charity; and also by will, gift, purchase or otherwise, to obtain, acquire, hold and maintain, for the purposes of the charity, any kind of personal estate, including money secured on mortgage charged on land:—Held, that those words implied a power to devise land for the use of the charity, and therefore, that where a testator gave certain legacies to this as well as other charities out of a mixed fund of realty and personality, the charity in question was entitled to receive the legacy in full. *Perring v. Trail*, 18 L.

L., Eq. 88, 43 L. J., Chanc. 775; 30 L. T., I. S. 248; 22 W. R. 513—V. C. M.

By a statute of Queen Anne a corporation was established to provide for the relief of the poor within a district, with power to raise money for that purpose, and it was enacted that it might without license in mortmain acquire land by gift or devise, and that any persons might without further license give or devise land to it. After the passing of 9 Geo. 2, c. 36, several acts relating to this corporation were passed, giving it additional powers, but not referring to the above-mentioned clause as to acquiring land, and in these acts were contained clauses providing that the clauses and powers of the former acts should remain in force and be executed as fully as if they were therein re-enacted:—Held, that the charity was not exempted from the operation of 9 Geo. 2, c. 36; and that a bequest to it of moneys to arise from the sale of real estate was void. *Luckraft v. Pridham*, 6 L. R., Ch. Div. 205; 46 L. J., Chanc. Div. 744; 26 W. R. 33; 37 L. T., N. S. 204; affirming the decision of Hall, V. C., 36 L. T., N. S. 501; 25 W. R. 747.

As to interpretation and effect of charitable bequests and devises, generally,—see WILL.

As to duties and liabilities of trustees for charitable uses,—see TRUSTEES.

#### IV. WHAT DEEDS AND TRANSFERS ARE WITHIN THE STATUTE; CONVEYANCES TO DEFEAT THE STATUTE.

Consideration to sustain transfer; conditions and reservations; execution and enrollment of deed.—A grant by deed, executed and enrolled pursuant to the Statute of Mortmain, of lands to trustees and their heirs, to the use of one of them, his heirs and assigns, upon condition that he, his heirs and assigns, should, from time to time, repair a vault and tomb, standing upon part of the lands; and, if need be, rebuild it, and permit the same to be used as a family vault for the grantor and any of her family; and in default thereof, then over to the other trustee, his heirs and assigns, is not within the words of the statute, which prohibit the granting of land to charitable uses, unless the deed is without any condition or reservation for the benefit of the grantor, or any person claiming under him. *Doe d. Thompson v. Pitcher*, 3 M. & S. 407; 2 Marsh. 61; 6 Taunt. 359.

An owner of land having, at his own expense, built a chapel, which was used for the purpose of public worship, and the congregation having subscribed money for the purpose of enlarging and improving the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for twenty-three years, reserving a pepper-corn rent during his life, and 10*l.* per annum after his death. A declaration of trust was afterwards

executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel, and that in case the public worship should be there discontinued, then, that they would assign the premises to civil purposes:—Held, that this was a conveyance for the benefit of a charitable use, and therefore void within 9 Geo. 2, c. 36, s. 1. *Doe d. Wallard v. Hawthorn*, 2 B. & A. 96.

Held, also, that neither the sum agreed to be expended on the premises, nor the rent reserved at the death of the lessor, could be considered a full consideration paid for the lease, so as to bring the case within section 2. *Id.*

Held, also, that the declaration of trust, although executed only by some out of the several lessees, was evidence against all of the purposes for which the lease was granted. *Id.*

A pauper being in custody for having left his wife and children chargeable to the parish for several years, executed an indenture, reciting "that the present as well as former parish officers had expended money in maintaining his wife and children, and that he had agreed to convey to the parish officers certain lands," and he thereby conveyed them to trustees for the churchwardens and overseers of the poor, and the inhabitants of the parish, to the intent that the rents and profits might be applied to their use and benefit, in aid of the poor rates:—Held, that this was a conveyance for the benefit of a charitable use, requiring enrollment, pursuant to 9 Geo. 2, c. 36, s. 1, and not a conveyance for a valuable consideration actually paid, within section 2; and that a person who had been a party to the deed conveying the property was not estopped from taking advantage of this objection. *Doe d. Preece v. Howell*, 2 B. & Ad. 744.

L., eighty-four years old, conveyed a house and land to the plaintiff in June, 1836, for 400*l.*, which was paid down. L. lived in the house till March, 1838, when he died; the property was conveyed by deed indented, executed in the presence of two witnesses, and enrolled within six months after execution, upon trust to promote the religious observances of a congregation of dissenters; and shortly after the execution of it, L. transferred 500*l.* to the plaintiff, who built a chapel on the land:—Held, that it was open to L.'s heir to impeach the validity of this deed, and that it was a question for the jury, whether the transaction was a fraudulent contrivance to elude the Statute of Mortmain. *Doe d. Williams v. Lloyd*, 5 Bing. N. C. 741; 8 Scott, 93; 3 Jur. 751.

The charitable uses to which land is conveyed may be declared by words of reference to another deed relating to other property. *Doe d. Williams v. Lloyd*, 1 M. & G. 670; 1 Scott, N. R. 505.

To prove an enrollment of a deed under 9 Geo. 2, c. 36, the deed was produced with the following memorandum indorsed thereon:

whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagees purported to exercise the power in favor of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would show that the security was satisfied at the time of the sale:—Held, that the sale, having been made to a bona fide purchaser without notice, was valid, even if the security should prove to have been satisfied. *Dicker v. Angerstein*, 8 L. R., Ch. Div. 600; 45 L. J., Chanc. Div. 754; 24 W. R. 844—R.

As to validity of powers of sale in mortgages,—see this title, I. 1; effect of assignments,—see this title, III.

**Rights of purchasers.]**—There is no rule in equity which precludes a puisne mortgagee from purchasing the mortgaged property on the occasion of the exercise by a prior mortgagee of his power of sale, and a puisne mortgagee so purchasing acquires as against the mortgagor an absolute irredeemable title. *Shaw v. Bunney*, 11 Jur., N. S. 99; 84 L. J., Chanc. 257; 83 Beav. 404.

Where a first mortgagee sells in exercise of his power of sale, and a second mortgagee purchases, he has the same absolute right against the mortgagor as a stranger would have. *Id.*

A mortgagee, if he is not redeemed, is entitled to every possible security for his title, and has a right to buy in an anterior mortgage at any price he pleases. *Kirkwood v. Thompson*, 11 Jur., N. S. 385; 84 L. J., Chanc. 305; 18 W. R. 495; 12 L. T., N. S. 446; affirmed on appeal, 13 W. R. 1053; 12 L. T., N. S. 811; 2 De G., J. & S. 613; 84 L. J., Chanc. 501.

When the owner of an equity of redemption of real estate is entered on the register of estates with an indefeasible title, under the Transfer of Land Act, 25 & 26 Vict. c. 58, subject to a mortgage, and the mortgagee afterwards exercises his power of sale, and conveys part of the registered property to a purchaser, such purchaser is entitled, after his conveyance has been entered on the register, to have the property bought by him, and all entries relating thereto, removed from the register without the consent of the mortgagor. *Winter, In re*, 15 L. R., Eq. 150; 21 W. R. 320; 27 L. T., N. S. 842—R.

**Application of purchase-moneys.]**—Preparatory to a contemplated sale under a trust for sale in a mortgage deed, an ejectment was brought by the first and second mortgagees against the heir of the mortgagor, and compromised upon the terms that he should give up possession on the 29th day of September following, and, if required, release to the mortgagees all his right, claim, and in-

terest, if any, in the premises. The sale did not take place; the heir was not required to execute any release, and he did not give up possession of the premises. Twelve years afterwards, the mortgaged property was sold under the trust for sale for considerably more than enough to pay principal, interest, and costs:—Held, that the mortgagees were not entitled under the compromise to retain the surplus purchase-moneys for their own use. *Rushbrook v. Lawrence*, 39 L. J., Chanc. 98—C.

A mortgagee in possession, who sells part of the mortgaged property under a power of sale in the mortgage, must apply the proceeds of sale, first, in payment of interest and costs, and then either pay the balance to the mortgagor or apply it in reduction of the principal due on the mortgage; and, in taking an account against the mortgagee, who has retained sale moneys beyond the interest and costs due, a rest must be made at the time of the receipt of the proceeds of sale, even although he may have entered into possession when the interest due to him was in arrear. The same rule applies where two distinct mortgages are held by the same person, who sells one of the mortgaged estates. *Thompson v. Hudson*, 10 L. R., Eq. 497; 40 L. J., Chanc. 28; 18 W. R. 1061; 23 L. T., N. S. 278—R.

W. intrusted to P., his solicitor, 7,700*l.*, and verbally arranged with a clerk of P. for its investment on a mortgage of leaseholds at C., which investment P., by letter, informed him had been made as arranged with the clerk. P. having died insolvent, it was found that no mortgage in favor of W. existed, but that P. had advanced upwards of 100,000*l.* in his own name on mortgage of the property at C. Of this sum considerably more than 7,700*l.* had been advanced by P. between the date at which W. had intrusted that amount to him, and the date of the letter informing W. of the investment. Under an order of the court in a suit for the administration of the estate of P., the mortgage property was sold, and the proceeds carried to a separate account:—Held, that the advances made by P. on mortgage of the property at C. included the moneys intrusted to him by W., and that W. was entitled to repayment of such moneys out of the fund in court. *Middleton v. Pollock, Wetherall, Ex parte*, 25 W. R. 94—R.

A solicitor invested money of a client on an improper security (a fourth mortgage). It being supposed that the security was worthless, and the solicitor having absconded, the client received a composition of 5*s.* in the pound from the estate of a deceased partner of the solicitor, under a general scheme of compromise between the executors and creditors of such deceased partner. The mortgaged estate having subsequently proved sufficient to pay the fourth mortgage:—Held, that the amount received under the composition must be repaid to the partner's estate, and did not inure to the benefit of subsequent incum-



ancers on the mortgaged property. *Sauv. v. Goodwin*, 45 L. J., Chanc. Div. 289; 1 R., Ch. Div. 351; 24 W. R. 498; 34 L. T., S. 635—C. A.

## 2. By Actions or Suits.

### (a) At Law.

**When action lies; nature and form; and what remedies available.**—When a mortgage deed contains no covenant for repayment, so that no action can be maintained on the deed, an action for money lent will lie. *Yates v. Aston*, 3 G. & D. 351; 4 Q. B. 182; 7 Jur. 83; 12 L. J., Q. B. 160.

The plaintiff was mortgagee under a mortgage from the defendant to him, with a power of sale in the event of non-payment of a sum of money, which was further secured by a bond given by the defendant to him. The property was afterwards sold by the plaintiff under the power, but did not produce sufficient to discharge the debt. An account was then stated between the plaintiff and the defendant, charging the defendant with the full amount of the principal and interest, and giving him credit for the net proceeds of the sale. The defendant admitted the correctness of the account, and promised to pay the balance, to recover which the plaintiff brought an action for money lent and due on an account stated:—Held, that the debt having been secured by specialty, the action could not be maintained, except upon the deed. *Middleditch v. Ellis*, 2 Exch. 628; 17 L. J., Exch. 865.

A devisee in trust of mortgaged premises, for sale and payment of the debts of the mortgagor, borrowed 200*l.* of the plaintiff, for the purpose of paying off a portion of the debts of the mortgagor; and by deed between him and the plaintiff, reciting these facts, charged the premises with the payment of that amount, and covenanted that he and his heirs should, out of the money that should come to his hands as such trustee, or out of the personal estate, if any, of the mortgagor, pay to the plaintiff the principal and interest secured by the deed:—Held, that the plaintiff was not entitled to sue the devisee in an action for money lent, but that his remedy was upon the covenant contained in the deed. *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J., Exch. 150.

A deed of mortgage, and conditional sale, contained a covenant for possession by the mortgagee during the mortgage term. Possession was withheld, though the mortgagor received the mortgage money:—Held, that an action would lie by the mortgagee against the mortgagor for recovery of the principal and interest on the money advanced. *Raja Oodit Purkash Sing v. Martindell*, 4 Moore Ind. App. 444.

There were cross covenants in a mortgage deed, and the mortgagees did not execute it:—Held, that they might nevertheless bring their action against the mortgagor, who did

execute. *Morgan v. Pike*, 14 C. B. 478; 2 C. L. R. 696; 23 L. J., C. P. 64.

A party having a mortgage, and also a bond as a security for the same debt, may arrest the defendant on the bond pending a suit in equity for a foreclosure. *Burnell v. Martin*, 2 Dougl. 417.

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security. *Davis v. Battine*, 2 Russ. & Mylne, 76.

After foreclosure and sale, the mortgagee may bring an action for the residue. *Tooke v. Hurtley*, 2 Bro. C. C. 125. See *Perry v. Barker*, 8 Ves. 527.

A mortgagee having filed a bill of foreclosure, and having proceeded to execution in ejectment, and being in possession of the rents and profits under an ejectment, and having brought an action for the mortgage money, and obtained execution, the court refused to discharge the defendant out of execution; for a mortgagee has a right to his remedy on all his securities. *Colby v. Gibson*, 8 Smith, 516.

After foreclosure a mortgagee fairly sold the estate for less than what was due to him:—Held, that he could not afterwards recover from the mortgagor upon his collateral personal securities the amount still remaining unpaid. *Lockhart v. Hardy*, 9 Beav. 349; 10 Jur. 532; 15 L. J., Chanc. 847.

**When action at law will be restrained in equity.**—The circumstance that a mortgagee, with power of sale, has entered into a contract to sell a portion of the property comprised in the security for a sum greater than the amount due on the mortgage, is not a sufficient ground for restraining him from prosecuting an action upon the covenant for payment contained in the mortgage deed. *Willes v. Lecott*, 1 De G. & S. 392.

A mortgagor having transferred the equity of redemption, the transferee and mortgagee joined in a partial alienation of the property, but the money was received by the transferee alone:—Held, that the mortgagee could not afterwards sue the mortgagor on his covenant to pay. *Palmer v. Hendrie*, 27 Beav. 349.

When, default having been made in payment of interest, a mortgagee has recovered judgment for the amount of the principal and interest, and a bill is filed to restrain execution and for specific performance, on the ground that the mortgage deed is not in accordance with the terms of a previous agreement, which provided that the principal should not be called in for a term still unexpired, an injunction will be refused except on the terms of the amount recovered being paid into court, since, if a clause in accordance with that provision in the agreement had been inserted in the deed, it would, as a matter of course, have made the not calling in of the principal, conditional on the punctual

payment of interest. *Seaton v. Troyford*, 19 W. R. 200—V. C. B.

As to payment of mortgage money and costs into court, after action brought,—see this title, VI., 2.

**Pleadings in actions.**—In an action on a mortgage deed for payment of principal with interest, a declaration for the principal only, without averring that the interest has been satisfied, is good, because the sums are separate and distinct. *Dickenson v. Harrison*, 4 Price, 282.

A declaration stated, that by an indenture it was witnessed, that, in consideration of 1,400*l.*, then due to the plaintiffs from the defendants, the latter conveyed premises to the former, subject to a proviso, that, if the defendants should pay or cause to be paid to the plaintiffs that sum on the 19th March, 1833, the plaintiffs should reconvey the premises to the defendants; and they covenanted that they would pay to the plaintiffs that sum at the time and in manner thereinbefore appointed for payment of the same; breach, non-payment of the money and interest, at the time and in the manner in the indenture appointed for payment:—Held, a sufficient allegation of the day of payment; and that the claim for interest in the breach, none being reserved by the indenture, did not vitiate the declaration, but might be struck out. *Tillasley v. Stephenson*, 4 M. & Scott, 442; 10 Bing. 545.

A declaration stated, that, by a deed between the plaintiff, the defendant's testator, and W., the testator, for himself, his executors, administrators and assigns, covenanted with the plaintiff to pay to W. 1,200*l.* and interest. By the deed, it appeared that the plaintiff mortgaged premises to W., with a proviso, that if the plaintiff, six months after demand in writing, should pay the 1,200*l.* to W., W. would reconvey; that the plaintiff made a subsequent mortgage to the testator, subject to the mortgage to W., and to the payment to him of the 1,200*l.* There was the general covenant (which was declared on) for the payment, by the testator, to W., of the 1,200*l.* The plea alleged that no demand, in writing, of payment of the 1,200*l.* had been made on the plaintiff:—Held, that the declaration was bad; since, as no demand of payment had been made by W. on the plaintiff, the money was not due, and the defendant was not liable. *Trott v. Smith*, 10 M. & W. 453; 12 L. J., Exch. 186.

In an action on a covenant which was for the payment of interest by half-yearly payments, the declaration alleged six half-yearly sums to be due, without setting out what the half-years were, or over how much time they extended:—Held, sufficiently certain. *King v. Greenhill*, 6 M. & G. 59; 6 Scott, N. R. 869; 7 Jur. 604; 12 L. J., C. P. 833.

In a count on a deed, dated 21st June, 1830, for payment of 900*l.*, and interest at five per cent., on 21st June next, the action was commenced, and the declaration dated,

in July, 1843. Breach, non-payment of the 900*l.* and interest on 21st June, 1840, and that there was due and owing a large sum, to wit, 1,200*l.*:—Held, good, on motion in arrest of judgment, first, because it did not appear that only one year's interest was due on the 21st June, 1840; secondly, because, if that did appear, the averment that more was due might be rejected as surplusage, or a remittitur entered for the excess. *Simmons v. Wood*, D. & M. 355; 5 Q. B. 170.

Action on a covenant in a mortgage deed by S. A. (the defendant's testatrix) and H. A., for payment of 2,800*l.*, and interest. Plea, on equitable grounds, setting out the deed, which recited the will of G. A., whereby he bequeathed his furniture, plate, books, pictures, &c., subject to the payment of his debts, to S. A. for life, and after her decease to H. A. The deed also recited a decree of the Court of Chancery, by which it was ordered that the furniture and other articles aforesaid should be sold, and the proceeds paid into court; that the books and pictures had been valued at 2,050*l.*, at which sum H. A. had agreed to purchase them, and that to enable him to do so, the plaintiff had agreed to lend him 2,050*l.*, and a further sum of 745*l.* 5*s.* upon the security of the joint and several covenant of S. A. and H. A., and an assignment of the furniture, &c. The deed then witnessed that S. A. and H. A. assigned the furniture, plate, pictures, and books to the plaintiff as a security for 2,800*l.*, with a power of sale in default of payment; the plaintiff to hold the proceeds of the sale in trust to pay the expenses, and then to apply the moneys in satisfaction of the principal and interest due. The plea then averred that the plaintiff sold the furniture, &c., and received sufficient to satisfy the principal and interest, which he ought to have applied accordingly. Replication, on equitable grounds, except as to 2,085*l.* 18*s.* 4*d.*, parcel of the plaintiff's claim, that the valuation of the plate and furniture was not complete at the time of the execution of the deed, and that they were afterwards valued at 706*l.* 8*s.*, at which sum H. A. agreed to purchase them; that, by an indenture between H. A. and the plaintiff, after reciting that 2,800*l.* and interest were due to the plaintiff, that S. A. had died, and that, in order to enable H. A. to purchase the plate and furniture, the plaintiff had agreed to lend him 600*l.*, H. A. assigned to the plaintiff all the property mentioned in the deed, to secure the 2,800*l.* and interest, and the 600*l.* and interest, together with a power of sale. The replication then stated that the plaintiff sold the plate and furniture, and, after the expenses, realized 1,127*l.* 15*s.*, and that there was due under the indenture, in respect of the 600*l.* and interest, 638*l.* 5*s.* 6*d.*; that H. A. not having paid into the Court of Chancery the 706*l.* 8*s.* for the purchase of the plate and furniture, the plaintiff, in order to pay the same, retained out of the money realized by the sale 706*l.* 8*s.*, and that the sums of 638*l.* 5*s.* 6*d.* and

land had been made by the commissioners appointed by the act, or by the persons authorized to make the navigation, nor until satisfaction should be paid to the owners of the lands, according to the determination of the commissioners, or by agreement, by the undertakers of the navigation. By a subsequent clause, the commissioners were to determine what satisfaction any person should have in respect of any prejudice, loss or damage sustained for such proportion of his lands next adjoining to the navigation as should be made use of for the purposes of the act, in case the undertakers of the navigation should not have agreed beforehand, and satisfied the party so damaged. But the act contained no clause giving the undertakers any power to purchase lands, nor did it recognize in them any right of soil in the beds or banks of the rivers intended to be made navigable. Where a river, mentioned in the act, was made navigable by certain undertakers in 1702, and their successors exercised for a long series of years various acts of ownership and enjoyment of the banks, by cutting bushes, &c., and had granted a lease of hatches and sluices, made in one of the banks, to an occupier of land adjoining thereto, for the purpose of irrigation, and there was no proof of any agreement between the undertakers and the original proprietors of the land for the purchase of the soil of the bank:—Held, that such an agreement could not be presumed from these acts of ownership and enjoyment, when opposed to similar acts exercised by the occupier of the adjoining land, and that the act afforded strong evidence against such presumption. *Hollis v. Gelfinch*, 2 D. & R. 316; 1 B. & C. 205.

Held, also, that by virtue of the provisions of this act, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to, and formed out of the earth excavated from a new channel made for the first time under the act, as would enable them to maintain trespass. *Ib.*

A navigation act directed that the salary of the clerk to the commissioners should be paid by the proprietors of the tolls. A person, seized in fee of a part of the navigation and tolls, granted annuities, and conveyed her part of the tolls to a trustee to secure the annuities, and to permit her to hold the conveyed premises and the profits to her own use till default in payment of such annuities. By a subsequent deed she conveyed the premises in fee to Y., together with other property, in trust to sell as in the deed was directed, and to receive the proceeds of such sale, and the tolls and profits of the navigation, and out of the several receipts and profits to defray the costs and expenses necessary for carrying the trusts into effect; to pay up, and, if possible, discharge the annuities; to pay off certain creditors, and to hold the surplus, if any, for her benefit. The trustee under the last-mentioned deed entered into receipt of the tolls, appointed a collector,

and represented himself to the commissioners as a mortgagee of the tolls, and as having a control over them, and over the repairs of the navigation, but refused to pay the salary of the clerk. The annuities were still subsisting. The clerk sued the trustee for non-payment of his salary:—Held, that it lay upon the trustee, having conducted himself as above stated, to show that he was not a proprietor within the meaning of the act. *Tibbitts v. Yorke*, 5 B. & Ad. 605.

Held, also, on reference to the several deeds, that he was such proprietor, although he only held the tolls in trust to pay creditors and discharge incumbrances, and although there was a legal estate outstanding in a trustee to secure the annuities. *Ib.*

By a local act of 1859, s. 7, the corporation of York was authorized to abandon the navigation of the River Foss, which they had previously purchased, to alter the channel, and to remove locks or works connected with the navigation; but before removing any locks the corporation was to make due provision for the escape or disposal of the water held up by such locks or theretofore accustomed to flow along or into the channel of the navigation, so as to prevent the same from overflowing or otherwise damaging the adjacent land. By s. 19, the corporation at their own expense was to make, and for the period of five years maintain, such arches, drains, and passages as should in consequence of any alteration of the navigation be necessary and sufficient to convey the water from the lands adjoining the navigation into the river. The corporation abandoned the navigation and made alterations, the effect of which was that, if the channel remained in the state it then was, due provision was made for the escape of the water. They, however, took no measures to prevent the navigation from becoming silted up and choked with weeds, and in consequence the land adjoining the river about a mile above the alterations was flooded during an extraordinary rainfall, and the grass was damaged:—Held, that the corporation was not responsible for this damage. *Hodgson v. York (Mayor, &c.)*, 28 L. T., N. S. 836—Q. B.

For analogous decisions in respect of canals,—see this title, II., 2.

As to tolls upon river navigation,—see this title, I., 3; upon canals,—see this title, II., 4.

**Towing-paths.**—The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball v. Herbert*, 3 T. R. 253.

But a right to a track path on each side of the river Tees (alternately) for towing, without paying any acknowledgment, was found upon a trial at bar. *Pierce v. Fauconberge*, 1 Burr. 292.

If an act for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empowers commissioners to set out such public and

private roads and ways as they shall think necessary, and directs that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson v. Soles*, 2 B. & P. 406.

By acts relating to a river navigation, commissioners were authorized to make such cuts as they should deem necessary for the navigation, provided that no cut should divert or stop up the present channel of the river, or alter the course of the stream. If any person should think himself injured by any work made by the commissioners, and should make complaint to the commissioners, they were to hear, and report to a subsequent general meeting, at which the commissioners were to make such order, determination and judgment thereon, as to them should seem just, and give such satisfaction as they should think reasonable. And if the party complaining should be dissatisfied with such order, he might appeal to the quarter sessions, who should make adjudication thereon, and award such costs to either party as they should think reasonable, which order and determination should be final and conclusive, to all intents and purposes whatever. A mandamus recited that B. was seized in fee of an ancient towing-path, on a part of the river, and to the exclusive right of towing barges at that part, taking reasonable tolls for such towing by his horses; that the commissioners made a cut, by which the barges were enabled to avoid that part of the river, dispense with the use of the horses, and withhold the tolls; that the commissioners had, by the cut, injured the old channel of the river, and made the navigation of the part aforesaid less easy and convenient, and diverted the navigation of the river from B.'s towing-path, and rendered the towing-path, and his exclusive right, wholly unprofitable; that B. had complained to the commissioners, and demanded compensation adequate to the injury he had sustained; that the commissioners, at a subsequent general meeting, made an order, determination and judgment, that they could not accede to B.'s application; that B., being dissatisfied with such order, appealed to the quarter sessions, who ordered the commissioners to pay B. 1,000*l.*, in full compensation for the injury sustained by him, and 200*l.* costs, which they refused to pay, and the writ commanded them to pay. Return: That the commissioners, believing B. had no claim to compensation, did not hear evidence on the complaint, or the amount of the alleged loss, and notified to B. that they refused to accede to his application; that B., treating this refusal as an order, appealed; that on the appeal the commissioners objected that the refusal was not an order, but the quarter sessions overruled the objection; that the cut enabled navigators to avoid a dangerous bend of the river; that B. was no further entitled to the path than as owner of the land; that

they had not obstructed his towing-path, nor placed any obstacle to the navigation ~~against~~ the towing path; that parties might, and sometimes did, still navigate by the old channel:—Held, first, that the refusal of the commissioners was an order, determination and judgment, from which an appeal lay to the sessions; secondly, that the sessions had jurisdiction to award compensation to B., both for the damage suffered by his towing-path being obstructed, and for the obstruction of the old navigation; thirdly, that the order of sessions was final and conclusive, and must be held to have been made on both complaints, inasmuch as the return (assuming it to negative the obstruction of the navigation) did not deny that the sessions had found such obstruction. *Reg. v. Thames and Isis Navigation*, 5 A. & E. 804.

Where it appeared that, for the purpose of making and maintaining the towing-path of a canal, the ownership of the soil was not necessary:—Held, that a mere easement and not the soil had been acquired by the company. *Badger v. South Yorkshire Railway and River Don Company*, 1 El. & El. 347; 5 Jur., N. S. 459; 28 L. J., Q. B. 118; 9 W. R. 158; 3 L. T., N. S. 449—Exch. Cham.

A company was possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land close to the sluice; there was a towing-path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By permission of the company, the intervening space had been lately used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned:—Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing the canal off; and that the other facts did not render the company liable for the accident. *Binks v. South Yorkshire Railway and River Don Company*, 3 B. & S. 244; 32 L. J., Q. B. 26; 11 W. R. 66; 7 L. T., N. S. 350.

A corporation constituted for the purpose of the upper navigation of the river Thames by the Thames Navigation Act, 1866, 29 & 30 Vict. c. 89, and under the powers of that act, and of the previous statutes relating to the navigation which had become vested in them, had constructed bridges and other works, and had acquired the right to use the whole of the towing-paths along the river, and to take toll for the same. In the exercise of such right the corporation took an aggregate toll in one sum for the use of the entire navigation and towing-paths, which included the works it had constructed, as well as the natural soil which had been worn into the track of a towing-path. Part of such natural towing-path got into a dangerous state by the

action of the water, and in consequence thereof the horses of the plaintiff, while using it in towing a barge, for which the proper toll had been paid to the corporation, fell into the river and were drowned:—Held, that as the corporation took one toll for the use of the entire towing-path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but that it was its duty to take reasonable care that the whole of the towing-path was in such a state as not to expose those using it to undue danger, and that for a neglect of such duty the corporation was responsible to the owner of the horses, although it was a public body receiving its powers for public purposes. *Winch v. Conservators of the River Thames*, 43 L. J., C. P. 167; 9 L. R., C. P. 378; 22 W. R. 879; 81 L. T., N. S. 128—Exch. Cham.; affirming *S. C.*, 7 L. R., C. P. 458; 41 L. J., C. P. 241; 27 L. T., N. S. 95; 20 W. R. 940.

Held, also, that the towing-path was not confined to the mere beaten track, but included so much of the bank as might ordinarily be used by horses when towing barges. *Ib.*

#### (b) The Thames.

**Wharfs.**—There is a custom on the Thames which authorizes barges to be moored at low water for one tide at the piles in front of the wharfs; but in places where there are no piles, the custom does not extend to mooring at the wharf, unless through distress. *Wyatt v. Thompson*, 1 Esp. 252—Kenyon.

The corporation of London, being conservators of the river Thames, and owners of the soil between high and low-water mark, cannot authorize a lessee to erect a wharf thereon, which produces inconvenience to the public in the use of the river for the purposes of navigation. *Ree v. Grosvenor*, 2 Stark. 511—Abbott. And see *Ree v. Hollis*, 2 Stark. 536.

**Erection of works or piers.**—The Metropolitan Board of Works has no power of erecting works of any kind in the bed or soil of the Thames, except with the consent, in writing, of the Board of Admiralty, signed by their secretary, previously obtained. *Brownlow v. Metropolitan Board of Works*, 8 Jur., N. S. 891; 31 L. J., C. P. 140; 10 W. R. 884; 6 L. T., N. S. 187; affirmed on appeal, 33 L. J., C. P. 233; 16 C. B., N. S. 546.

The Thames Conservancy Act, 1857 (20 & 21 Vict. c. 147), authorizes the conservators of the Thames to grant to the owner of any land fronting the river a license to make any pier or other work immediately in front of his land, and into the body of the river, upon payment of such reasonable consideration as directed by the act, and subject to such conditions as the conservators shall think fit to impose, and by a saving clause none of the powers of the act are to abridge any right, claim or privilege to which any owner of

lands on the banks of the river is entitled:—Held, that the conservators had power under the act to license the erection of a platform interfering with the navigation of the river. *Kearns v. Cordwainers' Company*, 5 Jur., N. S. 1216; 28 L. J., C. P. 285; 6 C. B., N. S. 388.

The owners of adjoining land on the banks of the river have no right to complain if the erection so licensed does not deprive them of access to their land by the river-side, but only interferes with the right which they have in common with the rest of the public to the unrestricted navigation of the river. *Ib.*

Under the same act, the conservators of the Thames were empowered to erect piers at any convenient place, of such form and construction as they should deem advantageous to the public, and causing the least obstruction to the navigation. The plans were to be first approved by the Admiralty:—Held, that a court of equity had no jurisdiction to interfere by injunction at the suit of the attorney-general, on the ground of the alleged inconvenience of proposed piers; or, at most, that it could only interfere where it was shown that the piers would be entirely useless. *Att. Gen. v. Conservators of River Thames*, 1 Hem. & M. 1; 8 Jur., N. S. 1203; 11 W. R. 163.

The statute directed that, whenever the conservators should remove or obstruct the free use and enjoyment of any public stairs or landing-places marked by the Waterman's Company, they should erect equally convenient stairs or landing-places in substitution for them:—Held, that the substitution of new stairs or landing-places was not a condition precedent to the removal or disturbance, and that where the conservators had prepared plans for piers which would interfere with such old stairs, without showing any adequate provision in substitution for them, a court of equity would not assume that the duty would be neglected, and would not interfere at the suit of the attorney-general to restrain the works until proper substitutes should be provided for the old stairs. *Ib.*

As to obstructions to navigation, generally, —see this title, I., 2.

**Water bailiffs.**—As to the right of the conservators of the Thames to appoint, see *Turnidge v. Shaw*, 7 Jur., N. S. 755; 30 L. J., M. C. 118; 9 W. R. 381; 8 L. T., N. S. 847; 8 El. & Bl. 588.

**Watermen.**—Under 22 & 23 Vict. c. 133, s. 54, a penalty is imposed upon any person not being a freeman, licensed in pursuance of the act, or an apprentice qualified according to the act to a freeman or to the widow of a freeman, who shall at any time act as a waterman or lighterman, or ply or navigate any wherry, passenger boat, lighter, vessel or other craft upon the river Thames, from or to any place or places within the limits of the act, for hire or gain. The limits of the act are defined to be from Teddington Lock to

**Lower Hops Point:**—Held, that a person not being a licensed freeman, or an apprentice to a freeman, or the widow to a freeman, and who navigates a barge for hire, within the limits of the act, is liable to the penalty, although such barge has started upon its voyage from a place outside the limits, and might, under 7 & 8 Geo. 4, c. 75, have been navigated as a western barge, by such a person, without incurring any penalty. *Doick v. Phelps*, 6 Jur., N. S. 1371; 30 L. J., M. C. 2; 9 W. R. 70; 3 L. T., N. S. 206—Q. B.

The 22 & 23 Vict. c. 133, s. 54, does not apply to a person (not being a freeman) conveying for his own purposes his servants or workpeople, and not making any charge for such conveyance. *Tudhunter v. Buckley*, 7 L. T., N. S. 273—Q. B.

The Waterman's Act, 7 & 8 Geo. 4, c. 75, s. 57, gave authority to the mayor and aldermen of the city of London to make by-laws "for the government and regulation of the freemen of the Watermen's Company, and their widows and apprentices, and boats, the vessels and other craft to be worked within the limits of the act:"—Held, that, under these words of the act, the lord mayor and aldermen were authorized to make general regulations affecting the speed of steam-vessels navigating within certain limits. *Tisdell v. Combs*, 3 N. & P. 20; 7 A. & E. 788; 1 W., W. & H. 5; 2 Jur. 32.

A steam-tug of eighty-seven tons burden employed in moving another vessel, was not a "wherry, lighter or other craft," under 7 & 8 Geo. 4, c. 75, s. 37, and a person navigating her for this purpose, not being a freeman, did not thereby incur a penalty. *Reed v. Ingham*, 3 El. & Bl. 889; 2 C. L. R. 1495; 1 Jur., N. S. 61; 23 L. J., M. C. 150.

A. was employed by the Great Western Railway Company, at a weekly salary, in navigating the company's barges upon the Thames, and at the time of the alleged offense he had the command of the company's barges, laden with the goods in the possession and care of the company as common carriers, and which were in the course of being forwarded for delivery to the owners and consignees. The goods had been laden on board the barge at a private basin of the Grand Junction Canal, adjoining one of the company's stations, and without the limits of the 7 & 8 Geo. 4, c. 75. The barge was towed along the canal to the river, and steered by A., upon the river and within the limits of the act, to a private wharf of the company west of London bridge. The barge was flat-bottomed, and of the same build as barges known as western barges, and before it was purchased by the company it was known as a western barge, and was worked and navigated upon the river from Reading and places west of Reading to the same wharf:—Held, that the barge was not, at the time of the offense, a western barge within s. 101. *Tibble v. Beadon*, 24 L. J., M. C. 104; 8 Q., nom. *Reg. v. Tibble*, 4 El. & Bl. 888.

## 2. Obstruction or Injury.

**What amounts to an illegal obstruction to navigation.**—[By 9 Hen. 3 (Magna Charta), c. 23, *all weirs from henceforth shall be utterly put down by Thames and Medway and throughout all England, but only by the sea coast.*]

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the reign of Edw. I. *William v. Wilcox*, 8 A. & E. 314; 3 N. & P. 606; 1 W., W. & H. 477.

If the weir when so first granted obstructs the navigation on only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. *Id.*

Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the right of the public; and therefore, in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. *Id.*

The 12 Edw. 4, c. 7, relates to navigable rivers only, and though weirs in navigable rivers are illegal unless they existed before the time of Edward 1, such an easement may be acquired in private waters by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted. *Rolls v. Whyte*, 3 L. R., Q. B. 286; 37 L. J., Q. B. 105; 16 W. R. 593; 17 L. T., N. S. 560; 8 B. & S. 116.

The owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and it is not enough to station a watchman near the spot to point out the danger. *Harmond v. Pearson*, 1 Camp. 515—Ellenborough.

Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution by placing a buoy or otherwise to prevent other vessels from striking against it. *Brown v. Mallett*, 5 C. B. 509; 12 Jur. 204; 17 L. J., C. P. 227.

Where a vessel is sunk by unavoidable accident in a public navigable river, whether in the usual track of navigation or not, it is the duty of the owner, so long as he continues to have the possession and control of the vessel, to take due precaution to prevent injury to other vessels by their striking against it, and this obligation may be transferred with the transfer of the possession and control to another person, and on the abandonment of the possession and control the obligation ceases. *White v. Crisp*, 10 Exch. 312; 2 C. L. R. 1215; 23 L. J., Exch. 317.

A. was possessed of a wharf, and had a mast projecting therefrom over the river. B. moored his vessel at the adjoining wharf, with her bowsprit overhanging the front of A.'s wharf, and, on the falling of the tide, the bowsprit of B.'s vessel coming in contact



with A.'s mast, broke it:—Held, that B. was not responsible. *Dalton v. Denton*, 1 C. B., N. S. 672.

One who erects or keeps erected on the shore of a navigable river between high and low water-mark a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction, or from want of repair, presents a dangerous (hidden) obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge of it. *White v. Phillips*, 15 C. B., N. S. 245; 10 Jur., N. S. 425; 83 L. J., C. P. 83; 12 W. R. 85; 9 L. T., N. S. 889.

Where in a public navigable river a decked barge or a dummy is firmly moored alongside a quay, so as to be a private nuisance to persons having a right to land from the river on the quay; if it is so fixed as not to be readily abatable, any such person may pass over such dummy in order to get to the quay, there being no other route available, where his so passing over it is not more injurious to the owners of it than the removal would be; and especially if to have removed it would have caused such person injurious delay in his affairs and business. *Eastern Counties Railway Company v. Dorling*, 5 C. B., N. S. 821; 5 Jur., N. S. 869; 28 L. J., C. P. 202.

But he is not entitled so to use the barge as a means of passage, except in such states of the tide as, but for the barge, would have enabled him to land directly on the quay, and when the barge is therefore an obstruction and a nuisance to his right of way. *Id.*

A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet, available for navigation:—Held, that this was such an obstruction as would be restrained at the suit of a corporation empowered by act of parliament to remove obstructions. *Att. Gen. v. Terry*, 9 L. R., Ch. 423; 22 W. R. 395; 30 L. T., N. S. 215; affirming the decision of the Master of the Rolls, 22 W. R. 200; 29 L. T., N. S. 716; which overruled *Rex v. Russell*, 6 B. & C. 566; 9 D. & R. 566.

An owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Id.*

By a local act a local board of health was authorized to construct, in conformity with certain deposited plans, "and upon the lands delineated upon the plans," a pier or landing-stage, "together with such other works and conveniences in connection therewith," as it should from time to time think fit. Before the landing-stage was commenced plans of the proposed works were to be deposited at the Admiralty for approval. The local act

was to be executed subject to the powers and provisions of the Public Health Act, 1848, s. 189 of which requires notice of action "for anything done or intended to be done" under the provisions. The local board deposited plans (differing in extension from the plans under the act) which received the approval of the conservators of the river, representing the Admiralty, and constructed the landing-stage in conformity therewith. The landing-stage was a floating one, and was moored by anchors lying in the bed of the river. The position of the anchors was indicated by a buoy, which, being carried down by the tide, became concealed from view. One of the anchors becoming displaced, stove in and swamped a vessel which was lawfully navigating the river:—Held, first, that the anchor, although placed where it was for the benefit of the public, was an obstruction which the local board could not have created without statutory authority, and was a nuisance to the river. *Jolliffe v. Wallasey Local Board*, 20 L. T., N. S. 582; 43 L. J., C. P. 41; 9 L. R., C. P. 62; and see *Rex v. Ward*, 4 A. & E. 384; overruling *Rex v. Russell*, 6 B. & C. 566; 9 D. & R. 566.

Held, secondly, that the local board was guilty of negligence in its management of the buoy, but that inasmuch as the plans had received the approval of the Admiralty, such approval was tantamount to the sanction of the act, so as to entitle the board to the statutory notice of action. *Id.*

A navigable river is a public highway, navigable by all her Majesty's subjects in a reasonable manner and for a reasonable purpose. A riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time. *Original Hartlepool Collieries Company v. Gild*, 5 L. R., Ch. Div. 713; 46 L. J., Chanc. Div. 811; 36 L. T., N. S. 483—R.

The court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighboring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. *Id.*

The plaintiffs were owners of a wharf 125 feet long on a navigable river, and of a collier boat 176 feet long, which stopped there at intervals of time for the purpose of unloading, and while there necessarily projected over part of the defendant's wharf, close to the entrance of a dock where he carried on the business of repairing ships, the wharf itself not being used. The defendant moored a raft of timber used in his business in front of his own wharf so as to interfere with the access of the collier to her berth:—Held, that the raft was an obstruction to the navigation; and that the collier had a right to come at reasonable times to, and remain a reasonable

time alongside of, the wharf of the plaintiffs, although she projected over the defendant's wharf while doing so. *Id.*

**Liability to action; and proceedings in actions.]**—A navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please; but if they abuse that right, so as to work a private injury (as to interrupt the enjoyment of a private fishery), they are liable to an action. *Anon.*, 1 Camp. 517, n.—Wood.

Where a plaintiff declared that he was navigating his barges laden with goods along a public navigable creek, and that the defendant wrongfully moored a barge across, and kept the same so moored thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden; per quod he was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land:—Held, that this was a special damage for which an action upon the case would lie. *Ross v. Miles*, 4 M. & S. 101.

The defendants having erected on their own premises a permanent obstruction, a navigable drain leading from a river through their premises to the plaintiffs' close:—Held, that an action lay by the plaintiffs, notwithstanding the portion of the drain, which passed through their close, had for sixteen years been completely choked up with mud. *Bowers v. Hill*, 1 Bing. N. C. 549; 2 Scott, 585; 1 Hodges, 834.

A declaration alleged that the defendant was possessed of a wharf for loading and unloading vessels on the banks of the river Thames, near to which wharf there was certain wood work, placed by the defendant at the bottom of the river, over which wood work, at certain states of the tide, a ship would float, but at others would not; that the plaintiff was possessed of a ship, which was, by sufferance and permission of the defendant, at and alongside the wharf, for reward in that behalf to the defendant; and that the defendant had the management and control of the wharf, and the mooring and stationing of ships at and near the same, while such ships were at the wharf for the purpose of using the same. Breach, that the defendant so unskillfully and negligently moored and stationed the plaintiff's ship in that part of the river, over the wood work, that it was greatly injured:—Held, that the declaration sufficiently alleged a duty, on the part of the defendant, to moor and station the plaintiff's ship safely, and that the breach was well stated. *Curling v. Wood* (in error), 16 M. & W. 628; 12 Jur. 1055; 17 L. J., Exch. 801—Exch. Cham.

A count stating that the plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed, and of right entitled, to have free use and navigation of the river, for the

purpose of passing in boats and conveying goods to the messuage, and convenient access to the messuage from the river; but that the defendant fixed barges, planks and logs of wood in that part of the river near the messuage, and kept and continued the same, and thereby hindered the plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and he was thereby put to expense in endeavoring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently showing a particular injury to the individual. *Dobson v. Blackmore*, 9 Q. B. 991; 11 Jur. 556; 16 L. J., Q. B. 223. S. P., *Ross v. Groves*, 5 M. & G. 613; 6 Scott, N. R. 645; 1 D. & L. 61; 7 Jur. 951; 13 L. J., C. P. 251.

A declaration stating that the defendants were possessed of a mooring anchor, which was kept by them fixed in a known part of a navigable river covered by ordinary tides; that the anchor had become removed into and remained in another part of the river covered by ordinary tides not indicated, whereof the defendants had notice; although they had the means and power of refixing and securing the anchor and indicating it, they neglected so to do; whereby the plaintiff's vessel, while sailing in a part of the river ordinarily used by ships, ran foul of and struck against the anchor, and was thereby damaged, is bad, for not showing that the defendants were privy to the removal of the anchor, or that it was their duty to refix it and indicate it. *Hancock v. York, Newcastle and Berwick Railway Company*, 10 C. B. 348.

A declaration stated that there was a public navigable river, called the Ouse, the waters of which of right flowed along the east and west sides of a certain island, without any obstruction to the navigation thereof; that the plaintiff was possessed of barges navigating it, and along the river to the east of the island; yet the defendants wrongfully and injuriously put earth into the bed of the river to the east of the island, and filled up the ancient channel, and penned up the water, and prevented it from flowing in its usual channel, whereby the plaintiff was prevented from navigating his barges in the ancient course. Plea, that the defendants were a railway company incorporated by an act embodying the Land and Railway Clauses Acts, 1845. That by the special act it was enacted, that, subject to the provisions of that act and of the incorporated acts, it should be lawful for the defendants to make and maintain the railway in the line and on the land delineated and described in the plans and books of reference. That the part of the bed of the river was in the line and among lands so delineated and described, whereupon the defendants, for the purpose of constructing the railway under the powers in the acts, entered on the part of the bed of the river, and made part of the railway thereon, and committed the grievances, the same

being necessary for making the railway. On the trial, the allegations in the plea were proved as laid; but the defendants gave no evidence of the preliminary steps having been taken, which would have been necessary under the acts if they had sought to have the ownership of the locus in quo vested in them as purchasers under the acts:—Held, first, that as the declaration did not claim for the plaintiff any interest in the soil, but merely a public right of way, the question of ownership was irrelevant, and it was not necessary for the defendants either to allege or prove that such preliminary steps had been taken. *Abraham v. Great Northern Railway Company*, 16 Q. B. 586; 15 Jur. 855; 20 L. J., Q. B. 822.

Held, secondly, that the first clause of s. 16 of the Railway Clauses Act (as to works to be executed by the company), empowers companies to execute such works in navigable rivers, and is not, by the second clause of that section, restricted to works in rivers not navigable. *Id.*

Held, thirdly, that although the proviso at the end of s. 16 requires that, in the exercise of the powers, the company "shall do as little damage as can be," the plea, which did not allege that the company had done as little damage as could be, was not bad for that omission. *Id.*

Action for navigating a vessel in the Thames in so negligent and unskillful a manner that she struck against and damaged a wharf and jetty. A plea, that the wharf and jetty were constructed within the flow of the tide, and below low-water mark, and obstructed part of the bed and course of the river, which was a public navigable river and highway for all the queen's subjects, with vessels, to navigate over and along at all times, at their free will: and that the wharf and jetty had been constructed, and wrongfully obstructed the liege subjects from navigating in, over or along the part of the bed and course of the river with vessels, to the common nuisance of the liege subjects; and that they could not navigate in, over or along the part of the bed and course of the river, unless the wharf and jetty were damaged; that the plaintiff had notice of the premises, and willfully continued the nuisance; that the defendant "had occasion to pass with the vessel over that part of the bed and course of the river, and in so passing did the damage mentioned, and that he navigated the vessel with all the skill and care which would have been due and proper had not that part of the bed and course of the river been obstructed, and that he did no unnecessary damage:"—Held, after verdict for the defendant, that the plea was proved, though the nuisance did not reach low-water mark, and there was no evidence that the plaintiff constructed the nuisance, and the defendant did not disprove negligence; but that the plea was bad for not alleging either a necessity to navigate the vessel over that part of the river where the nuisance was, or that the defendant's right course

was over that part of the river, and that it would have been inconvenient and difficult to have taken any other course by which the nuisance might have been avoided. *Dimes v. Petley*, 15 Q. B. 276; 14 Jur. 1132; 19 L. J., Q. B. 449.

A., being the owner of land adjoining a navigable lake, the bed of which was the soil and freehold of the plaintiff, granted to the defendants a right of way, and made a pier, part of which was upon his own land, and part upon the bed of the lake. He then leased the pier and the land belonging to him to a steamboat company, who used the pier for the purpose of landing and embarking passengers. If the pier had not been built on the bed of the lake, they might have brought their steamboats sufficiently near to be able to land their passengers by means of a temporary stage, reaching from their boats to the land so leased to them, and upon which part of the pier was built. The public had a right to navigate the lake, and the plaintiff had not removed the pier, although it had been erected without his consent and against his will:—Held, that he could not maintain an action against the defendants for using the pier as above stated, inasmuch as while he allowed it to remain, it was an obstruction to their right to navigate the lake, and to land and embark their passengers at that place. *Marshall v. Ulleswater Steam Navigation Company*, 41 L. J., Q. B. 41; 7 L. R., Q. B. 166; 25 L. T., N. S. 793.

#### Liability to indictment and punishment.]—

[By 24 & 25 Vict. c. 97, s. 80, *whosoever shall unlawfully and maliciously break down, or cut down, or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, water-course, or other work belonging to any port, harbor, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony.* (Former provision, 7 & 8 Geo. 4, c. 80, s. 12.)

By s. 81, *whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank, or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbor, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony.*

By s. 83, *whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of*

water or not), or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony.]

The 19 Geo. 2, c. 22, s. 1, which imposed a penalty for the offense of throwing ballast into navigable rivers, is repealed impliedly by 54 Geo. 3, c. 159, s. 11, which provides a different punishment for the same offense, and prescribes a different mode of procedure. *Mitchell v. Brown*, 1 El. & El. 267; 28 L. J., M. C. 53; 5 Jur., N. S. 707.

On indictment for nuisance to a canal established by act of parliament, it appeared that the canal was carried across a river and the adjoining valley by means of an aqueduct and embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal; and that in times of flood the water which was then penned back into the brook overflowed its banks, and was carried by the natural level of the country to the arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that, except for the nuisance after mentioned, the aqueduct would be sufficiently wide for the passage of the river at all times, but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water; that the occupiers of lands adjoining the river and brook, had, for the protection of their lands, subsequently to the making of the canal, aqueduct, and embankment, erected or heightened artificial banks called fenders on their properties, so as to prevent the flood-water from escaping as above mentioned; and that the water had consequently in time of flood come down in so large a body against the aqueduct and canal banks as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced many hundred acres of land would again be exposed to inundation:—Held, that the occupiers were not justified in altering, for their own benefit, the course in which the flood-water had been accustomed to run, and consequently they were indictable. *Rez v. Trafford*, 1 B. & Ad. 874. See *S. C.*, in error, 1 M. & Scott, 401; 2 C. & J. 265; 8 Bing. 204.

An indictment does not lie against the owner of a vessel, sunk by accident or misfortune in a navigable river, for not removing it. *Rez v. Watts*, 2 Esp. 675—Kenyon.

The erection of any building in a port or a navigable river, which of itself is such a hindrance to the navigation as to amount to a nuisance, is an indictable misdemeanor, although such building is productive of collateral benefit, sufficient, in the opinion of the jury, to counterbalance the injury done to the navigation. *Rez v. Ward*, 6 N. & M. 38; 4 A. & E. 384; 1 H. & W. 708.

On an indictment for a nuisance, it was proved that the wharf (the nuisance complained of) was erected over a part of the river between high and low-water mark, where boats were used before to pass. And, for the defendant, it was shown that the wharf was a convenience to the public, inasmuch as boats of heavy burden could come to unload at the wharf, which, before the building of the wharf, anchored in the middle of the river; and that the channel of the river was by this convenience kept clear:—Held, that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether the erecting of the wharf had caused a benefit to the navigation in general. *Reg. v. Randall*, Car. & M. 496—Wightman.

If property (as oysters) is placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it, if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. *Chester (Mayor, &c.) v. Brooke*, 7 Q. B. 339; 9 Jur. 1090; 15 L. J., Q. B. 59.

The defendants, who were owners of the soil adjoining a harbor, were indicted for a nuisance in erecting planks in it; a special verdict was found, but it did not distinctly appear by the verdict whether the erection was in the harbor or not. The verdict found, that, by the defendants' works, the harbor was in some extreme cases rendered less secure. Assuming the erection to have been in the harbor:—Held, that consequences so slight, resulting from the acts of the defendants, did not amount to a nuisance. *Rez v. Tindall*, 1 N. & P. 719; 6 A. & E. 143.

By a statute reciting that the river Witham was formerly navigable for lighters, boats, &c. from Lincoln to the sea, and that, by sand and silt brought in by the tide, the outfall had been greatly obstructed, and was in a great measure stopped up, whereby trade and commerce had decayed, powers were given to commissioners for the purpose of restoring the navigation; they were authorized, in order for the carrying on and effecting the navigation, to make a new cut through lands adjoining the river (not vested in the commissioners), and the navigation so made was to be open to all subjects of the realm paying tolls. The commissioners were also empowered, under certain regulations, to build bridges. The cut was made, and a more direct channel thereby created, through which the waters of the Witham passed to the sea. A company, in whom the powers of the commissioners afterwards became vested by statute, built a bridge not according to the regulations, and occupying to some extent the bed of the new cut. On an indictment against them for a nuisance to the river as a public highway, the jury found specially that the company was guilty of building the bridge,

but that it did not obstruct the navigation:—Held, first, that the cut was a public navigable river, the obstruction of which was an indictable offense. *Reg. v. Betts*, 10 Q. B. 1022; 19 L. J., Q. B. 501; 4 Cox C. C. 211.

Held, secondly, that building a bridge partly in the bed of a navigable river is not necessarily a nuisance; that the question, whether in fact it is so or not in a particular instance, is for a jury; and that the verdict negativing actual obstruction was in effect an acquittal. *Id.*

The judge, on the trial of an indictment for obstructing the navigation of the Menai Straits by erecting a wall, asked the jury whether they thought the erection proved "a material nuisance," in which case they were to find a verdict of guilty; but told them that if they thought the nuisance was so slight, rare, and uncertain, that the defendant ought not to be made criminally liable for it, they were to acquit him; and on the jury saying that they considered the erection, "although a nuisance, was not sufficiently so as to render the defendant criminally liable," he directed an acquittal:—Held, per Coleridge and Crompton, JJ., and *semble*, per Lord Campbell, C. J., that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance: and that the jury must be understood as finding that the obstruction in question was so insignificant, and that therefore there was not a misdirection warranting a new trial. *Reg. v. Russell*, 3 El. & Bl. 942; 18 Jur. 1022; 23 L. J., M. C. 173.

**Persons indictable.**—The workmen of a colliery owner, in working the colliery, stacked the refuse in such a manner that it fell into a navigable river, and caused an obstruction therein. The owner was indicted for a nuisance in causing such obstruction:—Held, that not having personally superintended the works, and having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and should not be thrown into the river, did not relieve him from liability upon the indictment. *Reg. v. Stephens*, 1 L. R., Q. B. 702; 12 Jur., N. S. 961; 35 L. J., Q. B. 251; 14 W. R. 859; 7 B. & S. 710; 14 L. T., N. S. 593.

**Convictions by justices.**—By an act, if any person shall build, erect, or place any building or erection within fifteen feet of the center of the bed of the stream of a river, he shall be summoned before justices, who may order the removal of the obstruction, and impose a penalty upon the offender. A flood washed away the bed of the river, and B., who had mills or works adjoining, and was owner of the land on both sides of the stream, restored the bed to its original level by laying large stones across, side by side, without any cement or other fastening:—Held, that this was not a building or an erection, and

therefore that the justices were justified in declining to convict. *Colbran v. Barnes*, 11 C. B., N. S. 240.

S. was convicted upon an information laid under 14 Geo. 3, c. 96, which was one of several acts passed to improve the navigation of the rivers Aire and Calder. By s. 97, any person who willfully throws any ballast, &c., into any part of these rivers, or of any watercourses thereunto belonging, is liable to a penalty. S. carried on the business of a tanner, and it was proved that on a certain day a quantity of rubbish was discharged by him into a beck, adjoining the premises, at a point about four miles from the river Aire, into which it flows at a place where that river is navigable:—Held, that the conviction was wrong, inasmuch as the words "watercourses thereunto belonging" did not include tributary streams, unless they formed part of the navigation. *Smith v. Barnham*, 34 L. T., N. S. 744—D. C. A.

*Semble*, that the section points to a knowingly willful act on the part of the doer, and, as S. merely exercised a supposed right, there was no willful throwing in of rubbish at all within the meaning of the section. *Id.*

As to obstruction of or interference with canal navigation—see this title, II., 8.

### 3. Tolls.

**Right to, and amount of tolls.**—By an act for making and keeping a river navigable it was enacted, that certain persons therein mentioned should be conservators, and that, for reimbursing them what should be laid out for the purposes of the act, with 6l. per cent. interest until they had been paid the principal and interest of what they had disbursed or should thereafter disburse, every vessel navigating the river should pay to the conservators certain tolls, namely, a sum not exceeding 4d. for every weigh of coals; and that, in default of payment of such sums, it should be lawful to detain the vessel, and that, after the conservators should be fully reimbursed, certain less tolls, that is, the sum of 1d. for every weigh of coals, should be paid, and no more. By a subsequent act, reciting that it was necessary to erect a lock on a certain part of the river, it was enacted, "that, from and after the building of the lock, an additional toll should be collected, and paid to the conservators at the lock, viz., the sum of 1s. over and above the sum of 4d. for every weigh of coals granted by the former statute;" and the same remedy was given for non-payment:—Held, that as the two acts were in *pari materia*, the clause giving the additional toll, in the second act, was to be construed with reference to that giving toll in the first act; and that, so construing it, the true meaning was, that until the conservators were fully reimbursed, they were not at liberty to take a less toll than that specified in the last-mentioned statute. *Rees v. Tone Conservators*, 1 B. & Ad. 561.

Where rates and duties were imposed on coals, landed within a certain district, to be paid to commissioners therein named, and the commissioners were empowered to sue in the name of their clerk for the time being for "any penalty or sum of money due or payable by virtue of the act."—Held, that an action might be brought in the name of the clerk for arrears of rates and duties; although, by another clause, a power was given of detaining and selling the vessel and goods in case of neglect or refusal to pay the rates and duties. The act directed, that any surplus of rates remaining in the hands of the commissioners should be annually invested in the funds until it should amount to 3,000*l.*, and that after that sum should be invested they should reduce the rates, so as they should not, together with the dividends of the 3,000*l.*, exceed the charges annually expended in carrying the act into execution.—Held, that the commissioners had impliedly a power, after so reducing the rates, also to raise them again in case of necessity. *Goody v. Penny*, 9 M. & W. 687.

Held, also, that after the passing of the Weights and Measures Act, 5 & 6 Will. 4, c. 63, the commissioners had power to levy the rates by the ton (they having been previously levied by the chaldron), without first applying to the sessions for an inquisition under s. 14. *Id.*

A local act imposed the following duties on articles carried on a navigable river:—"For every ton of coals, cinder, lime and lime-stone, gravel and manure, the sum of 4*d.*; and for every ton of butter or other goods, wares, merchandise and commodities, the sum of 9*d.*."—Held, that stone sleepers of a like size and shape, intended for a railway, were only liable to the duty of 4*d.* a ton. *Fisher v. Lee*, 1 A. & H. 11; 4 P. & D. 447; 13 A. & E. 622.

A navigation act gave a toll of 1*d.* per ton on "stone, pebbles, sand, clay, manure, lime-stone," and of 8*d.* per ton on "other goods, wares and merchandise" not before mentioned.—Held, that coprolites, which are fossil substances generally supposed to be the dung of animals, and which produce, when mixed with acid, sixty per cent. of phosphate of lime and forty per cent. refuse, and are then used as manure, were not stone or manure within the act, but came within the class of goods, wares and merchandise. *Dant v. Moore*, 9 L. T., N. S. 381—Q. B.

**Extinguishment.**—To an action on a bond, the condition of which bound the corporation of London to pay an annuity out of tolls collected on the Thames, a plea that the Thames Conservancy Act had transferred all control of the tolls to a corporation called the conservators of the River Thames, is a good plea, as the performance of the condition had become impossible by the act of law. *Brown v. London (Mayor, &c.)*, 9 C. B., N. S. 726; 7 Jur., N. S. 755; 30 L. J., C. P. 225; 9 W. R. 836; 3 L. T., N. S. 813; af-

firmed on appeal, 13 C. B., N. S. 828; 8 Jur., N. S. 1103; 31 L. J., C. P. 280; 10 W. R. 522—Exch. Cham.

As to tolls upon canals,—see this title, II, 4; in general,—see TOLLS.

## II. CANALS.

### 1. Canal Companies; their Organization, Regulation and Powers, in General.

**Statutes.**—[8 & 9 Vict. c. 28, empowers canal companies and commissioners of navigable rivers to vary their tolls, rates and charges in different parts of their navigation.

8 & 9 Vict. c. 42, enables canal companies to become carriers of goods upon their canals; and 10 & 11 Vict. c. 94, amends this act to enable these companies to borrow money on their property.

The 17 & 18 Vict. c. 31, regulates the traffic and tolls on canals.

As to the rules and forms of proceeding against canal companies violating the provisions of this enactment in regard to traffic arrangements with the public, see *Roy. Gen., C. P. II. T.* 18 Vict., 15 C. B. 473–476, and title CARRIER.

40 & 41 Vict. c. 60 (The Canal Boats Act, 1877), provides for the registration of canal boats used as dwelling-houses.]

**Limitation and duration of powers.**—An act of the 51 Geo. 3, for making the Bridgewater and Taunton canal, after reciting that the making of that canal would be very prejudicial to the tolls authorized to be levied and collected from the Tone navigation, authorized and required the canal company within three calendar months to contract and agree with the conservators of the river Tone navigation and other persons, proprietors of shares or parts of shares, or otherwise interested therein, for the absolute purchase of their several and respective estates, rights and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the town of Taunton, and the several parishes of Taunton, St. Mary Magdalen and Taunton St. James, for the absolute purchase of certain respective estates, rights and interests of the town and parishes under and by virtue of the therein-recited acts. This act was repealed by the 5 Geo. 4.—Held, by Bayley and Littledale, JJ., that the words "within three calendar months" applied to both branches of the clause, and that the canal company, therefore, was bound to have contracted within that period with the overseers of the parishes of Taunton; and not having done so, they could not afterwards compel them to sell their interest; and by Parke, J., that whether the right to purchase that interest was limited to three months or not, at all events it was gone when the 51 Geo. 3 was repealed. *Toss v. Ash (Conservators)*, 10 B. & C. 349.

By a canal act, a company was restricted from any alterations of their canal after the



piration of two years. By the same act, proprietor of a mill near the lower part of the canal, was entitled to all the surplus water of it:—Held, that the erection of a steam-engine after the two years, to pump water into the upper part of the canal, by which the carrying power of the canal was increased, and the surplus water diminished by the enlarged trade, was an injury to the mill-owner, for which he was entitled to damages. *Blakemore v. Glamorgan Canal Company*, 2 C., M. & R. 183; 1 Gale, 78; 5 Tyr. 603; *S. C.* (in error), 1 C. & F. 263; 5 Bligh, N. S. 547.

The statute directed that a mill-owner should be entitled to receive the surplus water by a weir above a certain lock, which the company was bound to keep water-tight:—Held, that it was to be inferred that the company should not have the right of passing any water through the lock, though necessary to the lower part of the canal, except that which passed when barges were lowered through the lock *Id.*

A clause in a second act relating to the same canal, declared that the works thereby authorized should be completed within two years from the time of its passing, and that the money to be raised by it should not be applied to defray the expenses of any of the works not made within that time:—Held, that this clause not only limited the application of the money to the works completed within that time, but that no works should be carried on adversely to the interests of individuals, after the expiration of two years. *Id.*

If an act is obtained by a company, authorizing them to make a canal, and for that purpose to take certain lands specified in the act, on giving compensation to the owners in the manner pointed out, but the act contains no limitation of time within which those powers are to be exercised, the company is entitled to commence those works, and avail themselves of the provisions of the act after any lapse of time, however great; and the owner, if dissatisfied, cannot restrain, and has no remedy against them in a court of law. *Thicknesse v. Lancaster Canal Company*, 4 M. & W. 472; 3 Jur. 11.

A local act empowered certain persons to make the river Kennet navigable, and to dig and cut through the banks of the river, and to erect in the river, and upon the lands adjoining, weirs, pens, dams, &c., and to do all matters and things necessary for making and maintaining or improving the navigation, the undertakers first giving satisfaction to the owners of such lands, weirs, &c., as should be digged, cut or removed, or otherwise made use of, as the commissioners named for the purpose should direct, in case the undertakers should not beforehand have agreed with the proprietors of such lands and hereditaments concerning the same. Commissioners were appointed to mediate between the undertakers and the owners of lands and hereditaments intended to be made use of, and to settle sat-

isfaction for such portion of the lands as should be cut, digged, or made use of; and a provision was made for filling up vacancies in the body of the commissioners. If any person should sustain damage in his mills, by the owners of the navigation taking away or diverting the water, or any similar injury, the commissioners should, by a jury impaneled as therein directed, assess such damage and award compensation to the party injured. The proprietors of the navigation obstructed the water flowing to a mill by the erection of a dam under the powers of the act. All the commissioners under the act had died, and there were no commissioners in existence by whom compensation could be assessed:—Held, by Wightman, J., Erle, J., Crompton, J., that the powers of the proprietors to raise weirs for the necessary purposes of the navigation did not cease by reason of the right of the mill-owner to recover compensation for consequential damages through the commissioners being lost; and, by Lord Campbell, C. J., that the power to raise the weir and cut off the water flowing to the mill, could only be exercised during the continuance of the body of commissioners, and that upon their extinction the extraordinary powers of the proprietors ceased. *Kennet and Avon Canal Navigation v. Witherington*, 21 L. J., Q. B. 419; 18 Q. B. 531.

By a local act, persons were incorporated for the purpose of improving the navigation of a river; and they were empowered to take tolls in respect of the transit or conveyance of goods thereon:—Held, that, in the absence of any express enactment on the subject in the act, the duties of the company were confined to matters relating to the navigation, and that they were not liable for the sewerage of the river, as to clear away weeds, which, though injurious to the adjoining lands, were no detriment to the navigation. *Parrett Navigation Company v. Robins*, 3 Railw. Cas. 383; 10 M. & W. 593; 12 L. J., Exch. 81.

As to power to take and use water, acquire lands, &c.—see this title, II., 2; to construct and operate canals.—see this title, II., 3; in respect of tolls,—see this title, II., 4.

**Shares.**—Shares in canal companies are pure personality. *Edwards v. Hall*, 6 De G., M. & G. 74; 1 Jur., N. S. 1189; 25 L. J., Chanc. 82.

A mandamus will lie against a company of proprietors of a canal navigation, and their clerk, to compel them to make an entry of the probate of a deceased proprietor, and to register the name and place of abode of his executrix as the proprietor of one share in the profits of the navigation, belonging to the deceased at the time of his death. *Horne, Ex parte*, 7 B. & C. 632; *S. C.*, nom. *Re v. Worcester Canal Company*, 1 M. & R. 520.

By a navigation act it was enacted, that on a certain day the first general meeting of the proprietors should be held, at which the company should execute a deed under their common seal for each distinct share, "which deed

should respectively vest a certain share in each proprietor;" the plaintiff declared in an action against the defendant, for not completing a contract for the purchase of some shares, averring, that, on a day prior to the first general meeting, he was lawfully entitled to so many shares:—Held, that this was a material averment, and the ground of a nonsuit, as it could not be proved; though there was another clause in the act, by which certain persons by name (of whom the plaintiff was one) were made a corporation for the purposes of the act: and the money to be subscribed was to be divided into so many equal shares, "which were thereby vested in the person so subscribing," &c. *Latham v. Barber*, 6 T. R. 67.

A canal was made under the authority of an act; the lands for that purpose were purchased and vested in a corporation, but the shares therein were to be deemed personal estate, and transmissible as such, and were to be conveyed by bargain and sale:—Held, that the shares did not bear the character of realty, so as to make a bequest of them specific. *Robinson v. Addison*, 2 Beav. 515.

**Accounts and rates.**—By an act for making and maintaining a canal, power was given to the canal company to make all such works as they should think necessary and proper for effecting, completing, maintaining, improving, and using the canal, and other works; and the company was required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an annual account of the rates collected, and of the charges and expenses of supporting, maintaining, and using the navigation and its works; and the sessions were authorized, in case it appeared to them that the clear profits exceeded the percentage limited by the act, on the sums mentioned in the first account to have been expended by the company (i. e., in making and completing the canal and its works) to reduce the canal rates:—Held, that the sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expenses, stated in the annual account of disbursements, for new works, such as a reservoir and a steam-engine, which the company deemed necessary, and proved to have been erected for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. *Rez v. Glamorganshire Canal Company*, 13 East, 157.

By an act, a company of proprietors was authorized to make the canal, and to do all other acts which they might think necessary and convenient for the making, improving, and using the canal; and the profit of the company on the money expended in making and completing the navigation was not to ex-

ceed 8l. per cent. per annum; and in order to ascertain the clear amount of the profits of the navigation, the company was required to keep an account of the money laid out in making the canal, and of all charges incurred before the canal was completed, and also to make out an annual account, balanced to the 29th of September, of the rates and of the charges attending the supporting, maintaining, and using the said navigation; and these accounts were to be laid before the justices at quarter sessions, and they were to reduce the rates whenever the clear profits of the navigation exceeded 8l. per cent. upon the money laid out:—Held, that the company was authorized to widen and deepen the canal, after it had been once completed (that being beneficial to the public), and that the charge of such widening and deepening was a charge attending the using of the canal. *Rez v. Glamorganshire (Justices)*, 7 B. & C. 723.

By an act for making the river Tone navigable, conservators were appointed, and it was enacted that the accounts of the conservators should be made up to the 24th of June yearly, and the accounts so made up, and vouchers for the same, should be brought before the bishop of Bath and Wells, or any five of the justices without the bishop, between the first day of August and the then next general sessions of the peace to be held for the county of Somerset, at a place appointed by the bishop, or by any five of the justices without the bishop, then and there to be examined, stated, and corrected; and the accounts, whether or not the same should have been examined and corrected by the bishop and justices, were to be brought before the bishop and justices, or any five of the justices in the absence of the bishop, at the opening of the court of the next quarter sessions to be held after the first day of August yearly; and the bishop and justices at the sessions, or any five of the justices in the absence of the bishop, were required to examine, state, and allow the accounts of the conservators, and that allowance was to be final and conclusive:—Held, that the bishop and justices were bound to examine, state, and allow the accounts, at the first sessions, and had no authority to adjourn the examination to a subsequent session. *Bridgewater Canal Company v. Bluet*, 10 B. & C. 893.

## 2. Taking and Using Water and Acquiring Lands; Compensation to and Other Rights of Owners of Property Taken or Injured.

**Rights and privileges of taking and using water.**—By 8 Geo. 3. c. 38, a canal company was established, without power to the proprietors to appropriate to themselves water raised from mines along the line of the canal. By 23 Geo. 3. c. 93, another canal was made, giving to the company power to take gratuitously the water raised from mines within a certain distance of that canal, "provided the

produce of such mines was carried along some part of the canal." By 24 Geo. 3, c. 4, both canals were incorporated, but the provisions as to each, contained in 8 Geo. 3, and 3 Geo. 3, were to be kept distinct and separate. The proprietor of a mine in the line of the first canal raised coal, one-third of which was afterwards carried along part of the second canal:—Held, that the company's privilege of taking mineral water did not attach to his mine on the first canal, by reason of the partial conveyance of the produce along the second. *Finch v. Birmingham Canal Company*, 8 D. & R. 680; 5 B. & C. 821.

A canal had three levels, of which A. was the highest, B. the middle, and C. the lowest level. The canal proprietors (though without authority under their act to do so) erected engines between the C. level and the plaintiff's mill forge, and pumped back the water which, after serving the purposes of navigation in levels A. and B., had flowed into level C. Afterwards a new act, repealing former acts, and re-enacting their provisions, with alterations and additions, was passed. The 15th section gave the proprietors authority to maintain engines for supplying the canal with water, and to have reservoirs and feeders supplied from all brooks, streams, &c., from which they were lawfully supplied before the passing of the act, and "from time to time to raise the water of the canals from one level to another, or to any reservoirs, and for any of the purposes aforesaid to use such engines as they should judge proper, making full satisfaction for all damages sustained by the owners of any mills, forges, brooks, streams, &c., taken, used, removed, diverted or injured." By s. 80, the proprietors were forbidden to take for the use of the canal any water out of the river above the plaintiff's forge, and they were directed to maintain flood-weirs, so that all waste water running into level C., not required for that canal, should flow into the river above the plaintiff's forge. The proprietors pumped up as before the water out of the level C. back into the level A., in consequence of which, except on extraordinary occasions, no water escaped over the weirs into the river:—Held, that they were entitled to do so, and that such pumping back of the water from one level of the canal to the other did not give the plaintiff a right to compensation. *Ellwell v. Birmingham Canal Navigation*, 3 H. L. Cas. 112.

By an agreement, a canal company was authorized to open the sluices of a lock at other times than when boats or barges navigating the canal were passing, or about to pass, through the lock, and to take water for maintaining the navigation of the canal below the lock, paying to the plaintiff a weekly rent for each occasion when water was so taken. To this there was a proviso, that the company might, once a year, let out the water for the purpose of cleansing and repairing the canal, and refill it for seventy-two successive hours without paying rent. A boat having sunk in

the lock, the water was let into the lock and pond again:—Held, that this was not a taking of the water at a time other than when a boat was passing through, and consequently, that the plaintiff was not entitled to claim rent. *Llewellyn v. Swansea Canal Navigation Company*, 2 H. & N. 509; 3 Jur., N. S. 1005; 27 L. J., Exch. 85—Exch. Cham.

On another occasion, the company emptied the pond below the lock, with a view of repairing another lock below, and on the repairs being done, they opened the sluices of the lock in question, and let the water down to refill the pond:—Held, that there was a taking of the water for the purposes of maintaining the navigation, and that the plaintiff was entitled to his rent. *Ib.*

An act for making a navigable communication for ships between the city of Norwich and the sea empowered a company to erect a lock or a sluice, with proper stop-gates, to prevent the waters of a broad and certain navigable rivers from flowing into a lake, and to make an entrance cut from that lake to the sea. Section 3 provided, that nothing in the act contained should authorize or enable the company to divert or abstract any of the waters of the broad or rivers for any purpose whatsoever, except for the purpose of supplying certain intended cuts with water, and for the purposes of locking ships or vessels from or into the lake. This entrance cut from the lake into the sea was constructed under the act, and the level of the water in the lake was kept lower than the level of the broad and rivers. The lock was made with proper gates in pursuance of the act. By several acts the lock and works became vested in the Norfolk Railway Company; it was provided that "the Eastern Counties Railway Company should have, as between themselves and the other company (but subject to such division and apportionment of gross receipts as is therein mentioned), the exclusive possession, use, enjoyment and receipt of all the property, rights, &c., of the works, in the same manner as the Norfolk Railway Company have become entitled to the same, under or by virtue of the respective acts or otherwise; that the Eastern Counties Company should at all times repair and keep up the works with the appurtenances;" and that the powers of the Norfolk Railway Company should be exercised by the Eastern Counties Company. By 17 & 18 Vict. c. 220, s. 2, the agreement was confirmed, and by s. 11, the Eastern Counties Company was to use, work, regulate and manage the five undertakings (in the act mentioned) as if they were one undertaking. By s. 12, the powers recited acts, or any of them, with respect to the user, working, regulation and management of their respective railways, works and undertakings, were to be exercised and enjoyed by the Eastern Counties Railway Company, under the same regulations and restrictions as were, by the recited acts relating to that company, imposed on that company.

After the making of the agreement, the Eastern Counties Railway Company entered into possession of the lock and works, and the Norfolk Railway Company was not in possession. At the time of making the agreement, the lock had been allowed to become out of repair, and such want of repair continued after the lock and works came into the possession of the Eastern Counties Railway Company, and during all that time large quantities of water escaped from the broad and rivers into the lake:—Held, first, that such water was diverted or abstracted contrary to the prohibition in the first-mentioned act. *Preston v. Norfolk Railway Company*, 2 H. & N. 785.

Held, secondly, that the Norfolk Railway Company was not responsible for the diversion or abstraction of the waters subsequent to the making of the agreement, and the passing of 17 & 18 Vict. c. 220, while the lock and works were in the possession of the Eastern Counties Railway Company. *Id.*

The S. and W. canal communicated at its highest level with the B. canal at lowest level. Owing to the unscientific construction of the locks on the B. canal, during a period of upwards of seventy years there had flowed into the S. and W. canal from the B. canal, with every barge that passed up or down the latter into or out of the former, a much larger volume of water than need have passed or escaped if the system of locks had been more ingeniously contrived. The proprietors of the B. canal proposed to improve the machinery on their canal, so as to put a stop to this unnecessary waste or flow of water. The proprietors of the S. and W. canal sought to restrain them, on the ground that they had acquired a prescriptive right by user, during a much longer period than forty years, to that amount of water which they had enjoyed during such period. They also claimed the right by parliamentary contract and by special agreement:—Held, that the true construction of the acts of parliament cited failed to establish the claim under the parliamentary contract, and that no special agreement was proved. *Staffordshire and Worcestershire Canal Navigation Company v. Birmingham Canal Navigation Company*, 1 L. R., H. L. Cas. 254; 85 L. J., Chanc. 757.

Held, also, that had any such agreement or grant been at any time made by the company, it would have been ultra vires and unlawful. *Id.*

Held, also, that as no grant could at any time have been lawfully made, no prescriptive right by user could be claimed or be deemed absolute or indefeasible under the Prescription Act, 2 & 3 Will. 4, c. 71, s. 2. *Id.*

Held, also, that the doctrine as to use of water in natural or artificial streams does not apply to water passing through locks in a canal, such water being accumulated under the authority of the legislature, to be used in a particular manner for the benefit of the public. *Id.*

A company was established by statute for

making and maintaining a navigable canal: and by a section reciting that the erection of steam-engines near to the navigation might promote its interests, it was made lawful for the owners of lands within twenty yards of the canal to draw off water sufficient to supply such engines, for the sole purpose of condensing the steam used for working them, such water to be returned into the canal (allowing for inevitable waste), so that no obstruction should arise to the navigation. The company sued R. for that he, being possessed of land within twenty yards of the canal, and of a mill and steam-engine on such land, drew water from the canal more than sufficient for the sole purpose of condensing, and used the same for other purposes than of condensing, whereby the company lost and was deprived of the water. Plea, that the defendant was tenant of land, and was the occupier of a mill erected on the land and abutting on the canal, and of a steam-engine in the mill, and that he and all occupiers of the land, mill and engine had for twenty years used as of right the easement of drawing from time to time from the canal such quantities of water as were necessary for other purposes than that of condensing, to wit, for the purposes of supplying the boilers of the engine with water, of generating steam to work the engine, of heating the mill, of cleansing the boilers, and of supplying water to a cistern on the roof of an engine-house on the land; and that the defendant, in exercise of his right, drew off the water for the purpose aforesaid. A mill of the defendant, called the Old Mill, with a steam-engine, abutting on the canal, existed more than twenty years; within twenty years a new mill with another engine had been erected adjoining to and communicating with the Old Mill, water passing from one to the other, and the machinery of one being worked by power from the other; and the water of the canal had been used in both mills (in the old during more than twenty years) for the purposes mentioned in the plea, except that of supplying a cistern on the roof of the engine-house, there being no cistern in that place. The jury found that the buildings constituted one mill, and that the user proved had been as of right, and a verdict was taken for the company. On motion to enter a verdict for the defendant:—Held, that the justification in respect of "a certain mill" was supported by the proof of the defendant having occupied and used the water for the Old Mill during twenty years, and that if the company meant to rely upon the more modern user in the new mill, they should have new assigned; and that the failure of proof as to the cistern did not entitle the company to an entire verdict on the issue joined, but that the verdict might be entered distributively, with nominal damages for the user not justified in proof. *Reed's Canal Company v. Radcliffe*, 18 Q. B. 287; 31 L. J., Q. B. 297.

The company moved for judgment non obstante veredicto, on the same issue, and relied

in the act of parliament and others establish-  
and regulating their canal, which gave the  
public a right, for the purpose of the naviga-  
tion, to use the canal and the adjoining wharfs  
in ways, paying certain rates, empowered the  
company to raise money on the security of  
such rates, and obliged them to convey all  
their waste water into the Duke of Bridge-  
water's canal:—Held, that the company could  
not, consistently with these enactments, have  
permitted the water for other purposes than  
that permitted by the statute, and that an ac-  
tual grant, if proved, for the purposes men-  
tioned in the plea, would have been illegal,  
and no justification; and, therefore, that the  
grant for such purposes, implied from twenty  
years' user, was no legal defense to the action.  
*Ib.*

A company incorporated for making and  
maintaining a canal, and having powers under  
their act to take water for the purpose of  
supplying the canal, cannot by user acquire,  
under 2 & 3 Will. 4, c. 71, s. 2, a prescriptive  
right to take the water for any other purpose.  
*National Guaranteed Marine Company v. Don-  
ald*, 4 H. & N. 8; 28 L. J., Exch. 185.

An easement to take water to fill a canal  
ceases when the canal no longer exists. *Ib.*

By an act a company was incorporated for  
making a canal, and empowered to supply the  
canal with water from certain rivers. In 1824,  
the company made a cut, and erected on it a  
water-wheel, for pumping water into the  
canal. The company occasionally used the  
water-wheel to drive a bone-crushing mill. In  
1853, an act passed for converting the canal  
into a railway, after repealing the first-men-  
tioned act, re-incorporated the company, for  
the purpose of making the railway. By that  
act it was enacted that easements, &c., vested  
in the canal company should, after the pass-  
ing of the act, be vested in the company  
thereby incorporated, for their absolute bene-  
fit; that all titles by possession "acquired by  
the canal company, should be as good in favor  
of the company thereby incorporated as the  
same were good, immediately before the pass-  
ing of that act, in favor of the canal com-  
pany;" and that in case any of the works used  
for the purposes of the canal should, in conse-  
quence of the stopping up of the canal, be no  
longer required for the purposes of the act,  
the works which should be no longer required  
might be sold by the company in the manner  
provided by the Land Clauses Act with re-  
spect to the sale of superfluous lands. The  
canal having been stopped up, and converted  
into a railway:—Held, that on the conversion  
of the canal into a railway, the right of the  
company to the flow of water into the cut  
for driving the wheel ceased, and that the  
railway company could not convey to a pur-  
chaser any right to such flow. *Ib.*

**Purchasing and acquiring lands.]**—Where  
a company was authorized by an act to pur-  
chase lands necessary for the navigation, and  
was required to enroll the conveyances of such  
purchased lands with the clerk of the peace,

copies whereof were to be good evidence in  
all courts, the court, after a lapse of sixty-five  
years from the time of the purchase of certain  
lands, during which no application had been  
made to the company to enroll the convey-  
ances, refused to grant a mandamus to that  
effect on the refusal of the company to do so.  
*Reg. v. Leeds and Liverpool Canal Company*,  
3 P. & D. 174; 11 A. & E. 310.

Under an act, proprietors of lands were  
authorized to contract for, sell, and convey  
their lands to a canal company; such "con-  
tracts, agreements, sales, exchanges, convey-  
ances and assurances," were to be valid to all  
intents and purposes: were to be enrolled  
with the clerk of the peace, and copies there-  
of to be evidence; and, upon payment of the  
sum agreed on for the purchase of lands, such  
lands were to be vested in the canal company:  
—Held, that a conveyance of land under this  
act must be in writing. *Doe d. Robins v.  
Warwick Canal Company*, 2 Bing. N. C. 483;  
2 Scott, 717.

Where an act enacted, in one clause, that  
after any land should have been set and  
ascertained for making the canal, it should  
be lawful for all persons seized or posses-  
sed of or interested in such lands, to contract  
for, sell and convey them to the company,  
and that all such contracts, sales, and assur-  
ances should be valid and effectual in law,  
and all such contracts, &c., should be made at  
the expense of the company and enrolled with  
the clerk of the peace, and copies signed by  
the clerk of the peace should be evidence;  
and a subsequent clause enacted, that upon  
payment of such sums of money as should be  
contracted or agreed for between the parties,  
or determined and adjusted by the commis-  
sioners, or assessed by a jury, in manner  
thereinbefore mentioned, the lands should be  
vested in the company:—Held, that, by refer-  
ence to the former clause, the contract, in  
order to vest the lands in the company, must  
be in writing, and that, therefore, proof of  
payment by the company, for particular lands  
identified in evidence, was not sufficient proof  
of title in the company. *Harborough v.  
Shardlow*, 7 M. & W. 87; 2 Railw. Cas. 253.

A canal company having power to purchase  
lands for gross sums or for annual rent-  
charges, to be determined by commissioners  
in cases of disability, took possession of the  
lands of an infant, on an agreement with his  
tenant, and after an award by the com-  
missioners of the gross sum or annual rent-  
charge which ought to be paid, but which  
award was invalid, no one being party to it  
who had power to bind the infant's interest,  
the awarded gross sum was paid by the com-  
pany to the steward, on an agreement for its  
return if the land was not conveyed to the  
company on the infant attaining his majority.  
No conveyance was executed and the pur-  
chase-money was returned, but the company  
continued in the use of the land for their  
canal, paying to the land-owner for forty  
years after he attained his majority a rent of  
nearly the amount awarded by the commis-

sioners. The company also, with his knowledge, purchased the interests of lease-holders in the land:—Held, first, that an agreement could not be presumed to have been entered into or ratified by the land-owner for a sale of the fee in consideration of a rent charge. *Somersetshire Coal Canal Company v. Harcourt*, 2 De G. & J. 596.

Held, secondly, that an ejectment brought by the land-owner and the intended erection of a bridge by him, ought to be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers (which had not expired), to acquire the land. *Id.*

**Vesting of title.**—In 1779, P. demised land, of which he was seized, to M. & Co., for a term of sixty-five years. In 1794, an act was obtained by the Swansea Canal Company, for the purpose of making a canal through part of the land in question; and it was enacted that upon payment or tender of certain sums of money, adjusted by commissioners or assessed by a jury, for the purchase of any such lands, it should be lawful for the company to enter upon such lands, or before such payment or tender, by leave of the owners or occupiers; and that, thereupon, such land should be vested in the company for the purposes of the act. In 1797, and during the continuance of the lease, B. entered into an arrangement with M. & Co., the lessees, by which a canal made by the latter was extended through part of the same land, and formed a continuation of the Swansea canal. No payment or satisfaction was made or agreed to be made to the owners of the lands, but everything was done by B. with the consent and in accordance with the wishes of such owners and proprietors. Upon the termination of the lease of 1779, the assignees of the reversion brought ejectment against the assignee of B., who continued in possession of the canal made upon the land demised:—Held, that the mere consent of the owner of the property to the construction of the canal did not bring the case within the act; and that the assignees were entitled to the possession of the land. *Doe d. Patrick v. Beaufort*, 6 Exch. 498.

A. was empowered by acts to make a canal, and he was authorized to supply the canal from brooks within five hundred yards thereof, to dig and trench the adjacent land, and remove earth, trees and other obstructions thereon, for making, using, and maintaining the canal, towing-paths, trenches and water-courses, with similar powers as to roads and other conveniences connected with the canal; to inclose and appropriate such parts of the land as should be proper for wharfs or quays; to set up posts, ditches and fences in places necessary for separating the towing-paths from the adjacent lands; to lay earth and other materials requisite for the works, and do all things necessary for the making, maintaining, and convenient use of the canal. It

was provided that nothing should authorize A. to use the lands for any other purpose than that of the navigation. Provisions were made for the purchase and sale of such lands as should be wanted; for assessing the price and the damages to be paid by A. for the use of or injury to the lands; and if he should be in possession of any lands for a certain space of time without using them for the canal, he was to re-convey his right and interest *thereto*; and it was provided that the works and things made in forming a certain part of the canal should become the property of A.:—Held, that no right to the soil of the lands adjoining to the canal, and applied to the purposes thereof under the powers of the act (not being those comprehended under the last-mentioned proviso), passed to A. where there had been no actual purchase. *Doe d. Reg. v. York (Archbishop)*, 14 Q. B. 81; 19 L. J., Q. B. 242.

**Remedies of parties aggrieved.**—Where a particular jurisdiction is appointed under a canal act to determine all questions that may arise respecting things to be done in pursuance and in execution of the act, if the projectors of the canal exceed their powers, or do any act not strictly within the terms of the statute, by which any individual finds himself aggrieved, he is not confined to the particular jurisdiction, but the wrong is to be remedied in the ordinary manner. *Shand v. Henderson*, 3 Dow. 519. And see *Re v. Croker*, Cowp. 26.

The court will not grant a mandamus to compel a canal company, pursuant to the provisions of an act, to proceed to an assessment of the value of land, taken by them for the purposes of their canal, and also of the recompense to be made for the damages thereby sustained, if the parties interested in the land do not make their application to the court within a reasonable time after the land was taken by the company; especially, if the parties have another remedy by ejectment. *Re v. Stainforth and Keadby Canal Company*, 1 M. & S. 32.

Under a clause in an act giving compensation for the value of lands, tenements, and hereditaments, or for damage done thereto, the title-owner is not entitled to compensation for the injury done to him by the conversion of titheable land taken for the purpose of the navigation, and covered with water. *Re v. Nene Outfall (Commissioners)*, 4 M. & R. 647; 9 B. & C. 875.

In order to induce the court to issue a mandamus to a canal company, to make compensation to a claimant, a clear refusal on the part of the company must be shown; mere delay in attending to the claim is not sufficient. *Reg. v. Wilts and Berks Canal Company*, 8 D. P. C. 623; 4 Jur. 848—B. C. See *Reg. v. Thames and Isis Navigation*, 8 A. & E. 201.

By 9 Geo. 4, c. 98, the undertakers of the Aire and Calder Navigation were empowered to make a navigable canal from certain points



mentioned in the act, and also to construct a railroad from such canal to a certain highway, and for such purpose to enter upon any lands, making satisfaction as thereafter mentioned; and it was provided, that, in case of any disputes between the undertakers and the parties interested in the lands, taken, used, damaged, or affected by execution of any of the powers of the act, a jury should assess the amount to be paid for the purchase of such lands, and also what amount should be paid by way of recompense, either for the damages which should before that time have been sustained, or for the future recurring damages which should have been occasioned, and the cause of which should have been only in part obviated or repaired by the undertakers, and which could be no further obviated, repaired, or remedied by them. Other causes provided that the company should agree for, or cause to be valued and paid for, the lands, which they were empowered to purchase, within five years after the passing of the act; that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years. A dispute having arisen as to the value of a piece of land, in which the contemplated railroad crossed the line of an existing railroad, a jury was summoned, who assessed the value and damages as follows:—Value of the land, £1.; present damages, 0; future damages, 2,800/. At this time the undertakers had contracted or paid for all the lands required for their works, but had not executed the works between the termini laid down in the parliamentary map, and had deviated above 100 yards from the parliamentary line, and made a cut through land of their own:—Held, first, that that part of the verdict which assessed the future damages, was void; for that, in order to enable the jury to make an assessment of future damages, the cause of injury must already exist in some work of the undertakers already done; and, secondly, that, unless the undertakers had finally abandoned the intention of making the cut in the parliamentary line, they had a right, at any time within fifteen years, to take possession of the land in question, on the payment or tender of the £1. assessed as its value, and that they had a right to go on simultaneously with the making both of the cut and the railroad. *Lee v. Milner*, 2 M. & W. 824; M. & H. 275.

As to injuries done by or to canals,—see this title, II., 8.

**Right to construct wharfs, roads and ways adjoining canals.**—A canal act empowered the lord of any manor, and the owner of any lands through which the canal should be made, to erect and use any wharfs, quays, landing places, or warehouses in or upon their lands adjoining or near to the canal, and to land any goods or other things upon such wharf, or upon the banks lying between the same and the canal, and also to make convenient places for boats to lie and turn in, so that the mak-

ing or using the same did not obstruct or prejudice the navigation of the canal or any towing-paths or sides thereof:—Held, that an owner of land adjoining the towing-paths had a right to erect a wharf on his own soil, and to land goods on the towing-path, and convey them across it to his own wharf. *Monmouthshire Canal and Railway Company v. Hill*, 4 H. & N. 421; 28 L. J., Exch. 283.

The power given by a canal act, enabling the proprietor of a mineral district to make roads and railways over lands of other persons from his mines to the canal, does not restrict him to the shortest practicable route, but enables him to adopt any more circuitous route which in the bona fide exercise of his judgment he may find expedient, provided the point at which he joins the canal is within four miles of the boundary of his estate. *Richards v. Richards*, 1 Johnson, 255.

Saving time by avoiding a lock is a sufficient reason for preferring a more circuitous route for this purpose. *Id.*

As to rights of fishery in canals,—see FISH AND FISHERY; working mines under canals,—see MINES AND MINERALS.

### 3. *Construction and Maintenance, Management and Operation of Canals; Injuries to or by Canals.*

**Liability of company to repair canal and banks.**—By an act a canal company was bound to repair the banks of the canal; in an action brought by the company against the owner of adjoining land, for digging clay-pits upon his own land, and causing the banks to give way, there was some evidence to show that the bank was not in good repair; but the judge directed the jury to find for the company, if they thought that the falling in of the bank was caused by the defendant having dug clay-pits:—Held, that the company was not entitled to recover, unless, at the time when the bank gave way, it was in good repair; and that question not having been submitted to the jury, a new trial was granted. *Staffordshire and Worcestershire Canal Company v. Hallen*, 6 B. & C. 317; 9 D. & R. 266.

Where an act authorized navigation commissioners to lease the works, and the act put the duty of repairing upon the lessees, and in case they did not repair, authorized and required the commissioners to give them notice to repair, and, in case they neglected to finish the repairs in such period as the commissioners pointed out, authorized them to take possession of the tolls, and cause the repairs to be done themselves, an action does not lie against the commissioners, for that the commissioners had neglected to give the notice, whereby a lock in the line of the navigation fell in, and the plaintiff's barge was delayed in the canal, so as to cause him to lose the use of it; the alleged injury not being the natural, necessary, and proximate result of the not giving notice. *Walker v. Goe*, 4 H. & N. 350; 5 Jur., N. S. 737; 28 L. J., Exch. 184—Exch. Cham.

An incorporated company was authorized by act of parliament to make a navigable canal, the construction of which would interfere with an ancient drain. By one section of the statute the company was required to make a drain on each side of the canal, and parallel therewith, in lieu of part of the ancient drain which would be destroyed. By another section the company was required to make such arches, tunnels, culverts, drains or other passages, over, under, by the side of, or into the canal, and the trenches, streams and watercourses communicating therewith, and the towing-paths on the sides thereof, of such depth, breadth and dimensions as shall be sufficient to convey the water clear from the lands adjoining or lying near the canal, without obstructing or impeding the same; and to support, maintain, cleanse and keep in repair all such arches, tunnels, culverts, drains and other passages:—Held, that the drains made in pursuance of the former section, in lieu of the ancient drain, were to be cleansed by the company, as well as those made in pursuance of the latter section; and that a summary remedy given by the latter section, in case of non-repair by the company, was applicable to a default in cleansing the drains made in lieu of the ancient drains. *Priestley v. Foulds*, 2 Scott, N. R. 265; 2 M. & G. 175; 2 Railw. Cas. 422.

**Liability of company to fence canal to prevent accidents.**—When a canal company is empowered to intersect highways and to construct bridges to connect the intercepted portions, and the canal and bridges are vested in it, and it is enabled to take tolls from boats passing the bridges, and the company erects swing-bridges, which the boatmen are entitled to open for the purpose of passing, and which when opened leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is that while the bridge is lawfully opened at night-time, a person falls into the canal, without any fault on his part, the company will be liable to an action. *Manley v. St. Helen's Canal and Railway Company*, 2 H. & N. 840; 27 L. J., Exch. 159.

A swing-bridge over a canal crossing a public highway, when turned back for the passage of a barge along the canal, left a gap on the side of the road, without any fence towards the water. A., being upon the bridge while it was in this state, and the spot being dark, incautiously stepped back and fell into the water and was drowned. In an action by his widow and administratrix against the canal company, the jury was told that if they thought there had been negligence on the part of the company, and no want of proper care and caution on the part of the deceased, the plaintiff was entitled to a verdict; but that if they thought that the deceased had by his own negligence contributed to the accident, they must find for the company:—Held, a proper direction, and that upon the facts the jury was warranted in finding for the

company, although of opinion that the bridge was not secured as it should have been. *Witherley v. Regent's Canal Company*, 13 C. B., N. S. 2; 6 L. T., N. S. 253; 3 F. & F. 61.

A company was possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land, close to the sluice; there was a towing-path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing-path and the footpath. By the permission of the company, the intervening space had been recently used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land was obliterated. A person using the path at night missed his way, and fell into the canal and was drowned:—Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing off the canal, and that the other facts did not render the company liable for the accident. *Binks v. South Yorkshire Railway and River Don Company*, 33 L. J., Q. B. 26; 3 B. & S. 244; 11 W. R. 66; 7 L. T., N. S. 350.

**Liability of company for overflow of water.**—A company undertaking for their own profit to maintain a channel for carrying off water, and neglecting to do so effectually, is responsible for damage done to the adjoining land by reason of the banks giving way after an unusual rainfall, although other persons who were bound to keep the outlet of the channel of certain dimensions had failed to perform that duty, and had thereby occasioned an increase of water in the channel, without which its banks would not have given way. *Harrison v. Great Northern Railway Company*, 10 Jur., N. S. 992; 33 L. J., Exch. 260; 12 W. R. 1081; 10 L. T., N. S. 621; 3 H. & C. 231.

A right of action against a canal company for negligently keeping their sluices, by reason whereof the canal overflowed, is not ousted by provisions in the canal act for compensation to parties affected by the works, and especially by the overflowing of the water over the sluices, those provisions relating to the due and proper management of the works, not to their negligent management. *Cockburn v. Erewash Canal Company*, 11 W. R. 84—Q. B.

Under a navigation act persons who sustained damage by reason of the navigation were entitled to compensation. The trustees of the navigation had, under their control, a lock, a weir and clows, through which, when raised, the water of the river could be let off. During a flood, after a heavy rain, they kept down the clows, and, by so penning back the water, caused the premises of the prosecutor to be overflowed and damaged:—Held, upon motion to enter a verdict for the trustees non obstante veredicto upon a mandamus, that

the prosecutor was entitled to judgment; that the mandamus was sufficient, though it did not aver that his premises would not have been flooded under similar circumstances before the river was altered by the works of the trustees; that the proximate cause of the damage, the penning back the water, being done on account of the navigation, the trustees were as much liable under the acts as if they had committed a breach of duty, and that it was no excuse that it had been done skillfully, and that, unless it had been done, other works of theirs lower down, and the lands of others, would have been damaged. *Reg. v. Delamere*, 13 W. R. 757—Exch. Cham.

By a local navigation act, a corporation was appointed the undertakers for improving and maintaining the navigation of a river, with power to do all things it should think convenient and necessary for making, improving and using the navigation, and to receive tolls from persons conveying merchandise on such river:—Held, that the corporation, not having the ownership of the soil of the river or any right to interfere with the river otherwise than for the purpose of navigation, was not liable for any injury to adjacent land from an overflowing of the river owing to not cutting the weeds therein, and to an accumulation of silt caused by stanches properly and not negligently erected for the navigation, if the weeds and silt so accumulated did not interfere with the navigation. *Cracknell v. Thetford (Mayor, &c.)*, 38 L. J., C. P. 353; 4 L. R., C. P. 629.

But where, by a drainage act, the commissioners were to construct a cut, with proper walls, gates and sluices, to keep out the waters of a tidal river, and also a culvert under the cut to carry off the drainage from the lands on the east to the west of the cut, and to keep the same at all times open, and in consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and bursting its western bank, flooded the adjoining lands, and the owners of lands on the east side of the cut closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, and so let the waters through on to the plaintiff's land to a much greater extent:—Held, that the commissioners were responsible for the entire damage thus caused to the land. *Collins v. Middle Level Commissioners*, 4 L. R., C. P. 279; 38 L. J., C. P. 236; 20 L. T., N. S. 442; 17 W. R. 920.

A company was by statute authorized to make a canal, and required to maintain it in good order for navigation by the public; preparatory to making some necessary repairs and improvements, they turned off the water into a drain (designed for that purpose) from whence it ought to flow, as on a previous

occasion it actually did, into a public sewer, which was under the exclusive care and control of the corporation of Dublin; but, owing to an unforeseen obstruction in the sewer, the water was stopped and flooded the plaintiff's premises; and, although the company became aware of the flooding—though not of the immediately efficient cause—it did not appear that they had taken, or could have taken, any steps to prevent or stop the discharge of water from the canal into the drain:—Held, first, that the company, while acting in exercise of their statutory powers, could not, in the absence of negligence on their part, be made responsible for the injury done. *Boughton v. Midland Great Western Railway of Ireland Company*, 7 Ir. R., C. L. 169.

The jury having found that the flooding of the plaintiff's premises was caused by the obstruction in the corporation sewer:—Held, secondly, that there was no evidence of negligence by the company which ought to have been submitted to the jury. *Id.*

The owners of a canal being threatened by an overflow of flood water from a neighboring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterwards broke into the canal at a point above the barricade of planks, and opposite to the plaintiff's premises, which were also situated on the banks of the canal, above the premises of the owners of the canal, and, being penned back by the planks, the water rose in the canal until it flooded the plaintiff's premises. In an action to recover damages for the injury so caused:—Held, that the owners of the canal were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural water-course, not to impede the flow of water down it. *Nield v. London and North Western Railway Company*, 10 L. R., Exch. 4; 44 L. J., Exch. 15; 23 W. R. 60.

**Liability of company for obstructing canal and fouling waters.**—An act constituted a company for the purpose of making and maintaining a navigable canal, which all persons were to be allowed to use, on payment of certain tolls. The act also provided, in case of obstruction by any sunken vessel, the owners of which should not weigh it up without loss of time, that it should be lawful for the company to do so, and to keep the same till payment made of the expenses for so doing:—Held, that the act did not make it compulsory upon the company, after notice, so to weigh up a sunken vessel; but that, as the company had made the canal for their profit, and opened it to the public upon payment of tolls, a duty was imposed on them, at common law, to take reasonable care

to prevent danger to the navigation; and that, therefore, they were liable for their neither weighing up nor giving notice of a sunken vessel, which damaged a boat navigating their canal. *Lancaster Canal Company v. Parnaby*, 3 P. & D. 162; 11 A. & E. 223; 1 Railw. Cas. 696—Exch. Cham.

Such a common-law duty need not be expressly alleged in the declaration; it is sufficient to allege facts from which the duty can be necessarily implied. *Id.*

When a canal company pumped foul water into their canal, so as to make the canal a nuisance, it is no defense that the foulness was caused by other persons. *Att. Gen. v. Bradford Navigation Company*, 35 L. J., Chanc. 619.

A canal company was empowered by an act to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains before it reached the canal, and it was then penned back in the canal and became a public nuisance:—Held, that the company was liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to create a nuisance. *Reg. v. Bradford Navigation Company*, 11 Jur., N. S. 769; 6 B. & S. 631; 34 L. J., Q. B. 191; 13 W. R. 892.

#### Wrongful abstraction of water of canals.]

—An act empowered a company to purchase lands for making and maintaining a navigable canal, and contained provisions with respect to the conveyance of land, and its vesting in the company on payment of the price assessed by compensation. It was also provided, that manufacturers within a certain distance of the canal might, after notice to the proprietors of the canal, lay down pipes to supply their steam engines with water for the sole purpose of condensing the steam used for working such engines; and that if any dispute should arise with any person desirous of taking water for the above purpose, or should be in the use of taking the same, such disputes should be finally determined by commissioners. A declaration by the company stated that the canal had been made and maintained by them in pursuance of the act; that the defendant having steam engines within the prescribed distance of the canal, had, after notice to the company, laid down pipes communicating with the canal, and that the defendant had used the water drawn off by such pipes for other purposes than condensing the steam of their engines. It was objected that the declaration did not show any conveyance or ownership of the canal or water; nor did it show any invasion of a private right, or damage to such a right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that a repetition of the act could never be used as evidence that it was rightful; also, that the remedy was by indictment as for a violation of a statutory provision; and

further, that the complaint was a dispute over which the commissioners under the act had exclusive jurisdiction:—Held, that the declaration was good; that it must be taken that the company was in possession of the canal, and that, without averment of special damage, the wrongful act appeared to be a damage to the company's right; that the disputes over which the commissioners had jurisdiction were disputes with persons either about to use, or in the actual use of the canal water for a rightful purpose, as to the mode of taking such water, and that the provision for reference to the commissioners did not apply to a mere wrongful act. *Rochdale Canal Company v. King (in error)*, 14 Q. B. 122; 15 Jur. 696—Exch. Cham.

By a statute a company was incorporated and empowered to do all things necessary to make the river Medway navigable; and the river or streams so to be made navigable, and all lands, tenements, and hereditaments to be by them made use of for the benefit of the navigation, were thereby vested in the company:—Held, that the statute conferred on the company such an interest in the whole of the water of the river and streams, for the purposes of the navigation, as to entitle them to sue persons abstracting part thereof, such persons not being riparian proprietors, and applying it to purposes more extensively than the rights of riparian proprietors cover; and that the company might sue, independently of any question of actual damage to the navigation by reason of such abstraction. *Medway Navigation Company v. Romney*, 9 C. B., N. S. 575; 7 Jur., N. S. 846; 30 L. J., C. P. 236; 9 W. R. 482.

When a corporation acquires riparian lands under parliamentary powers, all riparian rights, whether ordinary or prescriptive, already subsisting in respect of those lands attach to such corporation; and if the special objects of its incorporation include purposes requiring the use of the water, the supply of water to which the corporation is entitled will be measured by the extent of user necessary for the purposes of the act, if such user would be more extensive than that to which the corporation would be entitled as the successor of the former riparian owner. *Swindon Waterworks Company v. Wilts and Berks Canal Company*, 7 L. R., H. L. Cas. 697; 83 L. T., N. S. 513; 24 W. R. 284; affirming the decision of the Lords Justices. 9 L. R., Ch. 451; 43 L. J., Chanc. 393; 30 L. T., N. S. 443; 23 W. R. 444; reversing the decision of Malins, V. C., 29 L. T., N. S. 722; 22 W. R. 212.

A canal company incorporated by act of parliament claimed to be entitled to the flow of water in a certain stream for the purposes of navigation under the act, as the purchasers under the act of a tenement upon which was an ancient mill. A waterworks company, without parliamentary powers, acquired lands higher up the stream than the canal company, and diverted the water of the stream, and stored it in a reservoir for the purpose of sell-

g it to the town of Swindon, claiming to do as a matter of right:—Held, first, that the canal company was entitled to the flow of water to the extent claimed under both heads. *b.*

Held, secondly, the user claimed by the water-works company, not being a user connected with the servient tenement, was inconsistent with the right of the canal company. *b.*

Held, thirdly, that such user being claimed as of right might be restrained by injunction without proof of substantial damage already sustained or imminent therefrom. *Id.*

As to rights in respect of water and water-courses, generally,—see WATER AND WATER-COURSES.

**Mode of user of canals; rights of user by public.**—There is a public right of user of a canal with boats propelled by steam power, if they do no injury to the canal beyond what is occasioned by traction by horses. *Case v. Midland Railway Company*, 5 Jur., N. S. 1017; 28 L. J., Chanc. 727; 27 Beav. 247.

A canal company cannot grant the exclusive right to let boats for hire over their water, so as to give the grantee a right to sue a third party for the infringement of his right. *Hill v. Tupper*, 9 Jur., N. S. 725; 8 L. T., N. S. 792; 2 H. & C. 121.

A company was empowered by an act to make a canal, and to purchase lands for the purpose of the navigation, and upon payment of the purchase-money the fee simple of the lands was to be vested in the company for the use of the navigation, but to or for no other use or purpose whatsoever. By a subsequent act the company was empowered to make a reservoir, for the purpose of supplying the canal with water, and to purchase land for that purpose, and all the powers of the first act were extended to making the reservoir. The acts contained various clauses reserving rights of fishery to the owners of the lands through which the canal and reservoir were made, and enabling them to use pleasure boats thereon without paying toll, but prohibiting the passage of any boats carrying passengers or goods for hire, except upon payment of toll. The canal and reservoir, and all the rights of the canal company, were subsequently vested in a railway company by act of parliament, in the same manner and to the same extent as the canal company could have held or used the same, and all the powers of the canal acts were extended to the railway company. The canal company purchased from the plaintiff's ancestor land, upon which the company made the reservoir, and took a conveyance of it in fee to a trustee for the company. Two questions being raised, first, whether the railway company could lawfully let out boats for hire upon the reservoir; and secondly, whether they could lawfully use the reservoir for any other purposes than for supplying the canal with water:—Held, by Lord Campbell, C. J., that, under these statutes, there was not a universal prohibition

against the railway company using the reservoir for any other purpose, except that of feeding the canal, but that all uses of it, whether by pleasure boats or otherwise, other than for the purposes of navigation, whereby the grantor of the land, or his heirs or assigns, were prejudiced, was unlawful, but that the plaintiff, not being a shareholder, could not rely upon the improper applications of the corporate funds to this purpose. Per Coleridge, J., and Wightman, J., that the railway company could not lawfully let out pleasure boats for hire upon the reservoir, or use it for any other purposes on profit, except those contemplated by the statutes under which they were incorporated, as the land was vested in them for the use of the navigation, and for no other use or purpose, and also because such use of the reservoir would derogate from the rights of adjacent land-owners; and lastly, because it involved a disposal of the corporate funds to a purpose foreign to the object of their incorporation, and might be prejudicial to the shareholders. Per Erie, J., that the canal company and the railway company acquired, by the conveyance of the land to them, all the incidents to an estate in fee simple not expressly prohibited by their acts, with the specified duty superadded of using it for the purpose of the navigation, and of not using it for any purpose inconsistent with that object, and that therefore they might lawfully use the reservoir with pleasure boats or in any other manner which did not impede the performance of the statutory duty. *Bosstick v. North Staffordshire Railway Company*, 3 C. L. R. 1027; 1 Jur., N. S. 921; 24 L. J., Q. B. 225; 4 El. & Bl. 798. See *S. C.*, in equity, 2 Jur., N. S. 248; 25 L. J., Chanc. 825; 3 De G. & S. 584.

**Leasing and mortgaging canal.**—[By 21 & 23 Vict. c. 75, s. 3 (passed 2d August, 1858), canal companies being also railway companies are prohibited from taking leases of canals, unless specially authorized by act of parliament. This enactment, which was only temporary, is made perpetual by 23 & 24 Vict. c. 41.]

The 8 & 9 Vict. c. 42, enabled canal companies to become carriers on canals, to lease their canals, and to take leases of others. Subsequently a railway company obtained an act, enabling them to purchase the X canal, and to exercise all its "rights, powers, and privileges."—Held, that after the purchase, the railway company had authority to take a lease of canal Y., under the first act, this being a "right, power, and privilege" possessed by canal X., and which passed, on its sale to the railway company. *Rogers v. Oxford, Worcester and Wolverhampton Railway Company*, 25 Beav. 322; affirmed on appeal, 2 De G. & J. 662.

By a canal act, the company was empowered to borrow and take up money upon the credit of the undertaking and the rates or duties made payable by the act, and by writing under their common seal to mortgage or assign over the undertaking and the rates or

duties, to the person advancing the money, as a security for the money so borrowed; and a form of mortgage was given, whereby the company engaged to pay the interest half-yearly:—Held, that the property of the company, and the rates or duties alone, were pledged for the payment of the moneys advanced; and that the company was not liable to be sued for arrears of interest. *Pontet v. Basingstoke Canal Company*, 4 Scott, 182; 8 Bing. N. C. 433.

#### 4. Tolls.

**Right to, and amount of tolls.]**—Where a canal is made pursuant to an act, the right of the proprietors to toll is derived entirely from the act; and it is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is, that any ambiguity in the terms of the contract must operate against the company of adventurers, and in favor of the public. The proprietors, therefore, can claim nothing which is not clearly given to them by the act. *Stourbridge Canal Company v. Wheeley*, 2 B. & Ad. 793. S. P. *Barrett v. Stockton and Darlington Railway Company*, 2 Scott, N. R. 837; 2 M. & G. 134.

A canal was formed upon two levels, which were connected by a chain of locks. Upon the upper level, there was no lock whatever. By the act for making the canal, all persons were at liberty to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the company, not exceeding the rates therein mentioned; and, by another clause, the company was authorized to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks; and power was given to the owners of adjoining lands to use pleasure boats on the canal, without paying dues, so as the same did not pass through any lock, and were not used for carrying goods:—Held, that this act gave no right to demand toll for boats navigating the upper level of the canal, in which there were no locks. *Id.*

Where a canal act directed, "that no boat navigating thereon, which should not be capable of carrying a greater burden than twenty tons, or which should not have a loading of twenty tons on board, should be allowed to pass through any of the locks, unless the owner or navigator of such boat should pay tonnage equal to a boat of twenty tons;" and it did not appear that in any part of the act a boat per se was made liable to any toll, but that all the provisions as to tolls applied exclusively to goods conveyed on the canal:—Held, that the clause in question was confined to boats carrying some loading, and did not attach upon an empty boat passing through the locks. *Leeds and Liverpool Canal Navigation Company v. Hustler*, 2 D. & R. 556; 1 B. & C. 424.

A canal act gave a higher tonnage for light goods than for heavy goods. If a jury finds that certain goods were heavy goods when the act passed, ten years' subsequent consent of the company to consider the same species as light goods will not entitle the canal company to demand for these the toll on light goods. *Staffordshire and Worcestershire Canal Company v. Trent and Mersey Canal Company*, 6 Taunt. 151.

By an act, a toll of one shilling per ton was imposed on all coal, &c. (in addition to the ordinary toll) navigated on any part of the canal from a particular specified place, or from any place within two miles thereof:—Held, that this only applied to voyages commencing within the specified limits, and that no such additional toll was payable for coal loaded at a place more than two miles from the spot specified, although conveyed upon a part of the canal within two miles of that spot. *Britain v. Cromford Canal Company*, 3 B. & A. 139.

An act imposed a toll on "every ton of butter or other goods, wares, merchandises and commodities," and a lower toll on "every ton of coal, cinders, lime and limestone, stone, gravel and manure." Blocks, cut with wedges from the quarry, and there reduced to certain dimensions according to the order, and squared with a pickaxe, to be used as railway sleepers, each being, after such preparation, worth 9d. more than unwrought stone of the same weight:—Held, liable to the toll as stones only, not as merchandise. *Fisher v. Lee*, 12 A. & E. 622; 4 P. & D. 447.

A company was empowered by act to take for tonnage upon all coals and other commodities whatsoever, conveyed upon the canal, duties not exceeding 2½d. per ton, on entering or passing out of the canal; and also not exceeding 1½d. a mile for every ton of coal, except all dung, soil, marl, ashes, and other manure (other than lime, which was to pay half tolls), and except stone and other materials for mending roads, which was to pass toll free. By another section, no boat should pass through any of the locks, unless such boat should pay a duty equal to what would be paid by a vessel loaded with a burden of thirty tons, or unless it should be returning, after having passed on the canal, with a greater burden than thirty tons:—Held, that a boat laden with thirty-eight tons of manure, which had entered the canal and passed along it without paying toll, was not liable to pay any toll on returning through the lock empty, after discharging her cargo. *Grantham Canal Navigation v. Hull*, 3 Railw. Cas. 710; 13 M. & W. 114; 13 L. J., Exch. 283; affirmed, 14 M. & W. 880; 15 L. J., Exch. 63—Exch. Cham.

Under a canal act, imposing a toll "on coals, lime, timber, bricks, stone, and all other goods, wares or merchandise whatsoever," gravel and materials for the repair of turnpike roads are liable to toll. *Coulton v. Ambler*, 3 Railw. Cas. 724, n.; 13 M. & W. 403; 14 L. J., Exch. 11.



By a canal act a company was empowered make a canal, to be called the Union Canal, from L. to N., with a cut from G. to M. It being found impracticable to carry the work to N., another act was passed, enabling them to vary the line of the cut from G. to M., which was done accordingly. A third act was afterwards passed, for joining the Union Canal to the Grand Junction Canal, by means of a Canal from G., to be called the Grand Union Canal, which was also done. By the first act, the company was authorized to receive for coal navigated upon the Union Canal and cut a mileage tonnage of  $2\frac{1}{2}d.$ , so as not to exceed a certain sum (5s.). By the third act, it was enacted, that they should not be entitled to receive more than 2s. 6d. per ton for coal navigated on the Union Canal, and thence on the Grand Union Canal, for a certain specified distance (to H.); and 2s. 1d. if carried beyond that distance. A mandamus issued, reciting that M. was aggrieved by the tonnage taken by the company on coal being higher from L. to M. by G., than if it were carried, after passing G., upon the Grand Union Canal; and commanding the company to establish a uniform rate of tolls along the whole of their line, or to take tonnage on coal from L. to M. only in proportion to that carried from L. to G., and afterwards upon the Grand Union Canal, so long as they took less than 2s. 6d. and 2s. 1d. on coal carried from L. to G., and afterwards upon the Grand Union Canal. The return to the mandamus denied the receipt of unequal tolls:—Held, that, the first act having authorized a mileage toll, and the last act prohibiting in certain cases more than a certain amount of gross toll, the power of making a uniform rate of toll was expressly taken away from the company; and that the first act having imposed such mileage toll on coal on the whole of the Union Canal and cut, and having only exempted it from such toll if it passed along the Grand Union Canal, the original toll still prevailed from L. to M. on the Union Canal. *Reg. v. Leicestershire and Northamptonshire Union Canal Company*, 3 Railw. Cas. 730—Exch. Cham.

By 33 Geo. 3, c. 80, the Grand Junction Canal Company was empowered to take tolls for the passage of manure between Bramston and Brentford, and persons occupying lands through which the canal passed might carry manure without payment. By 34 Geo. 3, c. 24, for making a cut to Buckingham, the powers and authorities mentioned in the former act were to be exercised by the company and by the owners of lands on the new cut, as if re-enacted, and the like exemptions were to be allowed. By 35 Geo. 3, c. 43, reciting the first-mentioned act, the company was empowered to make a cut to Paddington, and the several powers, authorities, matters and things in the recited act contained, except the rates, were to be used and exercised by the company, and applied for making the cut, and for ascertaining tolls, and in all respects as if re-enacted, and as if the cut had been

part of the works authorized to be made by the first act. By 35 Geo. 3, c. 85, for making a cut from Watford to St. Albans, reciting the before-mentioned acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted, and the like exemptions were allowed:—Held, first, that on the construction of the 35 Geo. 3, c. 43, persons occupying lands on the Paddington cut could not carry manure on the canal free from toll. *Tune v. Grand Junction Canal Company*, 11 Exch. 786; 25 L. J., Exch. 223.

Held, secondly, that the provisions of the several public local acts with respect to tolls on different cuts, parts of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington act, alleged to create exemptions from toll upon the Paddington cut. *Id.*

By an act, a canal company was authorized to execute certain works for the purpose of making the river Tamar navigable for the distance of thirty miles, and in consideration of the great charge and expense which the company must incur and suffer in making and maintaining the works thereby authorized to be made and maintained, it should and might be lawful to and for the company from time to time, and at all times thereafter, to ask, demand, take, and recover the several rates therein mentioned for the tonnage and wharfage of all minerals, &c., which should be carried upon the navigation, canal, and collateral cut, or any of them. The company only completed the navigation to the extent of about three miles:—Held, nevertheless, that the company was entitled to recover rates in respect of the conveyance of goods along the navigation so completed by the company. *Tamar Navigation Company v. Wagstaff*, 9 Jur., N. S. 1324; 4 B. & S. 288; 32 L. J., Q. B. 295.

**Reducing or varying tolls.**—An act provided that the Monmouthshire Canal Company should not receive any higher rates of tonnage than should for the time being, be taken by the Brecknock Canal Company; and the latter, by a resolution of a general meeting, and under their common seal, reduced their tolls:—Held, that the Monmouthshire Canal Company could not question collaterally the validity of such resolution, but was bound by it. *Monmouthshire Canal Company v. Kendall*, 4 B. & A. 453.

Where a canal company was empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1d. per ton per mile upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, through

land not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1s. per ton, the company paying back 6d. per ton, is illegal and void; 1st, as a speculation by which the company might gain more or less than the legislature intended they should take, under similar circumstances, from the public in general; 2dly, as extending in effect the power of the company to purchase land beyond the limits assigned by the act; 3dly, as enabling them to raise more capital than they were entitled by the act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken upon mortgage; 4thly, because the tolls could, in no instance, be reduced but at a general assembly, and this, in fact, operates as a reduction of the tolls pro tanto. *Lees v. Manchester Canal Navigation*, 11 East, 645.

By an act, a company was entitled to demand a fixed sum for goods carried upon any part of the canal, which rates should be equal throughout the whole length of the intended canal. By 8 & 9 Vict. c. 28, subsequently passed, proprietors of canals were empowered from time to time to alter or vary the tolls granted to them, either upon the whole, or for any particular portion or portions of such canals, according to local circumstances, or the quantity of traffic or otherwise, as they should think fit, with a proviso that such tolls were to be charged equally to all persons, and after the same rate, whether per mile, or per ton per mile, in respect of all boats of the like description passing along or using the same portion of the canal, and all goods of the like description conveyed or propelled in a like boat, passing along or using the same portion of the canal, under the like circumstances:—Held, that it was competent to the company to take a proportionally less toll per ton per mile for goods carried a given distance (five miles) along any part of the canal, than for goods carried less than that distance. *Strick v. Swansea Canal Company*, 16 C. B., N. S. 245; 12 W. R. 711; 10 L. T., N. S. 460.

Held, also, that it was competent to the company to agree to carry at a lower rate for a particular individual, in consideration of a large guaranteed minimum toll, in order to enable the company to enter into a successful competition with a rival line of railway. *Id.*

**Distraining for tolls.**—A canal act gave a company tolls for all goods carried along the canal, which tolls, if not paid upon demand, they were empowered to recover by action; or they might seize the goods or other things in respect whereof such rates ought to have been paid, and the boat or other vessel laden therewith, and detain the same until payment of such rates, and all arrears due from the owner of the boats; and if such goods were not redeemed within seven days after the taking

thereof, the same were to be appraised and sold as in case of a distress:—Held, that this clause did not empower the company to sell the boats. *Fraser v. Sørensen Canal Company*, 3 N. & M. 391; 1 A. & E. 354.

Held, also, that their right to seize was confined to the limits of the canal; and that, therefore, they were not authorized to seize goods after they had been landed. *Id.*

A canal company was authorized to demand and sue for certain tolls upon the carriage of goods, in respect of which any such tolls ought to be paid, and to detain the same until payment made of such tolls, and of all arrears of the same then due from the owner of such carriage or goods; and in case such distress should not be redeemed within five days, to appraise and sell the same, as in a case of a distress for rent; they were not expressly authorized to levy any toll upon carriages:—Held, that teams could not be distrained for arrears of tolls due from the owners of goods carried in them, if they were not carrying goods of such owners at the time of the distress. *Jenkins v. Cooke*, 1 A. & E. 373.

The statute enacted that any action, brought for anything done in pursuance of the act, or in execution of the powers and authorities granted by it, should be brought within six calendar months next after the fact committed:—Held, first, that such a distress was a thing done in pursuance of the act. *Id.*

Held, secondly, that where an owner of teams let them to a third person, and during such letting they were illegally distrained for arrears due from the person hiring, while not carrying such person's goods, and afterwards sold, such owner might sue within six months from the time of sale, on a count complaining of injury done to his reversionary interest by the seizure and sale. *Id.*

As to tolls upon rivers,—see this title, L, 3; in general,—see TOLLS.

## Navv.

See ARMY AND NAVY.

## Ne Exeat Regno.

**Nature of the writ; jurisdiction to issue, and in what cases granted.**—The writ of ne exeat regno is a high prerogative right, originally applicable to purposes of state; afterwards extended to private transactions; it is confined to cases of equitable debts and is equivalent to equitable bail. *Dick v. Swinton*, 1 Ves. & B. 373; *Jackson v. Petrie*, 10 Ves. 164; *Boehm v. Wood*, 1 Turn. & Russ. 343; *Whitehouse v. Partridge*, 3 Swans. 377.

A court of equity will not grant a ne exeat

igno for a mere legal demand. *Pearne v. Ashle*, Amb. 75.

The master of the rolls has jurisdiction to direct a ne exeat regno to issue. *Boehm v. Wood*, 1 Turn. & Russ. 343.

The Court of Exchequer will grant an order in the nature of a ne exeat regno against an accountant of the crown, about to leave the kingdom without rendering his accounts. *Att. Gen. v. Mucklow*, 1 Price, 289.

When a sum of money admitted to be due is ordered to be paid on or before a certain day, a writ ne exeat regno may be issued against the debtor before that day; the order amounting to an immediate judgment, though payment is deferred. *Sobey v. Sobey*, 42 L. J., Chanc. 271; 15 L. R., Eq. 200; 21 W. R. 309; 27 L. T., N. S. 808—V. C. B.

In a suit for an account a ne exeat regno can be obtained against a co-defendant. *Id.*

**Proof of defendant's indebtedness and intention to depart.**—For the court to grant a ne exeat regno, there must be the most distinct evidence of a debt due. Mere belief of the plaintiff, that if the accounts were taken, a balance would be found due to him, is not sufficient. *Thompson v. Smith*, 11 Jur., N. S. 276; 34 L. J., Chanc. 412.

A trustee was in contempt for not answering, and out of the jurisdiction. He had gone out of the jurisdiction to avoid answering; he had sold out the trust fund to an amount exceeding 20,000*l.*, he had come from Boulogne with a return ticket, and intended to depart shortly, and had in fact been arrested at the station, on the day before the motion for a ne exeat was made, while attempting to depart. The order for a writ of ne exeat was made. *Hawkins v. Hawkins*, 1 Drew. & Sm. 75; 6 Jur., N. S. 490.

A ne exeat regno will not be granted on a general affidavit of belief of the defendant's intention to quit the country, the circumstances not being stated. *Perry v. Dorset*, 19 W. R. 1048—R.

## Necessaries.

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## Negligence.

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**VIII. INEVITABLE ACCIDENT. See ACCIDENT; SHIPPING.**

**I. WHAT CONSTITUTES; AND EXTENT OF LIABILITY.**

**1. General Principles.**

**Nature of the duty or obligation upon neglect of which action arises.**—To sustain an action for negligence, it is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and the defendant. However the duty may arise, if it exists, and is neglected to the injury of the plaintiff, he has a right to sue for damages. *Collett v. London and North Western Railway Company*, 16 Q. B. 984; 15 Jur. 1058; 20 L. J., Q. B. 411.

Persons forming themselves into a society for the protection of trade, and issuing prospectuses, in which they represented that they instituted inquiries for subscribers with reference to the respectability of proposed customers, are liable to subscribers for neglect to take due and reasonable care to make such inquiries. *Wood v. Woods*, 3 F. & F. 244—Mellor.

A person who sustains an injury from the execution of works authorized by a statute is not, generally speaking, entitled to compensation, under the compensation clauses of the statute, unless the injury sustained is such as, had the works not been authorized by the statute, would have given the claimant a right of action. *New River Company v. Johnson*, 2 El. & El. 425.

A company, in the execution of works authorized by a local act which incorporated the Waterworks Clauses Act, 10 & 11 Vict. c. 17, intercepted water from percolating underground into a well belonging to J., and also abstracted from the well, water which had already so percolated into and was in it. By 10 & 11 Vict. c. 17, s. 12, in the exercise of the powers conferred by the act, the undertakers shall do as little damage as can be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers:—Held, that, inasmuch as, apart from the statute, no action would have lain by J. against the company in respect of either the interception or the abstraction of such water, the statute gave no right to compensation in respect of either. *Id.*

Where a statutory obligation is imposed on a person, he is liable for any injury that arises to others in consequence of its having been negligently performed, whether by himself or by a contractor employed by him. *Gray v. Pullen*, 5 B. & S. 970; 34 L. J., Q. B. 265; 11 L. T., N. S. 569; 13 W. R. 257—Exch. Cham.

The 18 & 19 Vict. c. 120, s. 135, empowers the board of works to make a sewer, and to carry their works through or under any cellar or vault under the carriage-way or pavement of any street, making compensation for any damage done thereby; and a special mode of ascertaining the amount of damage sustained is pointed out:—Held, that these provisions did not preclude one who had sustained damage from work done by a contractor, under the order of the board, from maintaining an action against the contractor, where the damage had arisen from his negligence and want of proper care and skill. *Clothier v. Webster*, 12 C. B., N. S. 790; 9 Jur., N. S. 231.

As to liability of public and corporate bodies, trustees, commissioners, &c., for negligence in execution of statutory powers,—see this title, II., 4.

**Nature of cause from which injury arises.**—In an action for negligence there is no distinction between injuries arising from the careless and unskillful management of an animal or other personal chattel, and an injury resulting from the negligent management of fixed real property, unless perhaps where the act complained of is such as to amount to a nuisance. *Reallie v. London and North Western Railway Company*, 6 Railw. Cas. 184; 4 Exch. 244; 13 Jur. 659; 20 L. J., Exch. 65.

A contractor employed by the Metropolitan Board of Works, under their compulsory powers, to open a public road for the purpose of constructing a sewer, is not liable, after filling in the trench, and making that part of the road as sound and compact as it can then be made, for injury or damage to passengers in consequence of the natural subsidence of the soil which he has put in. *Hyams v. Webster*, 36 L. J., Q. B. 166; 2 L. R., Q. B. 264; 15 W. R. 619; 16 L. T., N. S. 118; 8 B. & S. 272; affirmed in the Exchequer Chamber, 38 L. J., Q. B. 21; 4 L. R., Q. B. 188; 17 W. R. 232.

As to what is negligence contributing to injury, and the effect of such contributory negligence,—see this title, III.

**Extent of the care or diligence required.**—A party who takes reasonable care to guard against accidents arising from ordinary causes is not liable for accidents arising from extraordinary ones. *Blyth v. Birmingham Waterworks Company*, 2 Jur., N. S. 333; 11 Exch. 781; 25 L. J., Exch. 212.

If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at

his peril. If it does escape and causes damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. *Rylands v. Fletcher*, 19 L. T., N. S. 220; 37 L. J., Exch. 161—H. L. See *Fletcher v. Rylands*, 3 L. R., H. L. Cas. 330; 35 L. J., Exch. 155; also *Wilson v. Newberry*, 7 L. R., Q. B. 31, 33; 41 L. J., Q. B. 31, 32.

Where a company has the right by law of taking up the pavement of the street, for the purpose of laying down pipes, the workmen they employ are bound to use such care and caution in doing the work as will protect the king's subjects, themselves using reasonable care, from injury; and if they so lay the stones as to give such an appearance of security as would induce a careful person, using reasonable caution, to tread upon them as safe, when, in fact, they are not so, the company will be answerable for any injury such person may sustain in consequence. *Drew v. New River Company*, 6 C. & P. 754—Tindal.

A manufacturer is bound to use reasonable skill and care in supplying any article, to ascertain that that article is fit for the purpose for which it has been made, but he is not bound to supply an article that shall be absolutely fit for such use; and, therefore, he is not responsible for any damage arising from a latent defect. *Randall v. Newson*, 34 L. T., N. S. 527—Q. B. Div.

As to right of action for, and presumptions and proof of negligence, generally,—see this title, IV., 1, 3.

As to the extent of the care required from particular classes of persons or in respect of particular kinds of property, business or work,—see this title, I., 2-4; and the several titles.

## 2. Condition, Management and Use of Lands, Buildings, Machinery and Works, in General.

**Condition of premises, generally, and liability for injuries resulting from defective or improper condition.**—It is the duty of the occupier of a building, with reference to persons resorting thereto in the course of business upon his invitation, express or implied, to exercise reasonable care to prevent damage happening to them from unusual danger in the construction of the premises, of which he has or ought to have knowledge. *Indermaur v. Dames*, 1 H. & R. 243; 1 L. R., C. P. 274; 13 Jur., N. S. 432; 35 L. J., C. P. 184; 14 W. R. 580; 14 L. T., N. S. 484; affirmed on appeal, 36 L. J., C. P. 181; 3 L. R., C. P. 811; 15 W. R. 434; 16 L. T., N. S. 293—Exch. Cham.

Any duty on the part of the occupier of a building to provide for the safety of a master workman employed to do work is equally owing to the servant workman whom he may lawfully send in his place. *Id.*

The defendant was the occupier of a sugar refinery, in which was a shaft necessary for

his business, but open and unfenced. Certain gas-fittings were being put up which it was desired to test. The plaintiff was sent by his employer, the gas-fitter, to the refinery for that purpose; while so engaged, the plaintiff fell down the shaft:—Held, that the defendant was liable for the injuries. *Id.*

A declaration alleged that the plaintiff was lawfully in the defendant's house, as a visitor, by his invitation, and that for the purpose of leaving the house, he, with the defendant's permission and knowledge, opened a glass door of the defendant's, which it was necessary to open, and that, by the carelessness, negligence, and default of the defendant, the door was in an insecure and a dangerous condition, and unfit to be opened; by reason whereof, and of the carelessness, negligence, default, and improper conduct of the defendant, a piece of glass fell from the door upon the plaintiff, and injured him:—Held, that the declaration disclosed no cause of action. *Southcote v. Stanley*, 1 H. & N. 247; 25 L. J., Exch. 339. But see *Watling v. Ooster*, 6 L. R., Exch. 78, 77; 40 L. J., Exch. 43, 45.

A carman was sent by his employer to the defendant's premises to fetch some goods. After waiting some time, he was directed by a servant of the defendants to go along a passage to a counting-house where he would find the warehouseman. The passage was dark, and in going along it he fell down a staircase, and was seriously injured:—Held, that the defendants were not responsible, inasmuch as there was no obligation on them to light the passage or fence the staircase. *Wilkinson v. Fairrie*, 1 H. & C. 633; 9 Jur., N. S. 280; 32 L. J., Exch. 73; 7 L. T., N. S. 599.

But an owner of a private way passing by his warehouses is liable for an injury to persons lawfully using the way, if caused by the negligence of his servants, e. g., by negligently lowering goods from the warehouses. *Gallagher v. Humphrey*, 10 W. R. 664; 6 L. T., N. S. 684—Q. B.

A declaration stated that the defendants were possessed of land with a canal and cuttings intersecting the same, and of bridges across the canal and cuttings communicating with and leading to certain docks of the defendants, which land and bridges were used with their consent and permission by persons proceeding to and coming from the docks; that they wrongfully and improperly kept and maintained the land, canal, cuttings, and bridges, and suffered them to be in so improper a state and condition as to render them unsafe for persons lawfully passing along and over the land and bridges towards the docks; and that G., lawfully passing over and using the bridges, through the wrongful, negligent, and improper conduct of the defendants, fell into one of the cuttings, and was drowned:—Held, that the declaration disclosed no actionable breach of duty on their part. *Gautret v. Egerton*, 2 L. R., C. P. 371; 36 L. J., C. P. 191; 15 W. R. 638; 16 L. T., N. S. 17.

A party, on the invitation of an officer of a vessel lying in the docks, went on board such vessel on business connected therewith, and on his return back he stepped on a gangway which formed the communication between the vessel and the shore, when it tilted over and threw him into the water. The gangway was the means of access to the vessel, which the dock company had provided for that purpose; it was their property, and at the time of the accident was about to be re-arranged by their servants to make it secure, it having been rendered unsafe by reason of their having just previously shifted the berth of a vessel on which it rested. The servants were aware of the gangway being dangerous, but the party was not:—Held, that there was a duty on the part of the company to have made the gangway safe, or to have given him notice of the danger; and that, for the breach of such duty, he had a right of action against the company. *Smith v. London and St. Katharine Docks Company*, 37 L. J., C. P. 217; 3 L. R., C. P. 326.

A, occupied for business purposes the ground floor and B, the second floor of the same house, respectively, as tenants from year to year. There was a water closet on B's premises to and of which he alone had access and use. After the respective premises had been closed on a Saturday evening, water percolated from the water-closet through the first floor to A's premises and caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the waste pipe being choked with paper. The defects could not be detected without examination, and B. did not know of them, and was guilty of no negligence:—Held, that there was no obligation on him to keep in the water at his peril; and that he was not liable to A. for the damage. *Ross v. Fellen*, 7 L. R., Q. B. 661; 41 L. J., Q. B. 270; 26 L. T., N. S. 960.

A servant (in breach of the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54) washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill paved and uneven, and there froze. There was no evidence that the master knew of the grating being obstructed. A horse, while being led past the spot, slipped upon the ice and broke its leg:—Held, that this was a consequence too remote to be attributed to the wrongful act of the servant. *Sharp v. Powell*, 7 L. R., C. P. 253; 41 L. J., C. P. 95; 20 W. R. 584; 26 L. T., N. S. 436.

A declaration alleged that the defendant was possessed of yew trees upon land belonging to him and in his occupation, the clippings of which trees were to his knowledge poisonous to horses and cattle, whereupon it

became his duty to take due care to prevent the clippings from being put or placed upon land, other than his own or in his occupation, where the horses and cattle of his neighbours and others might be enabled to eat them. Breach, that he took so little care of the clippings that they were put and placed upon land other than his own or in his occupation, whereby the horses of the plaintiff were enabled to eat the clippings, and were poisoned and killed:—Held, that this declaration was bad, as it was consistent with the inference that the clippings had been carried from the land of the defendant by a stranger, or through some cause over which he had no control. *Wilson v. Neuberry*, 41 L. J., Q. B. 31; 7 L. R., Q. B. 31; 25 L. T., N. S. 695; 20 W. R. 111.

A barge of the defendant being unlawfully navigated on the Thames, the plaintiff, a waterman, complained to the man in charge, who referred him to R., the defendant's foreman; the plaintiff went to the defendant's wharf in order to speak to R., and while he was there a bale of goods, by the negligence of the defendant's servants, fell upon him and injured him; the plaintiff had had no warning that the bale might fall:—Held, that the plaintiff was entitled to maintain an action for the injury sustained by him. *White v. France*, 2 L. R., C. P. Div. 308; 25 W. R. 878; 40 L. J., C. P. Div. 823—D. C. A.

**Public-houses and other places of public resort.**—The plaintiff went to a public house by appointment to meet a friend, and, as his friend had not arrived, walked into the parlor, and there fell through a hole in the floor, which was being repaired. As far as appeared, his only object in coming to the house was to meet his friend. In an action against the landlord for negligence in not fencing the hole, and in which the plaintiff alleged that he was in the house as a guest, the jury found for the plaintiff. The court refused a rule to enter a nonsuit, which was asked for on the ground that there was no evidence either of negligence on the part of the defendant, or of the plaintiff being in the house as a guest. *Axford v. Prior*, 14 W. R. 611—C. P.

In an action against the proprietors of a public exhibition for not properly maintaining a staircase, whereby the same fell down, and the plaintiff, who had paid for admission, was injured, there having been alterations which caused the fall; the questions left to the jury were, whether the proprietors had employed proper persons to make the alterations, and whether those persons had employed proper care and skill. *Brasier v. Polytechnic Institution*, 1 F. & F. 507—Wightman.

A declaration stated that the defendant was possessed of a theater, and of a stage therein on which dramatic entertainments were given, and of a dressing-room for chorus singers, and of a floor underneath the stage, in which floor was a cut or a hole, and along which floor the performers of the theater were accustomed



to pass from the dressing-room to the back of the stage. The plaintiff was engaged by the defendant to sing on the stage as a chorus singer. That it became the defendant's duty to cause the floor to be so sufficiently lighted, and the hole so fenced, as to prevent accident to persons passing from the dressing-room to the stage. That he, well knowing the premises, suffered the floor to be insufficiently lighted, and the hole to be open without any sufficient fence, so that the plaintiff was injured by falling into the hole:—Held, that the declaration was bad, because the facts stated did not raise the duty, a breach of which was complained of, and that the express allegation of duty would not aid. *Seymour v. Muldox*, 10 Q. B. 326; 15 Jur. 723; 20 L. J., Q. B. 327.

Refreshment rooms and a coal-cellar at a railway station were let by the company to S., the opening for putting the coals into the cellar being on the arrival platform. A train coming in while the servants of a coal merchant were shooing coals into the cellar for S., a passenger, whilst passing in the usual way out of the station, without any fault of his own, fell into the cellar opening, which the coal merchant's servants had negligently left insufficiently guarded:—Held, that S., the occupier of the refreshment rooms and cellar, was responsible for this negligence. *Pickard v. Smith*, 10 C. B., N. S. 470; 4 L. T., N. S. 470.

A declaration alleging that the defendant negligently hung a chandelier in a public-house, knowing that the plaintiff and others would be under it and that unless carefully hung it would fall and injure them, and without warning the plaintiff of the dangerous way in which it was hung, whereby the chandelier fell on and injured him while lawfully in the public-house, discloses no cause of action. *Collis v. Sellen*, 3 L. R., C. P. 495; 37 L. J., C. P. 253.

**Excavations in, adjoining or near to highway.]**—A person who excavates a hole in his own ground abutting on an immemorial public highway, so that the use of such way be rendered unsafe to the public, even when using ordinary care, is responsible for an injury to a person accidentally falling into such hole while passing with ordinary caution along the highway. *Barrow v. Ward*, 2 C. & K. 661; 9 C. B. 892; 14 Jur. 334; 19 L. J., C. P. 193.

The fact of the person so falling into the hole being thereby a trespasser, is no answer to an action by him for the injury which he has sustained. *Id.*

Though the liability arises from the defendant being in possession of the hole, the declaration may describe it by alleging the defendant to be in possession of a messuage, with the appurtenances, part of which appurtenances is the hole. *Id.*

An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road, or way, as to

constitute a public nuisance. *Hounsell v. Smyth*, 7 C. B., N. S. 731; 6 Jur., N. S. 897; 20 L. J., C. P. 303; 8 W. R. 277.

An owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that B. in using the road sustained damage:—Held, that A. was liable. *Corby v. Hill*, 4 C. B., N. S. 550; 4 Jur., N. S. 512; 27 L. J., C. P. 218.

Held, also, that the declaration was not objectionable for not averring that the obstruction was placed on the road without permission; inasmuch as such an allegation, if traversed, would have presented an immaterial issue. *Id.*

If an excavation has been made so near to a highway since its dedication and adoption, as to create or increase danger to the public, and an accident happens thereby, the person making the excavation is not absolved from liability by reason that a statutory obligation to fence the highway is imposed upon other parties, who have neglected to do so. *Wetor v. Dunk*, 4 F. & F. 298—Willes.

Where there are two modes of doing a work in a public highway, from which damage may result to a passer by, the one mode more dangerous than the other, though both are usual modes, it is for the jury to say whether the adoption of the former mode amounts, under all the circumstances, to negligence. *Cleveland v. Spier*, 16 C. B., N. S. 399.

When an owner of land makes upon it an excavation adjoining a public way, so that a person walking upon it might, by making a false step, or being affected with a sudden giddiness, or by the sudden starting of a horse, be thrown into the excavation, the party making the excavation is liable for the consequences; but it is otherwise when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the land of the party making the excavation before he reached it. *Harlestone v. South Yorkshire Railway and River Don Company*, 4 H. & N. 67; 5 Jur., N. S. 150; 28 L. J., Exch. 139; 7 W. R. 326; 32 L. T. 297.

The proper and true test of legal liability in such a case is, whether the excavation is substantially adjoining the way. *Id.*

A company was possessed of a canal and the land between it and a sluice; an ancient public footpath passed through the land close to the sluice; there was a towing path, nine feet wide, by the side of the canal, and an intervening space of twelve feet of grass between the towing path and the footpath. By permission of the company the intervening space had been recently used for carting, and ruts having been caused, the whole space between the sluice and the canal had been covered with cinders, and thus all distinction between the path and the rest of the land had

been obliterated. A person using the path at night missed his way, and fell into the canal and was drowned:—Held, that the canal was not so near the footpath as to be adjoining to it, so as to throw upon the company the duty of fencing the canal off; and that the other facts did not render the company liable for the accident. *Binks v. South Yorkshire Railway and River Dun Company*, 32 L. J., Q. B. 26; 11 W. R. 66; 7 L. T., N. S. 350; 3 B. & S. 244, 350.

**Excavations or other operations depriving adjoining premises of support.**—Where an owner of land builds houses upon it adjoining each other so as to require mutual support, there is either by a presumed grant or by a presumed reservation a right to such mutual support, and such right is not affected by a subsequent subdivision of the property. *Richards v. Ross*, 9 Exch. 218; 2 C. L. R. 811; 23 L. J., Exch. 3.

The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property, and till that is interfered with he has no legal ground of complaint, although in fact something may have been done which (without his knowledge) has occasioned results that will afterwards affect his property. *Backhouse v. Bonomi*, 9 H. L. Cas. 503; 34 L. J., Q. B. 181.

A land-owner has a right independently of prescription to the lateral support of his neighbor's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation for damage caused either to the land or to buildings upon it by the withdrawal of such support. *Hunt v. Penke*, 1 Johns. 705; 6 Jur., N. S. 107; 29 L. J., Chanc. 785.

The plaintiff was owner of land, and of modern buildings abutting on the land, in the occupation of the defendant. The defendant contracted with C. to erect some buildings upon the border of the defendant's premises, and C.'s workmen, in excavating the soil, shook and damaged the plaintiff's building. In an action founded on an alleged right to the support of the adjoining soil in the occupation of the defendant, for the damage occasioned by the negligence of the contractor's workmen:—Held, that in the absence of such right of support the action for the injury to the plaintiff's buildings failed. *Gayford v. Nicholls*, 9 Exch. 702; 2 C. L. R. 1066; 23 L. J., Exch. 205.

A count stated that a messuage and land, the reversion whereof belonged to the plaintiff, were, in fact, supported by the land adjoining, yet the defendant wrongfully and negligently dug and made excavations in the land adjoining without sufficiently shoring the messuage and land, and thereby deprived them of their support, whereby they sank and were injured. A second count stated that the plaintiff, by reason of her own interest in the messuage and land, was entitled

to have the messuage supported laterally by land adjoining; yet the defendant wrongfully and negligently dug and made excavations in the land adjoining without sufficiently shoring the messuage and land, and thereby deprived the messuage of the support to which the plaintiff was so entitled, whereby the messuage and land sank and were injured:—Held, that the first count was good, although it did not allege any right to support; for, as it did not appear that the defendant was the owner of the adjoining land, he must be taken to be a stranger and a wrongdoer. *Bibby v. Carter*, 4 H. & N. 153; 28 L. J., Exch. 182.

Held, also, that the second count was good. *Id.*

C. was the owner of a house built on a hill, having a descent towards the west. There was a house next below and adjoining his, belonging to A., and D. was the owner of the two houses next adjoining. For upwards of thirty years the four houses were visibly out of the perpendicularity, leaning to the west, but there was no evidence how or when this occurred, or when the houses were built, or that there was any connection between them in title, occupation or possession. In 1857, a lease of D.'s houses, which he had granted, having expired, he entered into a contract with B. to pull them down, and erect two other houses in their place. This B. proceeded to do, and in so doing caused damage to C.'s house:—Held, that C. had no right of action against D. *Soloman v. Vintners' Company*, 4 H. & N. 585; 5 Jur., N. S. 1177; 26 L. J., Exch. 370.

Upon a declaration for negligence in pulling down a house adjoining the plaintiff's house without shoring up the latter, whereby it fell, the plaintiff cannot recover without evidence, from which a grant of a right to the support of the adjoining house can be inferred. *Peyton v. St. Thomas's Hospital*, 4 M. & R. 625; *S. C.*, nom. *Peyton v. London (Mayor, &c.)*, 9 B. & C. 725; 3 C. & P. 363. See *Partridge v. Scott*, 3 M. & W. 220.

Nor upon such a declaration can the plaintiff insist that the defendant ought to have given notice of his intention to pull down. *Id.*

In 1803, the plaintiff's house was built against the pine end wall of the defendant's house, by permission. In 1829, the defendant made an excavation in a careless and an unskillful manner, in his own land, near to his pine end wall, by which he weakened his pine end wall and consequently injured the house of the plaintiff:—Held, that an action was maintainable for this injury. *Brown v. Windsor*, 1 C. & J. 20.

It is a good ground of action, that a next door neighbor conducts himself so negligently and unskillfully in pulling down his own wall, as by reason thereof to injure his neighbor's wall. *Trower v. Chadwick*, 3 Bing. N. C. 834; 3 Scott. 699; 2 Hodges, 267.

The possessor of a house which is not ancient, cannot maintain an action against

the owner of adjoining lands, for digging away that land, so that the house falls in. *Wyatt v. Harrison*, 3 B. & Ad. 871.

But an action lies against a party, who by carelessness or negligence in excavating his own ground, either causes or accelerates the fall of an adjoining house. *Dodd v. Holme*, 3 N. & M. 739; 1 A. & E. 493.

**Necessity and effect of notice of operations.**—Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of such adjoining premises rested:—Held, that the party giving notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old. *Massey v. Goyder*, 4 C. & P. 161—Tindal.

The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall. *Chadwick v. Trower*, 6 Bing. N. C. 1; 8 Scott, 1.

Nor if he is ignorant of the existence of the adjoining wall,—as, where it is underground,—is he bound to use extraordinary caution in pulling down his own. *Id.*

**Management and operation of machinery and other works, shipping, &c.**—The workmen in a government dockyard were permitted to use the water-closets erected for their accommodation, and for that purpose to use certain paths across the dockyard. A government contractor was permitted to erect in the dockyard machinery for the purpose of his work. He erected across a path which led to one of the water-closets a revolving shaft, partly covered with planks. A workman in the dockyard, having gone along this path to the water-closet, on his return stumbled, and on putting out his hand to save himself, his arm was caught by the shaft and lacerated. There was another path along which he might have gone, but the one he used was the more convenient:—Held, that the contractor was not liable for the injury, since he was under no obligation to fence the shaft, and the defect in the fencing was apparent. *Bolch v. Smith*, 7 H. & N. 736; 8 Jur., N. S. 197; 81 L. J., Exch. 201; 10 W. R. 387; 6 L. T., N. S. 158.

The defendant exposed in a public place for sale, unfenced and without superintendence, a machine, which might be set in motion by any passer-by, and which was dangerous when in motion. A boy four years old, by the direction of his brother, seven years old, placed his fingers within the machine while another boy was turning the handle which moved it, and his fingers were crushed:—Held, that he could not maintain any action for the injury. *Mangan*

*v. Atherton*, 4 H. & C. 398; 1 L. R., Exch. 239; 35 L. J., Exch. 161; 14 W. R. 771; 14 L. T., N. S. 411.

Where a company incorporated for supplying a street with water constructed their apparatus, according to the best known system, and kept it in proper repair for twenty-five years, at the end of which time a frost of unusual severity acted on the apparatus, so as to cause injury to the property of another person:—Held, that the company was not liable for negligence. *Blyth v. Birmingham Water-works Company*, 11 Exch. 781; 2 Jur., N. S. 333; 25 L. J., Exch. 212.

A vessel, through the negligence of the servants of its owners, took the ground and, becoming unmanageable in consequence, was driven against and damaged a sea-wall. She could not be removed from her position against the wall without being broken up. During the time occupied in landing the cargo, which was done with reasonable care, speed and diligence, further damage was done to the wall by the vessel bumping against it. The declaration stated in a first count that the vessel was wrecked by the negligence of the servants of the owners, and thereby injured the wall; and in a second count that the vessel had been wrecked and driven against the wall, and did and was continuing to do injury to it, and that by reasonable care the owners of the vessel might have prevented her from doing and continuing to do further injury to the wall:—Held, that the owners of the wall were entitled to recover the damage claimed in the first count. *Romney Marsh (Lords, Bailiffs, and Jurats of) v. Corporation of the Trinity House*, 41 L. J., Exch. 106; 7 L. R., Exch. 247—Exch. Cham.; affirming *S. C.*, 5 L. R., Exch. 204; 39 L. J., Exch. 163; 22 L. T., N. S. 446; 18 W. R. 869.

A river overflowed a wall belonging to a dock company working under a private act of parliament, and caused damage to property. The owner contended that the dock company was bound at common law to keep their wall at a reasonable height, and alleged that they had not done so. The height of the wall was also less than the height specified by their act of parliament. The company alleged that the wall was high enough to keep out any ordinary tide, and that the damage was caused by the act of God. They also contended that, if they were liable for any damage at all, they could not be held responsible for the damage which was caused by the water which would have come over the wall if it had been at the height at which the plaintiff alleged they were bound to keep it:—Held, that, as the company had not kept the wall at the height required by their act of parliament, they were guilty of negligence, and were therefore liable for the whole of the damages. *Nitro-Phosphate and Odam's Chemical Manure Company v. London and St. Katharine's Docks Company*, 37 L. T., N. S. 330—Fry, J.

As to effect upon liability of ownership or possession of premises,—see this title, II., 2.

As to liability of master or servant,—see MASTER AND SERVANT.

As to liability for nuisances,—see NUISANCE.

### 3. Driving and Management of Horses and Carriages.

**Defects in carriages.**—A master is liable for an accident in consequence of the chainstay of a cart breaking, when the horse, being frightened, ran away, and damage was done, as he is guilty of negligence in not having the tackle good. *Welsh v. Lawrence*, 2 Chit. 262.

A person letting out a carriage to hire for a specific purpose, by so doing warrants that it shall be reasonably fit for that purpose; and (if negligence is necessary to be proved) it is negligence in any one to let out to hire a carriage to convey either persons or merchandise, without previously taking care to ascertain that it is reasonably safe. *Jones v. Page*, 15 L. T., N. S. 619—Exch.

A person who, on hiring a carriage, looks at it merely to test its capacity to hold a certain number of persons, does not by so doing select it so as thereby to relieve the party letting it to hire from liability with respect to its safety. *Ib.*

A. having agreed to convey a party of persons to the races and back at so much a head, hired a carriage from B. for the purpose, which broke down on the journey by reason of some defect in one of the wheels. Some of the injured passengers recovered damages from A. in a county court:—Held, that A. was entitled to recover, in an action against B., for breach of an implied warranty to supply a carriage reasonably fit for the purpose, the amounts which he had been so compelled to pay to his passengers. *Ib.*

Action for negligence in conveying the plaintiff, who was a decorator and gardener in his service, to perform for him certain work. The defendant drove, and while on the road the kingbolt of the carriage broke, the horses bolted, the carriage was overturned, and the plaintiff injured. There was no evidence of gross neglect on the part of the defendant:—Held, first, that, in the absence of any evidence of gross negligence on the part of the defendant, the plaintiff was not entitled to recover damages. *Moffatt v. Bateman*, 3 L. R., P. C. 115; 6 Moore P. C. C. N. S. 369; 22 L. T., N. S. 140.

Held, secondly, that the evidence did not disclose such negligence as to render the defendant, performing a gratuitous service for the plaintiff, responsible. *Ib.*

**Collisions; rule of the road.**—Although a person driving a carriage is not bound to keep on the regular side of the road, yet if he does not, he must use more care, and keep a better look out, to avoid concussion, than would be necessary if he was on the proper side of the road. *Pluckwell v. Wilson*, 5 C. & P. 375—Alderson.

Though the rule of the road is not to be

adhered to, if, by departing from it, an injury can be avoided, yet, where parties meet on the sudden, and an injury results, the party on the wrong side should be held answerable, unless it appears clearly that the party on the right had ample means and opportunity to prevent it. *Chaplin v. Hera*, 3 C. & P. 554—Best.

It is matter of evidence whether sufficient room is left or not, in case any accident happens. *Wordsworth v. Willan*, 5 Esp. 271—Rook.

The rule of the road, as to keeping the proper side, applies to saddled horses as well as carriages; and if a carriage and a horse are to pass, the carriage must keep its proper side, and so must the horse. *Turley v. Thomas*, 9 C. & P. 103—Coleridge.

If the driver of a carriage is on his proper side, and sees a horse coming furiously on its wrong side of the road, it is the duty of the driver of the carriage to give way and avoid an accident, although, in so doing, he does go a little on what would otherwise be his wrong side of the road. *Ib.*

The mere fact of a man's driving on the wrong side of the road is no evidence of negligence in an action brought against him for running over a person who was crossing the road on foot. *Lloyd v. Ogleby*, 5 C. B., N. S. 667.

It is equally the duty of persons crossing a street or a road to look out for vehicles coming along, as it is for the drivers of those vehicles to be vigilant in not running against persons crossing. *Cotton v. Wood*, 8 C. B., N. S. 568; 7 Jur., N. S. 168; 29 L. J., C. P. 833.

Therefore a person suing an owner of a vehicle for negligence by and through the misconduct of his servant, in running over him while crossing a thoroughfare, must, in order to succeed, give affirmative and preponderant evidence of neglect of duty on the driver's part. *Ib.*

It is established, that where the evidence on each side, in cases of this kind, is equally strong against the other's negligence having caused the accident, the judge ought not to leave it to the jury as proving negligence either way. *Ib.*

In an action for killing an ass, which the declaration alleged to have been lawfully upon the highway when it met its death, it appeared, that the animal, fettered by the fore feet, had been placed on the highway by the plaintiff, and was killed by being unable to get away from the defendant's wagon, which, without its driver, was coming at a smartish pace along the road:—Held, that the jury was properly directed, that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, still, unless it being there was the immediate cause of the accident, the plaintiff was entitled to recover. *Davies v. Mann*, 10 M. & W. 546; 6 Jur. 63; 12 L. J., Exch. 10.

In an action for death caused, or injuries sustained, through being run over by a

whistle-driven by a servant, evidence that he might have seen the plaintiff or the deceased a time to pull up, if he had not been looking at his horses, owing to the want of a skid on a going down hill, is sufficient evidence of negligence, and even although there was some negligence on the part of the deceased in crossing the road, yet the master is liable if his servant by the exercise of reasonable care could have seen the deceased and avoided the accident. *Springett v. Bull*, 4 F. & F. 472—Cockburn.

**Other negligent acts or omissions.**—A porter removing goods is not liable for damage, unless he has been guilty of negligence; he is not obliged to put a person at the head of his horse while he removes goods from his cart. *Hayman v. Hewitt*, Penke's Adm. Cas. 170—Kenyon.

But if a horse and cart are left standing in a street, without any person to watch them, the owner is liable for any damage done by them, though occasioned by the act of a passer by, in striking the horse. *Illidge v. Goodwin*, 5 C. & P. 190—Tindal.

Through the defect of a gate which the defendant was bound to repair, his horse got out of the defendant's farm into an occupation road and strayed into the plaintiff's field, where it kicked his horse:—Held, that the defendant was liable for the trespass by his horse, and that it was not necessary for the maintenance of the action to prove that his horse was vicious and that he was aware thereof. *Lee v. Riley*, 18 C. B., N. S. 722; 11 Jur., N. S. 822; 34 L. J., C. P. 213; 13 W. R. 774.

Held, also, that the damage the plaintiff had sustained by the injury to his horse was not too remote, but was sufficiently the consequence of the defendant's neglect to be recoverable. *Ib.*

The plaintiff was driving a wagon with three horses along a highway, walking in the usual way at the head of the leading horse, on his proper side of the road. The defendant and his groom were riding by at a foot pace (meeting the wagon on the wrong side), when, just as he passed the plaintiff, the groom touched his horse with a spur, and the horse kicked out and struck the plaintiff:—Held, that the act of using the spur when so near to the plaintiff was such an improper act on the part of the groom as to justify the jury in finding the defendant to have been guilty of negligence. *North v. Smith*, 10 C. B., N. S. 572; 4 L. T., N. S. 407.

The defendant, who kept two horses at a livery stable, being desirous of trying them in double harness, had them put into his carriage and driven by a groom employed at the stable, while he himself sat beside the groom. As the groom was driving the horses were startled by a dog and became unmanageable to such an extent that the groom could not stop them, though he still retained some control over them. The groom endeavored to turn down a side street, but, failing to do so, drove on to the pavement and injured the plaintiff.

The jury having found that there was no negligence on the part of any one:—Held, that the act of the groom in giving to the horses the direction which brought them on the pavement and into collision with the plaintiff, being neither negligent nor willful, did not give a cause of action. *Holmes v. Mather*, 33 L. T., N. S. 861; 23 W. R. 864; 44 L. J., Exch. 176; 10 L. R., Exch. 231.

The defendant was the proprietor of a yard and premises used for the sale of horses. The plaintiff attended a sale and was walking up the yard behind a row of spectators who were watching a horse then on sale. In order to show the horse's pace a servant of the defendant led it with a halter down a lane formed by the spectators on one side and a blank wall on the other. There was no barrier between the horse and the spectators, and when the horse was about ten yards from the plaintiff another servant of the defendant struck it with a whip in order to make it trot. On being struck the horse swerved into and through the crowd, and kicked and injured the plaintiff. It was a usual thing for a man to be stationed with a whip at the particular point when horses were brought out for sale. There was no evidence as to the kind of blow that was given, nor the character of the horse, nor how it was being led, nor that it was customary to put a barrier for the protection of the public in yards where horses were being sold. The plaintiff sued the defendant to recover damages for injuries caused by the negligence of the defendant's servant:—Held, that there was no evidence upon which the jury could reasonably find negligence on the part of the defendant. *Abbott v. Freeman*, 35 L. T., N. S. 788—C. A.; reversing the judgment of the Exchequer Division, 35 L. T., N. S. 545.

As to liability for injuries to passengers or goods conveyed by carriage,—see CARRIAGE.

As to liability of master for negligence of servant in management of horse or carriage,—see MASTER AND SERVANT.

#### 4. Construction, Maintenance and Operation of Railways.

**Condition of railway stations and other premises, management of trains, &c.**—At a railway station it was the practice to unload coal wagons by shunting them, and tipping the coal into cells; it was also the practice for the consignees of the coal or their servants to assist in the unloading, and for that purpose to go along a flagged path by the side of the wagons. A consignee of a coal wagon could not unload it in the usual way on account of all the cells being occupied. With the permission of the station-master, he went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon, and descended on to the flagged path. The flag he stepped on gave way and he fell into one of the cells, and was injured:—Held, that, although not getting his coal in the

usual mode, he was not a mere licensee, but was engaged, with the consent of the company, in a transaction of common interest to both parties, and was therefore entitled to require that the premises should be in a reasonably secure condition. *Holmes v. North Eastern Railway Company*, 6 L. R., Exch. 123; 40 L. J., Exch. 121; 24 L. T., N. S. 69—Exch. Cham.; affirming *S. C.*, 4 L. R., Exch. 254; 38 L. J., Exch. 161; 20 L. T., N. S. 616; 17 W. R. 800.

A man went with a cart and team, by implied invitation, to fetch lime from a railway yard. While in the yard he unharnessed a mare that was leading his team. A passing train frightened the mare; she backed some considerable distance, and, in spite of his efforts to hold her, fell over a dwarf wall of the company's, and was hurt. An action having been brought in the county court by him against the company for not having a sufficient fence to the yard, it was proved at the trial that he knew the place well and had been there often before. The county court judge found that the fence was insufficient, and decided in his favor:—Held, that there was no proof of want of reasonable care on the part of the company to prevent damage from unusual danger to persons visiting the premises with full knowledge of the state of the place, and that, therefore, he was not entitled to recover. *Manchester, Sheffield and Lincolnshire Railway Company v. Woodcock*, 25 L. T., N. S. 333—Q. B.

The stations of the Bristol and Exeter Railway Company and another railway company adjoined and were open to each other, and the passengers by either railway had long been permitted to reach it by passing through the station of the other company. A party, while so passing across the platform of the Bristol and Exeter station to get to the other, was injured by a portmanteau, which fell from a truck, owing to the negligence of a porter of the company:—Held, without deciding what would have been the case if the accident had happened through the condition of the Bristol and Exeter Company's premises, that they were liable, as the injury was caused by the misfeasance of one of their servants in the course of his employment, and there was no presumption that the injured party had agreed to undergo greater risks than if he had been one of their passengers. *Tebbutt v. Bristol and Exeter Railway Company*, 40 L. J., Q. B. 78; 23 L. T., N. S. 772; 6 L. R., Q. B. 73.

A man went with some companions to a railway station to see an intending passenger off by the train, and he crossed the rails by a level pathway, used by the public without objection by the company, to the rear of an ordinary train then standing at the station. His companions, from where they stood, could see an express train approaching from an opposite direction, but he, from his position behind the stationary train, could not see it, and upon his attempting to re-cross the rails to his companions, he was killed by the

express train. The engine driver of the express admitted that it was his duty to whistle on approaching that station, and he and other servants of the company deposed that he had done so upon that occasion, but the deceased's companions deposed that they did not hear it:—Held, that there was evidence of negligence by the company proper to be submitted to the jury. *Slattery v. Dublin, Wicklow and Wexford Railway Company*, 10 Ir. R. C. L. 256—Exch. Cham.

A railway porter was standing, in broad daylight, upon a plank thrown across from parapet to parapet of a footbridge connecting the two platforms of a station, cleaning a lamp, when the plaintiff accompanying her daughter to a train, in crossing the bridge, struck her head against the plank and was injured:—Held, that the plaintiff was not a mere licensee; but that there was no evidence of negligence on the part of the railway company. *Watkins v. Great Western Railway Company*, 37 L. T., N. S. 193; 25 W. R. 905; 46 L. J., C. P. Div. 817—Denman, J.

The question whether there was, or was not, negligence on the part of the company should have been left to the jury. *Id.*—Lopes, J.

**Level crossings.**—Where a railway crosses a highway on a level at a place where there is considerable traffic, the fact of the engine driver blowing off the steam from the madcocks at that spot, so as to frighten horses waiting to pass over the line, is sufficient to warrant the conclusion that the company has been guilty of actionable negligence. *Manchester South Junction Railway Company v. Fullarton*, 14 C. B., N. S. 54; 11 W. R. 754.

There is no general duty on railway companies to place watchmen at public footways crossing the railway on a level, but it depends upon the circumstances of each case whether the omission of such a precaution amounts to negligence on the part of the company. *Staley v. London and North Western Railway Company*, 4 H. & C. 83; 1 L. R., Exch. 13; 11 Jur., N. S. 954; 35 L. J., Exch. 3; 14 W. R. 133; 13 L. T., N. S. 376.

A railway crossed on a level a public footway; and on each side of the line were swing gates through which passengers entered. At one of these gates the view up and down the line was obstructed by the piers of a railway bridge which crossed it, but near the line there was a clear view of 300 yards in each direction. A woman who approached the line by that gate waited until a luggage train passed, and immediately afterwards proceeded to cross the line, when a person on the other side twice called out to her, but being deaf she did not hear, when an express train which the luggage train prevented her from seeing, knocked her down and killed her. Thirty-six passenger trains passed along the line daily, besides luggage trains. No person was stationed at the crossing to warn passengers of danger, but caution boards were placed there:—Held, that there was no



dence of negligence on the part of the company. *Id.*

A declaration stated that the railway of a lorry company crossed a public highway on level, yet the company, disregarding their duty, and the statutes in that behalf, did not set up gates across the highway, at the point where the same is crossed by the railway, instantly closed, by reason whereof two horses of the plaintiff, lawfully being on the highway near to the railway at the point foresaid, went and escaped from the highway into and upon the railway, and were by a locomotive engine and train of carriages run over and killed. Plea, that the horses were not lawfully on the highway at the time when the injury was done. The horses, which were grazing in the plaintiff's field, had leaped over the hedge into a turnpike road, and had strayed thence into a new road formed by the company, leading across the railway on a level into an old highway, and, one of the gates at the crossing being open, had got upon the railway:—Held, first, that the road formed by the company was a highway, though the parish might not be bound to repair it. *Finchett v. York and North Midland Railway Company*, 16 Q. B. 610; 15 Jur. 173; 20 L. J., Q. B. 222.

Held, secondly, that the company, being required by their act, and by 5 & 6 Vict. c. 51, s. 9, to keep the gates at the crossings constantly closed, the horses were, as against them, lawfully on the highway, and therefore the plaintiff was entitled to recover against the company. *Id.*

A railway intersected a public foot and carriage-way upon the level close to a station on the line. At the place of intersection spring carriage gates opened both ways, and there was also a swivel gate on each side of the line for persons on foot. A return-ticket-holder, while crossing the line at this place to reach the passenger station, was killed by an overdue express. At the time of the accident one of the swing gates was partially open, and there was no gatekeeper:—Held, that this circumstance (which was in contravention of the provisions by statute, and by the company's rules for the protection of carriage traffic along the road) constituted an invitation to the ticket-holder to cross the line, and evidence of the company's negligence. *Stapley v. London, Brighton and South Coast Railway Company*, 4 H. & C. 93; 1 L. R., Exch. 21; 11 Jur., N. S. 954; 35 L. J., Exch. 7; 14 W. R. 132; 13 L. T., N. S. 406.

A railway crossed diagonally on a level by a public road, and also diagonally by a private road, the two roads converging and forming a right angle. A gate placed by the company on that side of the railway on which the roads met, in pursuance of s. 47 of the Railways Clauses Act, served for both, and was under the control of the company, who placed a gate-keeper in charge thereof. The private road led to a stoneyard on the opposite side of the railway, abutting thereon, and communicating therewith by means of a

private gate. A carman, having occasion to cross the line from the stoneyard, called to the gate-keeper to know if the line was clear, and receiving an answer in the affirmative, attempted to cross with a lorry and two horses, which were run into by a train:—Held, that it was the duty of the gate-keeper placed in charge of the gate, not merely to open it when required for the passage of horses and carriages, but there was an implied duty on him to exercise reasonable caution and discretion in doing so; and that the fact that the private road to the stoneyard was only available by means of the gate serving the public road, placed the carman in the same position with respect to the gate-keeper as if he were using the public road, and that the company was therefore liable for the damage occasioned by his negligence. *Lunt v. London and North Western Railway Company*, 1 L. R., Q. B. 277; 12 Jur., N. S. 409; 35 L. J., Q. B. 105; 14 W. R. 497; 14 L. T., N. S. 225.

A railway crossed a highway on a level. At the crossing there was a swing gate for foot passengers. It was proved that 100 trains passed this crossing daily, and that there was no attendant at the crossing. A person, in crossing the line at this point, was knocked down and injured by a train:—Held, that there was evidence of negligence on the part of the company. *Bilbee v. London, Brighton and South Coast Railway Company*, 18 C. B., N. S. 584; 11 Jur., N. S. 745; 34 L. J., C. P. 182; 13 W. R. 770; 13 L. T., N. S. 140.

Where persons are in the habit of crossing a railroad at a particular place, though there is no right of way there, it throws upon the company the responsibility of taking reasonable precautions in their use of such place. *Barrett v. Midland Railway Company*, 1 F. & F. 361—Watson. But see *Harrison v. North Eastern Railway Company*, 22 W. R. 335; 20 L. T., N. S. 844—Exch.

There is no duty upon a railway company acquiescing in persons crossing a portion of its line in no definite track to use care for the protection of those persons. *Harrison v. North Eastern Railway Company*, 22 W. R. 335; 20 L. T., N. S. 844—Exch.

A railway company drove trains over a line belonging to a dock company, and running between the dock and a public promenade. The public was allowed to cross the line at all points, but there was one regular crossing where they more usually crossed. The plaintiff crossed the line at a point some distance from the regular crossing, and was knocked down and injured by a train of the railway company driven at four miles an hour. There was a short curve at the spot, but no whistle or other warning was given:—Held, no evidence of negligence. *Id.*

C., while passing along an occupation road which crossed a railway on a level, was knocked down and injured by a train, owing, as was alleged, to the negligence of the railway company. There were gates across the

road left unfastened, and the company had at one time kept a gate-keeper, but had ceased to keep one some time before the accident. About three years before the accident the company had obtained powers under an act to make a new road and discontinue the level occupation road; the powers of the act were to be exercised within five years, and then to cease; and nothing had been done as to the road till after the accident. The jury negatived negligence in the driver of the engine; but found for the plaintiff on the ground generally of "negligence as to the crossing." The judge, in summing up, left to the jury, as evidence of negligence in the company, the omission to keep a gate-keeper, and the omission to exercise the powers of their act:—Held, a misdirection. *Cliff v. Midland Railway Company*, 5 L. R., Q. B. 258; 18 W. R. 456; 22 L. T., N. S. 382.

A railway crossed a highway at a level. There were gates to stop carriages, horses and cattle, and a watch-box, and a person to close the gates as soon as such horses, &c., should have passed. There were also swing-gates for foot passengers. A boy, aged fourteen, came to the crossing soon after a cart had passed over the line; the gates were still open, and he went through and got on the line; but, seeing an up train approaching, he waited on the down line till it had passed. While he was thus waiting, a down train approached, but the boy did not see it, though he might have done so if he had been on the look-out for it, or if his attention had not been engrossed by the up train. The up train having passed, the boy was just leaving the down line to cross, when the train knocked him down:—Held, that there was evidence of negligence; for the company, being bound by 8 & 9 Vict. c. 20, s. 47 to have closed the gates at the time, the fact that they were open was an invitation to the boy to cross, whereby he was put off his guard, and so, perhaps being embarrassed by the train which he did see, he was injured by the other, which, in consequence of that embarrassment, he failed to see. *North Eastern Railway Company v. Wanless*, 43 L. J., Q. B. 185; 7 L. R., II. L. Cas. 12; 22 W. R. 561; 30 L. T., N. S. 275; affirming *Wanless v. North Eastern Railway Company*, 6 L. R., Q. B. 481.—Exch. Cham.

When a railway company constructs its line across a highway on a level, under the sanction of an act of parliament, it is the duty of the company to keep the crossing in a proper state for the passage of carriages across the rails; and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company is liable. *Oliver v. North Eastern Railway Company*, 9 L. R., Q. B. 409.

A public footway crossed a railway on a level. The plaintiff, while crossing on the footway in the evening, after dark, was knocked down and injured by a train on the crossing. He stated at the trial, that he did not see the train until it was close upon him; that

he saw no lights on the train and heard no whistling. He stated also, that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called on behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question, at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter also stated that he had seen the plaintiff at the crossing on the night in question, and had called to him not to cross. The judge ruled that there was evidence to go to the jury of negligence on the part of the company, which caused the injury to the plaintiff:—Held, that there was no evidence of negligence. *Ellis v. Great Western Railway Company*, 9 L. R., C. P. 551; 4 L. J., C. P. 304; 31 L. T., N. S. 874.—Exch. Cham.

A line crossed a public footpath on the level; but the railway company had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61. A child of four years and a half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train:—Held, that there was evidence that the accident was caused by the neglect of the company to fence. *Williams v. Great Western Railway Company*, 9 L. R., Exch. 157; 22 W. R. 531; 31 L. T., N. S. 134; 43 L. J., Exch. 105.

In consequence of the servants of a railway company negligently sending trucks down an incline into a siding at 11 p. m., the plaintiff's drove of cattle, which were lawfully being driven across the siding, were separated from the drovers, became frightened, and escaped beyond the control of the drovers. Six of them could not be recovered till they were found several hours afterwards, dead or dying, on the line, where they evidently had been run over by a passing train. From the tracks of these six beasts it was discovered they had rushed down the occupation road, charged through a defective fence into an orchard, from which they had got on to the line. The orchard was the property of the railway company and was in the occupation of a tenant who was bound by the terms of his lease to keep the fence in repair:—Held, that these facts were evidence that the death of the cattle was the natural and proximate result of the negligence of the railway company, and that they could not avoid their liability on the ground that they were not responsible for the defective state of the fence. *Sneeby v. Lancashire and Yorkshire Railway Company*, 1 L. R., Q. B. Div. 43; 33 L. T., N. S. 372; 45 L. J., Q. B. 1—C. A.; affirming *S. O.*, 9 L. R., Q. B. 263; 43 L. J., Q. B. 69; 30 L. T., N. S. 492.

**Bridges.**—As a person was passing along a highway, under a railway bridge, which was a girder bridge resting on a perpendicular

brick wall with pilasters, a brick fell from the top of one of the pilasters on which one of the girders rested, and injured him; a train had passed just previously:—Held, that, the company being bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence on the part of the company. *Kearney v. London, Brighton and South Coast Railway Company*, 5 L. R., Q. B. 411; 85 L. J., Q. B. 200; 18 W. R. 1000; 22 L. T., N. S. 886.

A railway company, in place of a public footway crossing their line on the level, built a bridge over the line, and also over a roadway adjoining. The bridge was fenced with wooden hoardings where it crossed the rails, and with open ornamental work with triangular openings where it crossed the road. A child about four years of age went upon the bridge, in company with another child, for the purpose of crossing over, and instead of walking straight forward, he placed his back against the hoardings and slid along until he came to the ornamental ironwork, when he fell through backwards on to the road and was injured. In an action to recover compensation, evidence was adduced as to the dangerous character of the bridge. The jury found that the child was lawfully using the bridge when the accident occurred, and that the bridge was not reasonably safe for all her Majesty's subjects:—Held, that there was evidence of negligence, and that it was the duty of the company to keep the bridge in such a state as not to be dangerous to anyone using it in a lawful manner, and that there was no negligence on the part of the child contributory to the accident. *Lay v. Midland Railway Company*, 34 L. T., N. S. 30—Exch. Div.; reversing *S. C.*, 30 L. T., N. S. 529.

As to liability for injuries to passengers or goods conveyed by railway,—see **CARRIER**.

As to liability for damage by fire communicated from railway engines,—see **FIRE AND FIREWORKS**.

## II. PARTIES LIABLE.

### 1. In General.

**Who liable, in respect of cause of injury, generally.**—A. contracted with the postmaster-general to provide a mail-coach to convey the mail bags along a certain line of road; and B. and others also contracted to horse the coach along the same line. B. and his co-contractors hired C. to drive the coach:—Held, that C. could not maintain an action against A. for an injury sustained by him while driving the coach, by its breaking down from latent defects in its construction. *Winterbottom v. Wright*, 10 M. & W. 109.

An incorporated water company created a nuisance in a public highway by leaving un-

fenced a stream of water which they had caused to spout up in it. The horses of the plaintiff were frightened, and swerving from it fell into an unfenced excavation in the highway made by the contractor who was constructing a sewer, and were thereby injured:—Held, that the water company and not the contractor was the party liable. *Hill v. New River Company*, 9 B. & S. 303.

The defendants, in execution of some public works which they had contracted with the lords of the admiralty to execute, and under their authority, drove some piles in the bed of a public navigable river. After the works were completed and a reasonable time to remove the piles had elapsed, the defendants sold them for valuable consideration to J., who cut them off, and the surrounding soil being washed away, parts of the piles under the water protruded above the bed of the river, and the plaintiff's barge, while lawfully navigating it, struck upon them and was injured. If the piles had not been cut the damage would not have happened without gross negligence:—Held, that the defendants were not liable. *Burlett v. Baker*, 3 H. & C. 153; 34 L. J., Exch. 8.

Where works are going on over a line of railway, with which works the railway company has nothing to do, and the execution of such works is intrusted to contractors who are entirely independent of the company, it is not the duty of the directors to assume that such works will be negligently conducted by those who have contracted for their execution, and to take precautions against possible negligence on the part of persons who are not in their employment nor under their control. *Daniel v. Metropolitan Railway Company*, 5 L. R., II. L. Cas. 45; 20 W. R. 37; 40 L. J., C. P. 121; 24 L. T., N. S. 815.

The Corporation of London was authorized to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were therefore works in the execution of which danger was involved, but which were often executed elsewhere without mischief. The railway company had no control over these works, which were executed by contractors engaged by the corporation. Several girders had been safely put in their places by manual labor, but, on this occasion, the contractors brought into use for one of the girders a monkey steam engine, which moved the girder with a jerk, and so caused it to overbalance and fall. It fell on a passing train, and injured the plaintiff:—Held, that this was not a mischief the occurrence of which the railway company was bound to anticipate, and against which it was bound to take precautions, and consequently that the railway company was not liable. *Id.*

As to effect of contributory negligence,—see this title, III.

**Joint liability.**—In an action against two, for negligently driving a chaise, if they hired

it jointly and were jointly in possession of it, both are liable for the accident. *Davey v. Chamberlain*, 4 Esp. 229—Ellenborough.

Aliter, if it belongs to one only, and the other is merely a passenger. *Ib.*

In an action against ten, the plaintiff declared, that they were proprietors of a stage-coach, for the conveyance of passengers for hire from A. to B.; and that, being so, they received the plaintiff as an outside passenger, to be safely conveyed thereon from A. to B. for hire to them in that behalf; and that by reason thereof they ought to have safely conveyed him accordingly; and assigned for breach, that they conducted themselves so carelessly in this behalf, that by and through the carelessness, unskillfulness, and default of themselves and their servants, the coach was upset, by means whereof the plaintiff was hurt, and sustained other injuries: a jury having found a verdict against eight only, and in favor of the other two, and judgment being entered accordingly:—Held, that as the action was founded on a breach of duty, imposed by the custom of the realm, which was a breach of the law; and as the declaration was framed on a misfeasance; such verdict and judgment were not erroneous, and they were therefore affirmed in the Exchequer Chamber. *Bretherton v. Wood*, 6 Moore, 141; 8 B. & B. 54; 9 Price, 408. See *Pozzi v. Shipton*, 1 P. & D. 4; 8 A. & E. 963.

A declaration against three proprietors of a stage-coach, stated that the coach was under their care, and that through their negligence the coach ran against the plaintiff, and injured him; the evidence was, that one of the proprietors was driving when the accident happened; the jury found that the accident was occasioned by his negligent driving:—Held, that the plaintiff might maintain the action against all the proprietors. *Moreton v. Harden*, 6 D. & R. 275; 4 B. & C. 223.

## 2. Ownership, Possession or Control of Property.

**Landlord, tenant or occupier of lands or buildings.**—If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action for an injury sustained by a stranger from the want of repair. *Payne v. Rogers*, 2 H. Bl. 349.

An action lies against the landlord of a house demised by lease, who, under his contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Leslie v. Pounds*, 4 Taunt. 649.

It is universally the duty of an occupier of a house, having an area fronting the public street, so to fence it as to make it safe to passengers, and it is no defense to an action against him, for neglecting to do so, whereby a person fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as

when the accident happened. *Cousland v. Hardingham*, 3 Camp. 398—Ellenborough.

A tradesman who has a flap-door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it. *Proctor v. Harris*, 4 C. & P. 337—Tindal.

He is also bound to take reasonable care that the flap is so placed and secured, as that, under ordinary circumstances, it will not fall down; but if the tradesman has so placed and secured it, and a wrongdoer throws it over, the tradesman will not be liable for any injury occasioned by it. *Daniels v. Putter*, 4 C. & P. 362—Tindal.

Where a reversioner of some premises, the chimneys of which were ruinous and in danger of falling, demised them to B., and after the demise they fell upon the buildings of his neighbor and damaged them:—Held, that as he knew when he let the premises that the chimneys were ruinous and in danger of falling, he was guilty of the wrongful non-repair, and consequently was liable for the damages sustained by the plaintiff. *Todd v. Flight*, 30 L. J., C. P. 21; 9 C. B., N. S. 377; 9 W. R. 145; 9 L. T., N. S. 325.

The defendants were the temporary occupiers of a warehouse, and within fourteen inches of a highway was an unfenced boat hole, part of the premises, into which a party, in passing along the highway, accidentally fell, and was injured:—Held, that the defendants were liable for the injury. *Hadley v. Taylor*, 11 Jur., N. S. 979; 14 W. R. 59; 13 L. T., N. S. 338—C. P.

In 1830, houses were erected on land adjoining a new road constructed at a high level as an approach to a new bridge across the Thames. Between these houses and this road was a space which was covered over (as a means of access to the houses) by a flagging, in which were gratings to let light and air to the lower part of the buildings, which formed separate tenements, the entrance to which was upon the lower level at the rear. The space so covered had become, by dedication, prior to the 5 & 6 Will. 4. c. 50, a part of the public footway, and was used as such by the public. In 1862, in consequence of a large number of persons congregating upon the spot, the flagging and grating in front of one of the houses (having become weakened by user) gave way, and several persons were precipitated into the area below (a depth of about thirty feet), and one of them was killed:—Held, in an action by his widow, under 9 & 10 Vict. c. 93, that, there being under the circumstances no legal liability on the part of the lessees of the house to keep the surface of this way in repair, the action was not maintainable, the gulf at the side of the causeway being the result of the road being raised by the makers of it, not of the land at the side being excavated by the proprietors of it; and that the artificial character

of the flagging and grating did not make it more or less a way to be repaired by the parish. *Robbins v. Jones*, 15 C. B., N. S. 231; 33 L. J., C. P. 1; 12 W. R. 248; 9 L. T., N. S. 538.

The owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died; having devised the property, with an iron grating over the area improperly constructed and out of repair, so as to amount to a nuisance. The defendant having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises upon the same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating:—Held, by the Court of Queen's Bench (5 B. & S. 78), that the defendant, as reversioner, was liable to an action for the damage thereby occasioned. *Quære*, by the Exchequer Chamber? *Gandy v. Jubber*, 5 B. & S. 485; 13 W. R. 1022; 9 B. & S. 115. But see *Hayes v. Fitzgibbon*, 4 Ir. R., C. L. 500, 506, 507.

A well was let from year to year, neither landlord nor tenant being bound to repair the steining. The well being out of repair, the tenant complained to the landlord, who sent in men to repair it. The well was destroyed by the negligence of the workmen employed. An action having been brought by the tenant against the landlord to recover damages for the injury sustained by him:—Held, that the landlord was not necessarily responsible, but that it was a question of fact for the jury what was the nature of the obligation incurred by him by reason of his interference. *Mills v. Holton*, 2 H. & N. 14.

As to who is liable for nuisances on premises, —see NUISANCE.

**Borrowers and lenders of chattels.**—The duties of a gratuitous lender and borrower of a chattel are, in some degree, correlative. The loan must be taken to be for the purpose of a beneficial use by the borrower; and the borrower is not responsible for reasonable wear and tear, but he is for negligence, for misuse, for gross want of skill in the use and for anything which may be defined to be legal fraud. The lender is responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects, known to the lender, which may make the loan perilous or unprofitable to him. *Blackmore v. Bristol and Exeter Railway Company*, 27 L. J., Q. B. 167; 8 El. & Bl. 1035; 4 Jur., N. S. 657.

A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it. *MacCarthy v. Young*, 6 H. & N. 329; 30 L. J., Exch. 227; 9 W. R. 439; 3 L. T., N. S. 785.

A defendant, having purchased some timber of the plaintiff, a timber merchant, was permitted by the plaintiff to use a shed of the plaintiff's for the purpose of working up the timber. The defendant, with the knowledge of the plaintiff, employed a carpenter to work up the timber in the shed; the carpenter, in lighting his pipe, set fire to the shed, which was burnt down:—Held, first, that the defendant's right to use the shed was not a letting by the plaintiff, but a mere license to use the shed. *Williams v. Jones*, 3 H. & C. 256; 33 L. J., Exch. 297; affirmed on appeal, 3 H. & C. 632; 11 Jur., N. S. 843; 13 W. R. 1023; 13 L. T., N. S. 300—Exch. Cham.

Held, secondly, that the negligence of the carpenter in setting the shed on fire was not in the course of his employment as the defendant's servant, so as to render the defendant liable. *Id.*

**Donors of chattels.**—A donor of a chattel is not liable for negligence of the donee, who, in carrying it away from the donor's warehouse, injures a person passing in the street. *Walworth v. Barton*, 8 W. R. 190—Exch.

As to proof of ownership or possession of property,—see this title, IV., 3.

### 8. Employers, Contractors and Workmen.

**When employment of another as independent contractor relieves employer from liability.**—A person who employs another to do a lawful act is presumed, in the absence of evidence to the contrary, to employ him to do it in a lawful and reasonable manner; and therefore, unless the parties stand in the position of master and servant, the employer is not responsible for damages occasioned by the negligent mode in which the act is done. *Butler v. Hunter*, 7 H. & N. 826; 31 L. J., Exch. 214; 10 W. R. 214.

The unloading of a cargo of corn, for which the defendants were paid by the owner, being done by men engaged and paid by a ganger or a contractor, with whom the defendants contracted, they having no control over the men:—Held, not liable for an injury caused by their negligence to a corn meter in the service of the city, engaged in measuring the cargo. *Innocent v. Peto*, 4 F. & F. 8—Crompton.

A builder was employed by a committee of a club to execute alterations at the clubhouse, including the preparation and fixing of gas-fittings. He made a sub-contract with B., a gas-fitter, to execute this part of the work. In the course of doing it, through B.'s negligence, the gas exploded, and injured the plaintiff:—Held, that the builder was not liable for this injury. *Rapson v. Cubitt*, 9 M. & W. 710; Car. & M. 64; 6 Jur. 606.

A railway company contracted, under seal, with certain persons to make a portion of the line, and by the contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetency.

The workmen in constructing a bridge over a public highway negligently caused the death of a person passing beneath, along the highway, by allowing a stone to fall upon him:—Held, that the company was not liable, and that in such case the terms of the contract in question did not make any difference. *Reedie v. London and North Western Railway Company*, 4 Exch. 244.

A railway company entered into a contract with A. to construct a branch line; who contracted with B. to erect a tubular bridge, parcel of the works. B. had a surveyor, C., whom he paid by a salary of 250*l.* a year to attend to his general business; and after obtaining the contract for the bridge, contracted with C. to provide the necessary scaffolding, for which he was to receive 40*l.*, irrespective of his salary, B. to furnish the requisite materials, including lights. One of the poles of the scaffold rested on a highway, and owing to the want of sufficient light to warn the passers-by, D. stumbled over the pole and was injured; subsequently to which additional lights were placed on the spot, and B. paid for them:—Held, that B. was not liable, and that D.'s remedy lay against C. *Knight v. Fox*, 5 Exch. 721; 14 Jur. 963; 20 L. J., Exch. 9.

The defendants were employed to pave a district by A. They contracted with B. to pave one of the streets. B.'s workmen, in the course of paving the street, left some stones at night in such a position as to constitute a public nuisance, and the plaintiff was injured by falling over those stones. No personal interference of the defendants with, or sanction of the work of, laying down the stones was proved:—Held, that the defendants were not liable. *Overton v. Freeman*, 11 C. B. 867; 16 Jur. 65; 21 L. J., C. P. 52; 3 C. & K. 52.

The defendants employed A. for a sum of money to fill in the earth over a drain constructed for them across a highway, from their house to the common sewer, the defendants finding the carts, if necessary, to remove the surplus earth, which were to be filled by A. A. filled in the earth, but left it so heaped above the level of the road, that, there being neither light nor signal, the plaintiff by night drove his carriage against it, and sustained injury therefrom. The only evidence of interference or control on the part of the defendants was, that one of them, a few days before the accident, and when the work was incomplete, had seen the earth heaped over a part of the drain as it afterwards remained:—Held, that there was no evidence of their liability, for that the wrong complained of was a public nuisance by A., which the defendants (whether A. was their servant or only a contractor) had not authorized him to commit, having merely directed generally the doing of an act which might have been done without committing a public nuisance. *Peachey v. Rowland*, 13 C. B. 182; 17 Jur. 764; 22 L. J., C. P. 81. S. P., *Ellis*

*v. Sheffield Gas Consumers Company*, 2 El. & Bl. 767.

Where work is done for a company under a contract (parol or otherwise), the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though the company employs their own surveyor to superintend it, and to direct what shall be done. *Steel v. South Eastern Railway Company*, 16 C. B. 550.

A livery stable-keeper employed a builder (not a servant of the former, but an independent contractor) to erect on part of his yard a building, of which the lower part was a shed for the reception of carriages for reward. The plaintiff deposited two carriages with the defendant for safe keeping, which were placed in the above-mentioned shed. While the carriages were there the building was blown down by a high wind, and the carriages were injured. The builder was one whom a careful and prudent person might trust, and the defendant had no notice of any negligence on the builder's part. An action having been brought by the plaintiff against the defendant, evidence was offered at the trial, on the part of the plaintiff, to show that owing to the neglect of the builder and his workmen, the building was, in fact, *unskillfully* built and unsafe, and that this was the cause of the fall. The judge rejected this evidence and nonsuited the plaintiff:—Held, that this evidence was rightly rejected and that the nonsuit was right. *Scarle v. Laverick*, 30 L. T., N. S. 89; 22 W. R. 367; 43 L. J., Q. B. 43; 9 L. R., Q. B. 123.

By a resolution of the committee of management it was ordered that a part of a road should be raised for about 150 yards, and that the surveyor of the highway appointed by the vestry should employ men to do it. The surveyor contracted with G. to do the work at so much per yard, the vestry finding the materials. G. proceeded to do the work, employing his own men. During the progress of the work one half of the width of the road was raised first, and the other half left temporarily about a foot lower. No fence or light was put up to warn persons using the road at night, and the plaintiff driving with a horse and dog-cart was upset and injured. The surveyor had not personally interfered in doing the work, or in directing the road to be left as it was:—Held, that he was not liable for the injury to the plaintiff, either at common law or by reason of 5 & 6 Will. 4, c. 50, s. 56. *Taylor v. Greenhulph*, 9 L. R., Q. B. 487; 31 L. T., N. S. 184.

The defendants were builders and contractors who, after the outside of a house was finished, had removed the outer hoarding and had employed a sub-contractor to do the internal plastering. One of the men employed by the sub-contractor, in walking, shook a plank which caused a tool to fall out of a window of the house, and the tool in falling injured the plaintiff, who was passing along the highway. The jury found that the hoarding had been properly removed, but that the



injury was caused by the negligence of the defendants in not providing some other protection for the public.—Held, that the defendants were entitled to judgment, for there was no evidence that the falling of the tool was a probable accident which might reasonably have been foreseen, so as to make it the duty of the defendants to provide against it. *Pearson v. Cox*, 2 L. R., C. P. Div. 869; 36 L. T., N. S. 495—C. A.

Held, also, that if it was the duty of any one to supply protection against the consequences of the falling of the tool, it was the duty of the sub-contractor and not of the defendants. *Id.*

**When, and for what acts or omissions of contractor or person employed, the employer is liable.]**—Though a person employing a contractor to do a lawful act is not responsible for the negligence or misconduct of the contractor or his servants in executing that act; yet if the act itself is wrongful, the employer is responsible for the wrong so done by the contractor or his servants, and is liable to third persons who sustain damage from the doing of that wrong. *Ellis v. Sheffield Gas Consumers' Company*, 2 El. & Bl. 767; 18 Jur. 140.

B., owner and occupier of premises adjoining a highway, employed C. to make a drain therefrom, to communicate with a common sewer. In the performance of this work the workmen employed by C. placed gravel on the highway, in consequence of which A., in driving along the road, sustained personal injury. Before the accident, the dangerous position of the heap was pointed out to B., who promised to remove it. C. had the sole management of the work, and employed and paid D. to cart away part of the rubbish at a certain price per load, and had charged B. in his bill with the sum so paid:—Held, that B. was liable to A. *Burgess v. Gray*, 1 C. B. 578; 14 L. J., C. P. 184.

A railway company was authorized by act of parliament to construct a railway bridge across a navigable river. The act provided that it should not be lawful to detain any vessel navigating the river for a longer time than sufficient to enable any carriages, animals or passengers, ready to traverse, to cross the bridge, and for opening it to admit such vessel. The company employed a contractor to construct the bridge in conformity with the provisions of the act of parliament, but before the works were completed, the bridge, from some defect in its construction, could not be opened, and the plaintiff's vessel was prevented from navigating the river:—Held, that the company was liable for the damage thereby caused. *Hole v. Sittingbourne and Sheerness Railway Company*, 6 H. & N. 488; 30 L. J., Exch. 81; 9 W. R. 274; 3 L. T., N. S. 760.

A. was employed, under 18 & 19 Vict. c. 120, ss. 77, 110, 111, to make a drain from his premises to a sewer, by cutting a trench across a highway, and filling it up after the

drain should be completed. For this purpose he employed a contractor, by whose negligence it was filled up improperly, in consequence of which damage ensued to B.:—Held, that A. was responsible for it. *Gray v. Pullen*, 5 B. & S. 970; 34 L. J., Q. B. 265; 13 W. R. 257; 11 L. T., N. S. 569—Exch. Cham.

When money is paid by spectators at races or other public exhibitions for the use of temporary stands or platforms, there is an implied warranty on the part of the person receiving the money, that due care has been used in the construction of the stand by those whom he has employed as independent contractors to do the work, as well as by himself. *Francis v. Cockrell*, 39 L. J., Q. B. 113; 5 L. R., Q. B. 184; 18 W. R. 668; 21 L. T., N. S. 203; affirmed, 5 L. R., Q. B. 501; 30 L. J., Q. B. 291; 18 W. R. 1205; 23 L. T., N. S. 466—Exch. Cham.

The defendant, acting on behalf of a committee of which he was a member, employed certain persons to erect and let to them a temporary stand for the use of persons desirous of seeing a steeple chase. The stand having been erected, the defendant, on behalf of himself and his colleagues, received money from the plaintiff and other visitors for the use of places on the stand. The contractors were competent and proper persons to be employed to erect the stand, but it was in fact so negligently erected that it fell, and caused injury to the plaintiff, while he was upon it, looking at the races. Neither the plaintiff nor the defendant knew of the improper construction of the stand:—Held, that the contract by the defendant, to be implied from the relation which existed between him and the plaintiff, was that due care had been used not only by the defendant and his servants, but by the persons whom he had employed to erect the stand, and that consequently he was liable for the injury to the plaintiff. *Id.*

A person who employs a contractor to do a particular act is liable for the injurious acts of the contractor which flow out of the fulfillment of the contract. *Pitts v. Kingsbridge Highway Board*, 19 W. R. 884; 23 L. T., N. S. 195—R.

A man, who orders a work to be executed on his own premises, lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent mischief; and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. *Bower v. Peate*, 1 L. R., Q. B. Div. 321; 45 L. J., Q. B. Div. 446; 35 L. T., N. S. 821.

B. and P. were respective owners of two adjoining houses, B. being entitled to the support, for his house, of P.'s soil. P. employed a contractor to pull down his house, excavate the foundations, and rebuild the

house; the contractor undertook the risk of supporting B.'s house, as far as might be necessary, during the work, and to make good any damage and satisfy any claims arising therefrom. B.'s house was injured, in the progress of the work, owing to the means taken by the contractor to support it being insufficient:—Held, that P. was liable, even if the undertaking as to risk had amounted, which it did not, to an express stipulation that the contractor should do, as part of the works contracted for, all that was necessary to support P.'s house. *Ib.*

The defendant became the lessee and occupier of a house, from the front of which a heavy lamp projected several feet over the public foot-pavement. As the plaintiff was walking along, in November, the lamp fell on her and injured her. In the previous August the defendant had employed an experienced gas-fitter, C., to put this lamp in repair. At the time of the accident a person employed by the defendant was blowing the water out of the gas-pipes of the lamp, and in doing this a ladder was raised against the lamp-iron or bracket from which the lamp hung, and on the man mounting the ladder, owing to the wind and wet, the ladderslipped, and he, to save himself, clung to the lamp-iron, and the shaking caused the lamp to fall. On examination it turned out that the fastening by which the lamp was attached to the lamp-iron was in a decayed state. The jury found that there had been negligence on the part of C., but no negligence on the part of the defendant personally; that the lamp was out of repair through general decay, but not to the knowledge of the defendant; that the immediate cause of the fall of the lamp was the slipping of the ladder; but that, if the lamp had been in good repair, the slipping of the ladder would not have caused it to fall:—Held, that the plaintiff was entitled to the verdict. By *Lush and Quin, J.J.*, on the ground that if a person maintains a lamp projecting over the highway for his own purposes it is his duty to maintain it so as not to be dangerous to the passengers; and if it causes injury owing to want of repair, it is no answer on his part that he had employed a competent person to repair it. By *Blackburn, J.*, on the ground that, under the circumstances of the case, it was shown that the defendant knew that the lamp wanted repair in August, and it was his duty, therefore, to put it in reasonable repair, and the person he employed having failed to do so, he was liable for the consequences of the breach of duty. *Tarry v. Ashton*, 1 L. R., Q. B. Div. 814; 45 L. J., Q. B. Div. 260; 24 W. R. 581.

**What employment or control necessary to create liability of employer or principal.**—Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person:—Held, by *Abbott, C. J.*, and

*Littledale, J.*, that the owner of the carriage was not liable to be sued for such injury. *Bayley and Holroyd, J.J., diss. Laughier v. Forster*, 5 B. & C. 547.

A person who drives in his own carriage with job horses, and a driver hired to accompany them, is not liable for any injury caused to a third party by negligent driving or carelessness of the person so hired, even although he has selected that person from among the servants usually employed by the job master for that purpose. A person hiring job horses and a driver, may, however, in such case, render himself liable by his own conduct, such as directing the servant to drive in a particular manner, which caused the injury, but this is not in respect of the general relation of master and servant. *Quarman v. Burnett*, 6 M. & W. 499; 4 Jur. 969.

A party who had a carriage of his own, had been in the habit of hiring horses and a servant from a particular job master, and was in the habit of paying the servant a fixed sum for each drive, and had provided him with a livery to wear while driving. The servant, on returning from a drive, went into the house of the hirer to change his livery, leaving the horses without any one to mind them, who accordingly ran off:—Held, that these facts did not constitute him the servant of the hirer of the horses, so as to render the latter liable for injury done by them to the carriage of a third party. *Ib.*

A party, consisting of the defendant and others, hired, for a day's excursion, a carriage and post-horses, driven by postillions, who were the servants of the owner of the horses. The defendant rode upon the box. The postillions, in endeavoring to force their way into a line of carriages, overturned a gig, and seriously injured the plaintiff, who was in the gig. The defendant, at the time and afterwards, held himself out as responsible for the accident, and used expressions showing that he had a control over the postillions at the time it happened:—Held, that he was liable in trespass. *McLaughlin v. Pryor*, 4 M. & G. 48; 4 Scott, N. R. 655; Car. & M. 354.

A., lessee of a ferry, hired from the defendant, for one day, a steam tug and crew, to assist in carrying his passengers across. He received the fares; and the defendant was paid by him for the hire of the tug; the defendant sent and paid the crew. The plaintiff, who had contracted with and paid A. for being carried across the ferry at all times during one year, went on board the tug, from A.'s pier, as a passenger, for the purpose of crossing. By the negligence of the crew some tackle broke, and the plaintiff, while on board, was injured:—Held, that he was entitled to recover against the defendant for such negligence. *Dalyell v. Tyrer*, El., Bl. & El. 899; 28 L. J., Q. B. 52; 5 Jur., N. S. 335.

A. received an injury by falling at night from the highway into an unfenced and unlighted sewer, which was being constructed under a written contract between B. and certain local commissioners. A clause in the

contract prohibited sub-letting without the engineer's consent. B. contracted by parol with N., a competent workman, to do the excavation and brickwork, and the watching, lighting, and fencing, at an ascertained price per yard, while he supplied the bricks, and carried away the surplus earth. B.'s name was on the carts, and also on a temporary office near the works. He did not interfere during the progress of the work, but admitted that he should have dismissed N. if dissatisfied with the execution of the work. The clerk of the works was in the employment of the commissioners:—Held, that there was evidence of B.'s liability. *Blake v. Thirst*, 2 H. & C. 20; 32 L. J., Exch. 189; 11 W. R. 1034; 8 L. T., N. S. 251.

A gas company contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside, to a meter inside his premises. Gas escaped, from the pipe laid down under the contract, into his shop. The servant of a gas-fitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it, with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's premises and stock. On the trial of an action against the gas company to recover for the injury sustained, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied; and, secondly, that there was negligence on the part of the gas-fitter's servant in carrying a lighted candle:—Held, that the plaintiff was entitled to recover, and that the company was not relieved from responsibility by the negligent act of the gas fitter's servant.—Per Kelly, C. B., and Pigott, B., the cause of action was the negligence of the company, from the consequences of which the intermediate negligence of a person not in the plaintiff's service could not relieve them.—Per Martin, B., the liability of the company arose from their breach of contract in not supplying the plaintiff with a proper service pipe; and even if the person whose negligence was the immediate cause of the explosion had been in the plaintiff's service, the company would nevertheless have been liable. *Burrows v. March Gas and Coke Company*, 5 L. R., Exch. 67; 39 L. J., Exch. 33.

As to liability of master for negligence of servant, and upon what employment, hiring or authority the liability depends,—see MASTER AND SERVANT.

#### 4. Public and Corporate Bodies, Trustees and Statutory Commissioners.

**Liability for acts or omissions of contractors, workmen, &c., in general.**—A public body bound to discharge a public duty without reward and without funds, is respon-

sible for the negligence of those whom they employ. *Coe v. Wise*, 7 B. & S. 831; 1 L. R., Q. B. 711; 14 L. T., N. S. 891—Exch. Cham.

Although, where statutory powers are conferred, and exercised merely for the public benefit, and in the discharge of public duties, the persons so exercising them, being in the position of trustees for the public interest, may not be liable for injuries thereby occasioned; yet, where such powers are conferred on parties, partly for their own benefit, and exercised for their own profit, such parties are answerable for injuries occasioned by their careless exercise of the powers so conferred. *Manley v. St. Helen's Canal and Railway Company*, 2 H. & N. 840; 27 L. J., Exch. 159.

Commissioners acting under statutory powers are liable for injuries arising from the execution of works which they order, and which are defective in proper precautions against danger. *Ruck v. Williams*, 8 H. & N. 308; 27 L. J., Exch. 357.

When a specified duty is imposed by statute upon a public body, it is, in the absence of express enactment, to be assumed that the legislature intended to exempt the public body from liability to make compensation for alleged omissions to fulfill that duty, unless negligence can be proved to exist. *Hammond v. St. Pancras (Vestry)*, 43 L. J., C. P. 157; 9 L. R., C. P. 316; 22 W. R. 826; 30 L. T., N. S. 296.

— in particular instances.]—By a local act commissioners were appointed for improving a navigation, all their powers to be executed by a majority present at a meeting of not fewer than three; they were not to be personally liable on contracts made, or for damages incurred in relation to anything done in pursuance of the act, but might be sued in the name of their clerk. The commissioners, at a meeting duly held, resolved to accept a tender for executing works in pursuance of the act; their clerk thereupon drew up a contract according to the tender, and it was afterwards signed by the contractor. It purported to be made by A., B. and C., being three of the commissioners appointed for putting the act in execution, and recited the previous resolution; but it did not appear (unless as before mentioned) that the contract was executed or sanctioned by the majority of a regular meeting:—Held, that the contract made in consequence of the resolution was a contract entered into by the commissioners in execution of their office; and that they were liable, and might be sued in the name of their clerk, for damage negligently done by the contractor to third persons in execution of such contract. *Allen v. Inghward*, 7 Q. B. 960; 10 Jur. 92; 15 L. J., Q. B. 90.

The contractor, in executing part of the work contracted for (the diversion of a creek), made a drain, which from a defect in the materials could not resist water; and without

having any authority to do so, he turned in the water, which broke through and flooded the neighboring land. The drain was not finished at the time; but it did not appear that anything further was about to be done for the purpose of securing it, if the mischief had not happened. In an action against the commissioners, the declaration stating that they made the diversion, and executed the works so negligently, that, in consequence thereof, and from no other cause, the water broke through, and flooded the plaintiff's land:—Held, that on the facts stated, they were not liable. *Id.*

By an act for improving and maintaining a harbor, commissioners were empowered to build or provide steam tugs for towing vessels into or out of the harbor, and to receive for the use of such vessels such reasonable compensation as they should fix. The commissioners entered into an arrangement with the proprietors of steam vessels to perform this duty for them at certain rates of charge; the commissioners paying them in addition a sum annually, and the vessels being placed under the direction and control of the harbor master. A vessel having sustained damage in consequence of the negligence and want of skill of the master and crew of a tug, while being towed into the harbor, the owner brought an action in a county court against the commissioners, and under the direction of the judge recovered a verdict. The court, on appeal, set aside the verdict; holding that the decision of the judge could not, upon any inference which could be legitimately drawn from the facts before him, be correct in point of law. *Cuthbertson v. Parsons*, 12 C. B. 304; 16 Jur. 860; 21 L. J., C. P. 165.

A municipal corporation employing workmen to lay down gas pipes in the borough is responsible for the negligence of the persons employed. *Scott v. Manchester (Mayor, &c.)*, 1 H. & N. 50; 26 L. J., Exch. 182; affirmed on appeal, 2 H. & N. 204; 3 Jur., N. S. 590; 26 L. J., Exch. 406.

Where a canal company is empowered by a private act of parliament to intersect high-ways, and to construct bridges to connect the intercepted portions, and the canal and bridges are vested in them as proprietors, and they are enabled to take tolls from boats passing the bridges, and they erect swing bridges, which the boatmen are entitled to open for the purpose of passing, and which, when opened, leave the edge of the canal unprotected, and there is not sufficient light or other means of preventing accidents, and the consequence is that while the bridge is lawfully opened at night-time a person falls into the canal, without any fault on his part, the company will be liable to an action. *Mantley v. St. Helen's Canal and Railway Company*, 2 H. & N. 840; 27 L. J., Exch. 159.

By a statute, commissioners of an inland navigation were required to, and in pursuance of the act did, execute a lease of the navigation and tolls for a term of years. The statute enacted "that in case the lessee should

at any time permit the navigation or the works thereof to be out of repair, the commissioners were authorized and required to give notice thereof to such lessee, and in such notice to specify the particular repairs which ought to be done; and they might by such notice require that such repairs should be commenced and finished within reasonable periods; and in case the lessee should neglect, then it should be lawful for the commissioners and they were authorized to take possession of the tolls, and to cause such repairs to be done, and to pay the expenses out of the tolls." A lock, forming part of the navigation, fell in for want of repairs, by reason of which the navigation was stopped, and the plaintiff, a master of a barge, was necessarily detained with his barge a number of days with a load of wheat, which was ready to be conveyed through the lock. The fact that the lock had been for some time out of repair was known to the commissioners, but they had given no notice to the lessee, although sufficient time had elapsed for giving such notice, and for the repairs being done, before the lock fell in. The plaintiff claimed as damages a uniform sum per day during the time he was detained, calculated according to the average weekly earnings of his vessel:—Held, that even assuming that there was a duty in the commissioners to give notice of repairs required to be done, for neglect of which an action would lie by a party injured, still the facts did not disclose any damage flowing from the breach of that duty, so as to give the plaintiff a right of action against the commissioners; for the falling in of the lock was not the natural, proximate, or necessary consequence of the omission of the commissioners to give such notice. *Walker v. Goz*, 4 H. & N. 350; 5 Jur., N. S. 737; 28 L. J., Exch. 184—Exch. Cham.

Where a local board of health ordered new sewers to be constructed under a contract and plans which did not provide for a penstock or a flap, necessary to prevent premises from being flooded, and the consequence was that the premises were flooded with sewage:—Held, that the commissioners were liable to be sued for negligence, and that they were properly sued in the name of their clerk. *Ruck v. Williams*, 3 H. & N. 308; 27 L. J., Exch. 357.

The trustees of a turnpike road converted an open ditch, which used to carry off the water from the road, into a covered drain, placing catchpits with gratings thereon to enable the water to enter the drain. Owing to the insufficiency of such gratings and catchpits, the water, in very wet seasons, instead of running down the ditch as it formerly did, before the alterations by the trustees, overflowed the road and made its way into the adjoining land and injured a colliery:—Held, that the trustees were liable for such injury, if they were guilty of negligence in respect of such gratings and catchpits. *Whitehouse v. Fellows*, 30 L. J., C. P. 806; 10 C. B., N. S. 765; 9 W. R. 557; 4 L. T., N. S. 177.

A corporation erected baths and wash-houses, under 9 & 10 Vict. c. 74. While using a drying machine, moved by steam, a person who paid a small sum for the use of it, was, by reason of its improper construction, dragged against the machinery and injured:—Held, that an action was maintainable, and that the corporation was the proper party to be sued, notwithstanding the affairs of the washhouses were managed by a committee consisting of some only of the members of the corporation. *Cowley v. Sunderland (Mayor, &c.)*, 6 H. & N. 555; 30 L. J., Exch. 127; 9 W. R. 668; 4 L. T., N. S. 720.

Persons intrusted with the performance of a public duty, discharging it gratuitously, and being personally guilty of no negligence or default, are not responsible for an injury sustained by an individual through the negligence of workmen employed under them. *Holliday v. St. Leonard's, Shorelitch*, 11 C. B., N. S. 192; 8 Jur., N. S. 79; 30 L. J., C. P. 361; 9 W. R. 694; 4 L. T., N. S. 406.

A vestry in whom were, by 18 & 19 Vict. c. 120, vested the powers and duties of surveyors of highways, under the powers conferred upon them by that act, appointed a surveyor at a salary. Workmen employed by the surveyor, and paid out of the parish funds, being directed to carry certain paving-stones from a public street under repair, and placing them in another public street, so negligently performed that duty that the plaintiff, in driving through the street, was upset and injured:—Held, that the vestry was not responsible. *Id.*

Proprietors of docks, for the use of which they were entitled to tolls, opened them for public use to all vessels of a certain size before the low-water basin was completed, and while a bar of earth remained across a large part of it, dangerous to navigation, not visible at high tide, not in any manner marked by buoys, and which, by the exercise of reasonable care on their part, might have been removed before. The plaintiff's vessel, which was under the size limited, and had entered the docks and loaded her cargo, on coming out into the basin was driven upon the bar and wrecked, without any negligence or mismanagement on the part of the plaintiff or of the crew, or of the pilot who had been engaged to take the vessel out. The pilot knew of the bar, but the plaintiff did not:—Held, that the proprietors were liable for the injury to the ship, as they were guilty of negligence in not having taken reasonable care while they kept the basin open for the public use, that those who chose to navigate it might do so without danger. *Thompson v. North Eastern Railway Company*, 31 L. J., Q. B. 194; 2 B. & S. 119; 10 W. R. 404; 6 L. T., N. S. 127—Exch. Cham.

Held, also, assuming the knowledge of the pilot to be the knowledge of the plaintiff, that knowledge of the existence of the bar did not disentitle him to recover, as it was not found by the jury that it was an act of imprudence

on his part, if he had such knowledge, to attempt to navigate the vessel out. *Id.*

The Towns Improvement Clauses Act (10 & 11 Vict. c. 34, s. 52) imposes on the commissioners elected under the act the duty of fencing footpaths, if needed for the protection of passengers, and leaves them no discretion:—Held, that such commissioners are therefore liable, in their corporate capacity, to an action at the suit of a person injured by their negligent omission to fence a foot-path. *Ohrby v. Ryde Commissioners*, 10 Jur., N. S. 1048; 33 L. J., Q. B. 296; 12 W. R. 1079; 5 B. & S. 743.

A corporation was empowered by act of parliament to make and maintain docks for the use of the public, and to take tolls from persons using them. The corporation did not (nor did its individual members) derive any emolument from the tolls, but was bound to apply them in maintaining the docks, and in paying a debt contracted in making them. The corporation had the usual powers of appointing water-bailiffs, harbor-masters, and servants, by whose hands the duties of superintendence were practically carried out. A ship, in entering one of the docks, struck against a bank of mud left at its entrance, of the existence of which the corporation was either aware, or negligently ignorant. The ship and cargo were both damaged, and the respective owners thereof brought actions for negligence against the corporation:—Held, that as long as the docks were open for the public, the corporation was bound, whether it received the tolls for beneficial or fiduciary purposes, to take care that the docks were navigable without danger, and consequently that the corporation was liable to the owners for negligence. *Mersey Docks and Harbor Board v. Penhalls*, *Mersey Docks and Harbor Board v. Gibbs*, 11 H. L. Cas. 686; 12 Jur., N. S. 571; 35 L. J., Q. B. 225; 14 W. R. 872; 14 L. T., N. S. 677.

The Metropolis Management Act, 1855, s. 73, imposes upon vestries the duty of keeping the sewers in their respective parishes properly cleared, cleansed and emptied. An occupier of a messuage in one of those parishes received injury from the overflow of a sewer; the overflow happened without any default on the part of the vestry:—Held, that the occupier could not maintain an action against the vestry for the injury which he had sustained. *Hammond v. St. Pancras (Vestry)*, 9 L. R., C. P. 816; 43 L. J., C. P. 157; 30 L. T., N. S. 296; 22 W. R. 826.

### III. CONTRIBUTORY NEGLIGENCE.

**Effect upon liability; and what is negligence contributing to injury, in general.**—No action will lie for the consequences of a negligent act where the party complaining has by his own want of due care and caution been in any degree contributory to the misfortune. *Witherley v. Regent's Canal Company*, 12 C. B., N. S. 2; 3 F. & F. 61; 6 L. T., N. S. 255.

To an action for bodily injury caused to the plaintiff through a breach of duty on the part of the defendant, it is a good defense, that although he was guilty of such breach of duty, the plaintiff willfully, and contrary to the command of the defendant, committed the act which was the direct cause of the injury. *Caswell v. Worth*, 5 El. & Bl. 849; 3 Jur., N. S. 116; 25 L. J., Q. B. 131.

A foot passenger, though infirm from disease, has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it. *Boss v. Litton*, 5 C. & P. 407—Denman.

In an action for an injury to a person crossing a public highway, by driving against him and knocking him down, the jury must be satisfied that the injury was attributable to the negligence of the driver, and to that alone, before they can find a verdict for the plaintiff; and if they think that it was occasioned in any degree by the improper conduct of the plaintiff in crossing the road in an incautious and imprudent manner, they must find their verdict for the defendant. *Hawkins v. Cooper*, 8 C. & P. 473—Tindal.

To sustain an action for an injury caused by the negligent driving of the defendant, the injury must have been caused by his negligence only, without the negligence of the plaintiff contributing in any way to the accident. *Williams v. Richards*, 3 C. & K. 81—Pollock.

It is the duty of a person who is driving over a crossing for foot passengers at the entrance of a street, to drive slowly, cautiously and carefully; but it is also the duty of a foot passenger to use due care and caution in going upon such crossing, so as not to get among the carriages, and thus receive injury. *Id.*

A declaration alleged that a railway crossed on a level a turnpike road, and gates were erected and maintained by the company across the turnpike road, and were so constructed that when open they would shut themselves by their own weight, and which gates the company kept constantly closed, except when horses were passing; that the company, not regarding their duty, did not employ or have proper persons to open and shut the gates, and negligently left the gates wholly without any person to open and shut the same, and that during the time while there was no person to open and shut the gates the plaintiff was traveling along the turnpike road with a carriage and horse, and necessarily had occasion to cross the railway through the gates, and by reason of the company's neglect of duty was unable to cross the railway without himself necessarily opening the gates; that he waited a reasonable time for some person to come and open the gates, and used all reasonable means to make known his desire to pass through the gates; but no person came to open the gates, and by reason thereof he was obliged to and did open the gates and pass through, and it being night-time and dark,

and having passed through one of the gates, the gate, without any default on his part, by its own weight flew back and struck the horse, which became unmanageable, whereby he was thrown out of the carriage and hurt.—Held, that the declaration disclosed no cause of action, for the plaintiff had no right to open the gates himself, and the injury was caused by his own act in doing so. *Wyatt v. Great Western Railway Company*, 11 Jur., N. S. 825; 84 L. J., Q. B. 204; 13 W. R. 837; 12 L. T., N. S. 568; 6 B. & S. 709.

The plaintiffs, merchants in New York, inclosed in a letter to W. & Co., their correspondents in England, a check drawn on Smith & Co., bankers, London, and indorsed by the plaintiffs to W. & Co. The letter was placed with others for the purpose of being posted, but was abstracted, and the check was some time after presented to the defendants by C., the check at that time bearing a forged indorsement to C. At the request of C. the defendants obtained cash for the check from Smith & Co., and allowed C. to draw for the amount:—Held, there being no evidence of negligence in the plaintiffs, disentitling them to sue, that they were entitled to recover from the defendants the amount of the check, for the property in the check never having passed out of the plaintiffs, the defendants were guilty of a conversion, and therefore they were entitled to waive the tort, and hold the proceeds of the check to be money received to the plaintiffs' use. *Arnold v. Cheque Bank*, *Arnold v. City Bank*, 45 L. J., C. P. Div. 563; 1 L. R., C. P. Div. 578; 34 L. T., N. S. 729; 24 W. R. 750—C. P.

Evidence was tendered by defendants, which was rejected, of a practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship; with a view to show that the plaintiffs in omitting to do so were estopped by their own negligence from recovery:—Held, that such evidence was rightly rejected, for negligence, in order to operate as an estoppel, must be in the transaction itself, and there was no duty, either towards W. & Co., or the general public, cast on the plaintiffs to comply with such a practice, which could only be collateral to the transaction. *Id.*

**Comparison of respective degrees of negligence of the parties.]**—The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet, unless he could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover. *Davies v. Mann*, 10 M. & W. 546; 6 Jur. 954; 13 L. J., Exch. 10.

In all cases of collision, the question is whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster by his own negligence, or want of ordinary and common care, that but for his default in this respect the disaster would not have happened; in the



former case he recovers, in the latter not. *Tuff v. Warman*, 5 C. B., N. S. 573; 27 L. J., C. P. 322; 5 Jur., N. S. 222—Exch. Cham.

Also, if the defendant might, by the use of ordinary care, have avoided the consequences of the plaintiff's mere negligence, the plaintiff is to recover. *Ib.*

A person who is guilty of negligence and thereby produces injury to another, cannot set up as a defense, that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence. *Greenland v. Chaplin*, 5 Exch. 243; 19 L. J., Exch. 293.

In an action for damage occasioned by negligence, a material question is, whether or not the plaintiff might not have escaped the damage by ordinary care on his own part; but the defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury. *Clayards v. Dethick*, 12 Q. B. 439.

It is no justification to an action for negligently driving, that the plaintiff was on the wrong side of the road, if there was room sufficient for the defendant to pass without inconvenience. *Clay v. Wood*, 5 Esp. 44—Ellenborough. S. P., *Wade v. Carr*, 2 D. & R. 255.

The proposition that a plaintiff in an action for negligence cannot recover if he has been guilty of negligence or want of ordinary care contributing to the injury complained of, is subject to this qualification, namely, that if the defendant could, by the exercise of reasonable care and diligence, have avoided the injury, he is not excused by the plaintiff's contributory negligence. *Radley v. London and North Western Railway Company*, 1 L. R., App. Cas. 754; 46 L. J., Exch. Div. 573; 35 L. T., N. S. 637; 25 W. R. 147;—H. L.; reversing the judgment of the Exchequer Chamber, 10 L. R., Exch. 100; 44 L. J., Exch. 73; 33 L. T., N. S. 209; which reversed the judgment of the Court of Exchequer, 9 L. R., Exch. 71; 43 L. J., Ex. Ch. 73.

The plaintiffs were the owners of a colliery and of a siding connected with a line of railway, which siding was crossed by a wooden bridge about eight feet high, also belonging to the plaintiffs. The siding was used for the purpose of bringing loaded trucks of coal from the colliery upon the railway and of bringing them back when empty. The company was in the practice of bringing the empty trucks upon the siding, and the plaintiffs removed them whenever it was convenient. On a Saturday afternoon, after working hours in the colliery were over, the company left several trucks on the siding, one of which had upon it another truck which had broken down, and the combined height of the two trucks was too great for them to pass under the bridge. The presence of this truck

was known to the person left in charge of the colliery. On the following evening, after it was dark, the servants of the company brought some more trucks upon the siding, and the engine driver, in order to clear the main line, shunted the trucks against those which were already there, and thus brought the loaded truck into contact with the bridge. On finding that there was an obstruction he did not go to ascertain its cause, but assuming that it was caused by a brake he drew back his engine and pushed up the whole train of trucks with such violence as entirely to carry away the bridge. In an action for the damage caused to the bridge, the judge directed the jury that if there was any negligence or want of ordinary care on the part of the plaintiffs contributing to the accident the company would be entitled to the verdict. A verdict was found for the company:—Held, that there was evidence of contributory negligence to go to the jury, but that the judge had misdirected the jury in not leaving to them the question whether, even if there had been contributory negligence on the part of the plaintiffs, the company might not have avoided the accident by the exercise of due care and diligence. *Ib.*

#### Contributory negligence by children and other persons incapable of ordinary care.]—

The rule of law, that a plaintiff who has contributed to an injury occasioned by the negligence of the defendant, cannot recover a compensation in damages, does not apply where the plaintiff is a person incapable of exercising ordinary care and caution. *Lynch v. Nurdin*, 4 P. & D. 672; 1 Q. B. 29; 5 Jur. 797. See *Lygo v. Newbold*, 9 Exch. 302.

Where, therefore, the defendant's servant left a horse and a cart unattended in a public street, and a child under seven years of age, during his absence, climbed on the wheel, and other children urged forward the horse, whereby he was thrown to the ground, and the wheel fractured his leg:—Held, that the jury was justified in finding a verdict for him, if of opinion that there was negligence on the part of the servant. *Ib.*

Held, also, that the co-operation of third parties in the injury was not a ground of defense, if the means of injury were negligently left where it was extremely probable that they would be set in motion. *Ib.*

Contributory negligence by an infant has the same effect in disentitling him to maintain an action as in the case of an adult. *Hughes v. Muesle*, *Abbott v. Muesle*, 10 Jur., N. S. 682; 33 L. J., Exch. 177; 9 L. T., N. S. 513; 12 W. R. 315; 2 H. & C. 744.

The defendants were owners of a warehouse, in front of which was a cellar in a public street. The opening of the cellar was covered with a flap or lid, which the defendants raised, and leant against a wall when they wanted access to the cellar. While it was leaning against the wall, a young child, who had been warned not to meddle with it, climbed up upon it, and caused it to fall upon

himself, and he was injured by the fall:—Held, that the defendants were not liable for the injury. *Id.*

The lid also fell upon and injured another young child:—Held, that the defendants were not liable to him, if he was a joint actor with the other child; that they were liable, if he was not. *Id.*

An infant suing for a personal injury, cannot sue for expenses paid by his parents for his cure. *Collins v. Lefevre*, 1 F. & F. 486—Coleridge.

Contributory negligence does not disentitle an infant to recover for an injury sustained otherwise than where such injury is occasioned entirely by the negligence of the infant. *Gardner v. Grace*, 1 F. & F. 859—Channell.

A boy, twelve years of age, entered a third-class railway carriage at night-time, and was about to seat himself, when he placed his fingers on a part of the door. His father was behind him getting into the carriage, when a porter violently closed the door, which crushed the boy's fingers, and struck his father on the back:—Held, that there was evidence of negligence on the part of the porter, which was properly submitted to the jury, and that there was no contributory negligence on the part of the boy; per Martin, B., Channell, B., Pigott, B.; dissentiente, Kelly, C. B. *Coleman v. South Eastern Railway Company*, 4 H. & C. 699; 12 Jur., N. S. 944.

The defendant exposed in a market-place a machine for crushing oil cake, without the handle being fastened or its being thrown out of gear or in the care of any person. The plaintiff, a boy four years old, on returning from school under the care of his brother, who was seven years old, stopped with other boys at the machine, and while one of them was turning the handle, put his fingers in the cogs of the wheels, on being told by his brother to do so, and three of his fingers were crushed:—Held, that the defendant was not liable, as there was no negligence on his part, and the injury was caused by the act of the plaintiff and the boy who turned the handle. *Mangn v. Atherton or Atterton*, 4 H. & C. 888; 1 L. R., Exch. 239; 35 L. J., Exch. 101; 14 W. R. 771; 14 L. T., N. S. 411.

A railway crossed a footway on the level, and on each side of the railway the company put a swing gate which closed of its own accord, and on the top of the post of each gate was a ring, which a pointsman at an adjoining signal-box was able, by working a lever there, to raise or fall. When it so fell, it would ordinarily fall over the post so as to keep the gate securely closed; and this was usually done when a train was approaching. There were several lines of railway running over this crossing, and a foot passenger standing at the gate could only see about twenty yards up or down the lines; but when he had crossed to the first line he could see a distance of 800 yards; and when he had reached the six-foot way, being a space between the two sets of rails, he could see as far as 500 or 600 yards. A foot passenger came to the gate

when the ring was up and the gate capable of being opened, but a goods train was standing on the first line, in the way of the crossing, and the passenger waited until the train had moved off. He then opened the gate and attempted to cross the railway; but after he had reached the six-foot way he was run over and killed by a train. The pointsman and another person called out to him before the accident to warn him of his danger, and he might have escaped had he heard them, but he was deaf:—Held, that the company was not liable, as he had contributed by his negligence to the accident. *Skelton v. London and North Western Railway Company*, 36 L. J., C. P. 249; 3 L. R., C. P. 631; 16 L. T., N. S. 563; 15 W. R. 925.

Contributory negligence of agents, workmen, drivers and others.]—In an action against the defendant for the negligence of his agent in pulling down the party-wall between the houses of the plaintiff and defendant, it is a good defense to show that the plaintiff appointed an agent to superintend the work jointly with the defendant's agent, and that both agents were to blame. *Hill v. Warren*, 2 Stark, 377—Ellenborough.

A passenger in a public conveyance, injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury. *Thorogood v. Bryan*, 8 C. B. 115; 18 L. J., C. P. 336.

In an action for negligence, it appeared that the plaintiff was a passenger on an omnibus which was racing with the defendant's omnibus, and in trying to avoid a cart, a wheel of the defendant's omnibus came in contact with the step of the omnibus on which the defendant was driving, which caused the latter to swing towards the curbstone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck a lamp-post, and he was thrown off:—Held, that the jury was properly directed that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driving at a furious rate, and that the collision took place from the negligence of the defendant's omnibus, so that the other omnibus was not in fault in not endeavoring to avoid the accident, and that the defendant was liable. *Righty v. Hewitt*, 5 Exch. 240; 19 L. J., Exch. 201.

A child, five years old, was in the care of his grandmother, at a station of a railway company. For the purpose of going by it, she purchased a ticket for herself and one for him. In crossing the line to be ready for the train, they were knocked down by a goods train. The jury found that there was negligence in the servants of the company, and in the grandmother:—Held, that the child was so identified with his grandmother, that, by reason of her negligence, an action in his name could not be maintained against

the company. *Waite v. North-Eastern Railway Company*, 5 Jur., N. S. 936; 28 L. J., Q. B. 258; El., Bl. & El. 943; 7 W. R. 311—Exch. Cham; affirming *S. O.*, El., Bl. & El. 719; 4 Jur., N. S. 1300; 27 L. J., Q. B. 417.

A traveling inspector of the carriage department of the London and North Western Railway Company was traveling with a free pass of that company in a train of theirs upon a journey on the railway of the Lancashire and Yorkshire Railway Company, over which the London and North Western Company had running powers, and while so traveling the train in which he was, came into collision with a number of coal trucks of the Lancashire and Yorkshire Railway Company, which were being shunted on their line by their servants, and the inspector received bodily injuries. Either in consequence of the hazy state of the weather and the slippery state of the rails, the driver of the train was unable to stop the train when he came in sight of the distance signal, which had been put at "danger" by the servants of the Lancashire and Yorkshire Railway Company, or he disregarded it. The jury, in an action by the plaintiff against the Lancashire and Yorkshire Railway Company, found that the accident was due to the joint negligence of them in shunting the trucks when a passenger train was due, and of the London and North Western Railway Company in their driver running past the danger signal:—Held, that the contributory negligence of the driver of the London and North Western Railway Company's train, with whom the plaintiff must for the purpose of the action be identified, disentitled him to maintain an action for damages against the Lancashire and Yorkshire Railway Company for their negligence. *Armstrong v. Lancashire and Yorkshire Railway Company*, 33 L. T., N. S. 228; 10 L. R. Exch. 47; 44 L. J., Exch. 80; 23 W. R. 295.

#### IV. ACTIONS FOR INJURIES, GENERALLY.

##### 1. Parties.

**Who are entitled to sue.**—To enable the plaintiff to maintain an action for negligence, it is not necessary that the duty neglected should have arisen out of a contract between the plaintiff and defendant. *Collett v. London and North Western Railway Company*, 16 Q. B. 984; 15 Jur. 1053; 20 L. J., Q. B. 411.

However the duty may arise, if it exists and is neglected to the injury of the plaintiff, he has a right to sue for damages. *Id.*

Where a duty was cast by 1 & 2 Vict. c. 98, upon a railway company, to carry any officer of the post-office whom the postmaster-general might elect, for which service the company was to be remunerated by the postmaster-general, and the plaintiff was the officer elected, and he was injured by the negligence in carrying him of a railway company:—Held, that it was the duty of the company to carry him with proper care and diligence, and that for a breach of such duty, to his injury, he might well sue the company,

though there was no contract between him and the company, but the duty arose only from the obligation imposed upon the company by the act of parliament. *Id.*

If one, being the owner of a shop and goods, allows A. to be at this shop, and in his own name to sell and dispose of the goods as he pleases, and a portion of these goods is destroyed by the negligent driving of the coachman of B. while the servant of A. is carrying them, A. has such a qualified property in these goods as will entitle him to maintain an action against B. for damages. *Whittingham v. Blozham*, 4 C. & P. 597—Patteson.

A wife, in the lifetime of her husband, received, during a journey as a passenger on a railway, a bodily injury, in consequence of the negligence of the company, by reason whereof her husband incurred expenses and suffered pecuniary loss; and on his death, without having received any compensation for the damage thereby incurred, she, as his executrix, sued the company upon their contract safely and securely to carry, to recover compensation for such expenses and loss to her testator's personal estate:—Held, that the action was an action of contract, and that a loss or damage from the breach of the contract having accrued to the personal estate of the testator, an action to recover damages by reason of that loss survived to her as executrix, and that therefore the action was maintainable. *Potter v. Metropolitan Railway Company*, 32 L. T., N. S. 36—Exch. Cham.

As to effect of contributory negligence of plaintiff, —see this title, III.

As to who are liable to actions for negligence, —see this title, II.

As to who may maintain action for negligence causing death, —see this title, V., 2.

##### 2. Pleading.

**Declarations.**—In an action by the tenant in possession against a wrong-doer, it is sufficient to declare generally, without disclosing any title. *Grimstead v. Marlow*, 4 T. R. 717.

But if a defendant justifies under a right, it must be formally set out in the plea. *Id.*

A declaration in an action for running over the plaintiff, alleged by way of inducement, that the defendants were possessed of a cart and a horse, which was being driven by their servant, without stating "at the time of the grievance" complained of:—Held, an immaterial allegation, and not traversable. *Mitchell v. Craswell*, 13 C. B. 162; 17 Jur. 716; 22 L. J., C. P. 100.

A declaration stated that the plaintiff was possessed of premises at Milton, in the county of Kent, abutting on a public navigable river, to wit, the Thames, and on a certain part of the river called the Blockhouse Dock; that in these premises he carried on the business of a blockmaker; that the occupiers of the same had always, for sixty years previously to the

commencement of the suit, been entitled to have access to and from the river and the Blackhouse Dock, and to land their timber at Blackhouse Dock, and that the defendants obstructed Blackhouse Dock by placing piles thereon, and deprived the plaintiff of free access thereto. The venue in the margin was, London. Plea, not guilty:—Held, that whether it was a local action or not (and semble it was) there was nothing in the declaration which made it necessary to prove that the cause of action arose in the city of London. *Simmons v. Lillystone*, 9 Exch. 431; 22 L. J., Exch. 217.

A declaration stated that the defendant wrongfully caused to be kept and continued quantities of dirt and rubbish, before wrongfully placed upon a public highway, near a wall and a canal; by means whereof the plaintiff, passing along the highway, was induced and caused to walk over the rubbish, and to fall into the canal:—Held, on motion in arrest of judgment, that the declaration was good. *Goldthorpe v. Hardman*, 2 D. & L. 442; 13 M. & W. 377; 14 L. J., Exch. 61.

A declaration alleged that the plaintiff was possessed of a house, and that the defendant was possessed of a house next adjoining to that of the plaintiff, and that the defendant conducted himself so carelessly, negligently and improperly, in pulling down the house of the defendant, and in neglecting to use due and proper precaution in that behalf, that quantities of bricks, tiles, &c., fell from the house of the defendant into and upon divers parts of the house of the plaintiff, and upon and through the windows and skylights of the plaintiff:—Held, that the declaration disclosed a sufficient cause of action, for that it complained, not of a mere omission on the part of the defendant, but of his doing certain acts, by the negligent performance of which the plaintiff was injured. *Bradbee v. Christ's Hospital (Governors)*, 2 D., N. S. 164; 4 M. & G. 714; 5 Scott, N. R. 79.

In an action against a railway company for an injury to the plaintiff's house by reason of an adjoining house falling against it, the breach alleged was, that the company did not use due care or skill, or take proper precautions in making the railway and excavations; and that they proceeded in making the railway and excavations without taking proper precautions to prevent the house so near to the house of the plaintiff, from falling upon and against the house of the plaintiff, by reason of the careless, negligent, unskillful and improper conduct of the company; and for want of proper precautions by them, the house gave way, and fell upon and against the house of the plaintiff:—Held, sufficient. *Davis v. London and Blackwall Railway Company*, 2 Scott, N. R. 74; 1 M. & G. 799; 2 Railw. Cas. 308; 1 Drink. 9.

A husband, as administrator to his wife, declared that the defendant was in occupation of a brewery and an office, and a passage leading thereto from the public street used by him for the reception of customers

in his trade of a brewer, which passage was the usual means of access from the office to the public street: yet he wrongfully and negligently permitted a trap door in the floor of the passage to lie and remain open without being properly guarded and lighted; and the wife, who had been to the office as a customer, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being open, and not properly guarded and lighted, whereby she was killed:—Held, that the duty of the defendant, and breach, sufficiently appeared. *Chapman v. Rothwell*, El., Bl. & El. 168; 4 Jur., N. S. 1180; 27 L. J., Q. B. 315.

A first count alleged that the plaintiff was engaged in loading a truck with stones, and was standing in the truck for that purpose, and a railway company by their servants so negligently backed, shunted, and managed certain trucks under the care and management of the company by their servants, that they were, by the negligence and carelessness, breach of duty and improper conduct of the company in that behalf, driven with great force and violence against the truck in which the plaintiff was standing, and he was thereby with force and violence cast out of the truck in which he was standing, and was greatly hurt. A second count repeated the allegations in the first count, with the addition that the plaintiff was "lawfully engaged in loading the truck":—Held, that the first count could not be supported; but that on the second count, although it would probably have been set aside as embarrassing, yet, inasmuch as it contained allegations showing some duty of care on the part of the company towards the plaintiff, to which he was entitled by being "lawfully" there, and a breach of that duty by an act of active negligence of the company, the plaintiff was entitled to judgment. *Bulman v. Furness Railway Company*, 32 L. T., N. S. 430—Exch.

**Plea[s].**—In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration: e. g., in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial to the plaintiff's occupation of the house. Reg. Gen., Q. B., C. P. and Exch., T. T. 16 Vict. r. 61; 1 El. & Bl., App. lxxxii.

The plea of not guilty does not put in issue any material and traversable part of the inducement. *Dunford v. Trattles*, 1 D. & L. 554; 12 M. & W. 529; 8 Jur. 780; 13 L. J., Exch. 124.

**A** declaration alleged that the defendant was possessed of a wagon and horses, which were under the care of his servant, and the servant was driving them, and that the defendant, by his servant, so carelessly drove the same, that the plaintiff's carriage was injured:—Held, that under not guilty, the defendant could not prove that the servant and horses were not his; for the allegation that they are so is matter of inducement, and is admitted by the plea. *Hart v. Crowley*, 12 A. & E. 378.

In an action for running against the plaintiff's carriage, a plea that the damage was the result of the negligence of both parties, is bad in substance as well as form, for it amounts to the general issue. *Armitage v. Grind Junction Railway Company*, 6 D. P. C. 840; 3 M. & W. 244; 1 H. & H. 26. S. P., *Woolf v. Beard*, 8 C. & P. 378.

To an action for negligence in fixing an apparatus for roasting coffee, so that the same exploded, the defendant pleaded that the explosion took place in consequence of the apparatus being used while the brickwork was in a damp state, and that they had given notice and warning to the plaintiff not to use the same until a sufficient time had elapsed for the drying thereof, and that by reason of the premises the apparatus upon and in the using of the same as aforesaid exploded:—Held, bad on special demurrer, as being an informal traverse of a part of the cause of action. *Dakin v. Brown*, 7 D. & L. 151; 8 C. B. 92; 18 L. J., C. P. 344.

In an action for negligence against the defendant, where the plaintiff is contributory to the mischief of which he complains, the defense is admissible under not guilty. *Holden or Holding v. Liverpool Gas Light Company*, 3 C. B. 1; 10 Jur. 883; 15 L. J., C. P. 301.

A declaration stated that the defendant was employed by commissioners of sewers to make a sewer in a public highway; and that he kept and continued in the highway two iron gratings lying thereon, in his custody and care, for forming the sewer, without placing any light to show that the gratings were there:—Held, that the averment that the gratings were in the custody and care of the defendant being immaterial, was not admitted by the plea of not guilty, and that the material averment, namely, that the defendant kept and continued the gratings on the highway without a light, having been negatived by the jury, the plaintiff ought to be nonsuited. *Grew v. Hill*, 6 D. & L. 664; 3 Exch. 801; 18 L. J., Exch. 317.

In an action against a defendant, for negligence by driving his cart and horse against the plaintiff's horse:—Held, that under the plea of not guilty, the defendant could not show that he was not the person driving when the injury happened, and that the cart did not belong to him; and, after trial, the court refused permission to amend by substituting another plea. *Taverner v. Little*, 5 Bing. N. C. 678; 7 Scott, 796; 3 Jur. 702. S. P., *Emery v. Clark*, 2 M. & Rob. 260.

In an action for damage to goods, against a carrier, the defendant cannot, under not guilty, show that the statement of the plaintiff, as to the weight of the goods at the time of hiring the van in which they were conveyed, induced him to send a van unequal to carry them, such defense admitting that the insufficiency of the van caused the accident. *Webb v. Page*, 6 M. & G. 196; 6 Scott, N. R. 951; 1 D. & L. 531; 12 L. J., C. P. 327.

A declaration stated that H. was in the service of a railway company, and that in the discharge of his duty he became a passenger in a railway carriage of the company, drawn by a steam-engine under the guidance of their servants; that the company was possessed of another steam-engine, which was drawing other railway carriages, and which was under the guidance of their servants, yet the company conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed. Plea, that the collision took place solely through the negligence of the servants of the company, and that the engines and carriage were under the guidance of the servants of the company, who were fit and competent persons to have the guidance of the same, and that the negligence was wholly unauthorized by the company, and without their leave, license or knowledge:—Held, that the plea did not amount to the general issue. *Hutchinson v. York, Newcastle and Berwick Railway Company*, 5 Exch. 343; 14 Jur. 837; 19 L. J., Exch. 296.

A declaration in an action for running over a plaintiff stated, that while he was crossing a street, the defendants, by their servant, negligently drove against and injured him:—Held, that the defendants, under not guilty, might show that the driver was not at that time acting as their servant. *Mitchell v. Craswell*, 13 C. B. 162; 17 Jur. 716; 22 L. J., C. P. 100.

As to pleading in actions for causing death by negligence,—see this title, V., 3.

### 3. Evidence; what Questions are for the Jury; and how Submitted and Found.

**Evidence of proprietorship.**—In an action for negligent driving by the defendant's servant, if it appears that the defendant holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which it belongs, the action is maintainable against him, although it is proved that he had for some days ceased to be the owner of the cart and not concerned in the business, having resigned both to his former partner. *Stables v. Eley*, 1 C. & P. 614—Abbott.

If the carriage of A. strikes against the cart of B., and a person who sees it demands the address of the owner of the carriage, the address given by a person in the carriage is admissible; but a statement that any dam-

age done will be paid for, is not so. *Beamon v. Ellies*, 4 C. & P. 585—Taunton.

**Evidence of possession of premises.]—**Action for obstructing a wharf of which the plaintiff was possessed. The plaintiff having proved sixty years' general user, the defendant proved, that, thirty years before the trial, the parties through whom the plaintiff claimed accepted a lease of adjoining land, containing a grant of the use of the land in question, as the same had been theretofore used by the lessees, as a sawpit and for buying timber:—Held, that the jury might, nevertheless, from the general user, infer that the plaintiff was possessed of the land absolutely at the time referred to in the pleadings. *Page v. Hutchett*, 8 Q. B. 593; 10 Jur. 634; 15 L. J., Q. B. 281.

In an action, the plaintiff declared that he was possessed of a messuage and premises, with the appurtenances; the plea traversed this allegation, and at the trial it appeared that the plaintiff had the separate use and occupation of only one floor of a dwelling-house:—Held, that the evidence did not negative the allegation that the plaintiff was possessed of a messuage. *Fenn v. Grafton*, 2 Bing. N. C. 617; 3 Scott, 56; 2 Hodges, 58.

In an action for an injury resulting from falling down an unprotected area, the declaration stated that the defendant was possessed of the premises, and that they were adjoining a public and common street and highway. The defendant had agreed with the owner of the premises (two carcasses of houses) to finish one of them, for doing which he was to have the other; and the workmen employed by him were then actually at work upon them, but it did not appear that any conveyance had been made to him:—Held, that it was sufficient evidence of a possession in him. *Jarvis v. Dean*, 11 Moore, 354.

The defendants, being the owners of a house and premises, demised the same on the 1st of April, 1858, to M. for thirty years, at a rent payable quarterly, with a right of re-entry if the rent should at any time be in arrear more than fifteen days. M. occupied the first floor for some time, and let out the rest of the house to separate weekly lodgers, each of whom had a right to draw water from the tank in the area, and to use the area for the purpose of doing so. In March, M. let the first floor to T., a weekly lodger, and then ceased to reside in the house, never paying the quarterly rent due at Lady-day, 1858, or at Midsummer, and both were in arrear at the time the action was brought. T. had the same privilege of using the area and tank as the other lodgers. In July, M. became insolvent, and about the 25th of that month he gave up the lease to the official assignee, and was discharged upon the 30th. In the same month, the defendants gave notice to the lodgers that the rent must be paid to them, and two of the lodgers did so pay the rent. Upon the 4th of August, the

plaintiff suffered an injury by falling through a grating in an area belonging to the house, and being part of the premises so let with the house. A few days after the accident to the plaintiff, viz., on or about the 7th of August, T., who was the tenant of the first floor, received a notice from the inspector of nuisances to repair the grating in front of the house; this notice was immediately handed by him to the defendants, and they repaired the grating. In November, the defendants called upon the assignees to elect whether they would take the lease or not, and upon their refusal to take it, the defendants took possession of it, and of the house and premises. It was admitted that the injury to the plaintiff was occasioned by the negligence of some person or persons in not keeping the grating in repair:—Held, that there was no evidence that the defendants, before the time of the accident, had avoided the lease and entered into possession of the premises, and had thus become answerable for the negligence by which the plaintiff was injured. *Bishop v. Belford Charity (Trustees)*, 6 Jur., N. S. 230; 29 L. J., Q. B. 53; 1 El. & El. 697—Exch. Cham.

**Presumptions and proof of negligence.]—**The mere happening of an accident is not sufficient evidence of negligence to be left to the jury; but the plaintiff must give some affirmative evidence of negligence on the part of the defendant. *Hammack v. White*, 11 C. B., N. S. 588; 8 Jur., N. S. 706; 31 L. J., C. P. 120; 10 W. R. 230; 5 L. T., N. S. 676.

Where, therefore, it was shown that the defendant was riding a horse at a walking pace, when the animal became restive, and rushing on to the pavement, knocked down and killed the husband of the plaintiff; but the witnesses for the plaintiff also proved that the defendant was doing his best to prevent the accident:—Held, that this was no evidence of negligence; that, taking the evidence of the witnesses for the plaintiff altogether, it was clear that the defendant was carried on to the pavement against his will, and that there was therefore nothing to turn the scale of evidence against the defendant, and to show that he was responsible for the consequences of the accident. *Id.*

B.'s horse, being on a highway, kicked a child who was playing there. There was no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he was accustomed to kick:—Held, no evidence from which a jury would be justified in inferring that B. had been guilty of actionable negligence. *Cox v. Burbidge*, 13 C. B., N. S. 430; 9 Jur., N. S. 970; 33 L. J., C. P. 80; 11 W. R. 425.

But accidents may be of such a nature that negligence may be presumed from the mere fact of the accident; the presumption depending on the nature of the accident. *Byrne v. Bowdler*, 33 L. J., Exch. 13; 9 L. T., N. S. 450; 2 H. & C. 722; 12 W. R. 279.

A person was walking in a public street,



past the defendant's shop, when a barrel of flour fell upon him from a window above the shop, and seriously injured him:—Held, sufficient *prima facie* evidence of negligence to cast on the defendant the onus of proving that the accident was not caused by his negligence. *Id.*

In an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence to warrant the judge in leaving the case to the jury. *Scott v. London and St. Katharine Docks Company*, 8 H. & C. 506; 11 Jur., N. S. 204; 34 L. J., Exch. 220; 18 W. R. 410; 13 L. T., N. S. 148—Exch. Cham.

But where the instrument or machinery is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Id.*

In an action against a dock company for injury to the plaintiff by their alleged negligence, the plaintiff proved that he was an officer of the customs, and that, while in the discharge of his duty he was passing in front of a warehouse in the docks, six bags of sugar fell upon him:—Held, reasonable evidence of negligence. *Id.*

In an action against a party as owner of a coach, for so carelessly managing it, and allowing it to be used in such an unsafe condition that one of the wheels came off, whereby it fell upon the plaintiff:—Held, that it was for the plaintiff to show that the wheel came off and the coach fell, through some cause for which the defendant would be responsible; and, it being consistent with the evidence that the axle-tree had broken, and that he was not owner, that there was no case. *Doyle v. Wragg*, 1 F. & F. 7—Wilkes.

In an action in a county court for negligently driving a horse and cart, the plaintiff having simply proved the fact of a collision under circumstances which might or might not amount to negligence, the defendant proved that the accident arose from the horse suddenly beginning to kick, whereby the shafts of the cart were broken and the driver thrown out, when the horse started off and ran against and injured the plaintiff's horse. The judge, upon this evidence, ordered a verdict for the plaintiff, being of opinion that the breaking of the shafts, even under the circumstances stated by the defendant's witnesses, showed a defect in the cart, which raised a presumption of negligence in the owner. An appeal against his decision was dismissed with costs. *Templeman v. Haydon*, 13 C. B. 507.

A child three years and a half old strayed upon a railway, and had its leg cut off by a passing train:—Held, that in the absence of any evidence, to show that the child got there through neglect or default on the part of the company, the company was not responsible

for the injury. *Singleton v. Eastern Counties Railway*, 7 C. B., N. S. 237.

The plaintiff, going to a doorway of a house in which the defendant had offices, was pushed out of the way by his servant, who was watching a packing-case belonging to his master, and was leaning against the wall of the house. The plaintiff fell, and the packing-case fell on his foot and injured him. There was no evidence as to who placed the packing-case against the wall, or what caused its fall:—Held, that there was a *prima facie* case against the defendant to go to the jury, the fall of the packing-case being some evidence that it had been improperly placed against the wall. *Briggs v. Oliver*, 4 H. & C. 403; 35 L. J., Exch. 163; 14 W. R. 658; 14 L. T., N. S. 412.

The defendant was possessed of a workshop, the windows of which overlooked a yard, in which the plaintiff was engaged in the service of his employer; a ladder in the defendant's workshop fell through one of the windows, and the fragments of the glass in falling injured the plaintiff's eye; the judge directed a nonsuit, on the ground that there was no evidence of negligence on the defendant's part:—Held, that the nonsuit was right, it not being shown that the ladder was under the control of the defendant or his servants. *Higgs v. Maynard*, 12 Jur., N. S. 705; 1 H. & R. 581; 14 W. R. 610; 14 L. T., N. S. 332.

A person was walking on a highway under a bridge forming part of a line of railway, when a brick fell from its place in the perpendicular pier of the bridge, and injured him. He at the time heard a noise as of a train passing above:—Held, that these facts were sufficient evidence of negligence on the part of the railway company. *Kearney v. London, Brighton and South Coast Railway Company*, 40 L. J., Q. B. 285; 6 L. R., Q. B. 759; 24 L. T., N. S. 918; 20 W. R. 24—Exch. Cham.

In an action against a booking-office keeper, who takes in parcels to be forwarded by carriers, where the declaration alleged that a parcel was delivered to D., and that he promised to take care of it, that it might be forwarded to its destination, and averred that it was lost through his negligence, on which issue was joined:—Held, that it was not sufficient evidence of negligence, to show that the parcel was delivered to D. and that it had not reached its destination. *Gilbert v. Dale*, 1 N. & P. 22; 5 A. & E. 548; 2 H. & W. 883.

What are questions for the jury; and directions to jury on questions of negligence.]—In an action for damages done through negligent driving of a carriage and horses let to hire, and driven by the servants of the owner, it is a question for the jury whether the servants were acting as the servants of the person hiring or of the owner. *Brady v. Giles*, 1 M. & Rob. 494—Abinger.

Gross negligence is a question for the jury.

*Duff v. Budd*, 6 Moore, 469; 2 B. & B. 177. S. P., *Batson v. Donovan*, 4 B. & A. 21.

In all actions for negligence, where there is evidence of negligence on the part of the plaintiff, the proper question to be left to the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. *Walton v. London, Brighton and South Coast Railway Company*, 1 H. & R. 424; 14 W. R. 895; 14 L. T., N. S. 253.

In an action for negligence, it appeared that the plaintiff's horse and cart were drawn up opposite to his shop and left unattended, and that a horse and van of the defendants were drawn up two or three feet in the rear of the cart, and also left unattended. No person actually saw the circumstances leading to the accident; but it seemed that the two vehicles had been in collision, and the evidence was conflicting. The judge, in summing up, withdrew from the jury the question of contributory negligence on the part of the plaintiff:—Held, that there must be a new trial for misdirection. *Id.*

Where the question, whether or not a railway company has been negligent, depends upon the nice distinction between that which is reasonably safe and that which is not so, it is a question entirely of degree, and one exclusively and emphatically for the decision of a jury; and where a jury, with all the evidence before them, has found a verdict, the court will not interfere to disturb their finding by granting a rule to set the verdict aside on the ground that there was no evidence of negligence. *Leishmann v. London, Brighton and South Coast Railway Company*, 23 L. T., N. S. 712; 19 W. R. 106—Exch.

In an action for negligence it is for the judge to say whether any facts have been proved from which a case of negligence may reasonably be inferred, and then it is for the jury to say whether from those facts negligence ought to be inferred; and *Bridges v. North London Railway Company* (7 L. R., H. L. Cas. 213), does not lay down any new rule as to what is evidence for the jury. *Jackson v. Metropolitan Railway Company*, 26 W. R. 175—H. L.; reversing the judgment of the Court of Appeal, 2 L. R., C. P. Div. 125; 46 L. J., C. P. Div. 876; 25 W. R. 661; 36 L. T., N. S. 485—C. A.; and the judgment of the Common Pleas, 10 L. R., C. P. 49; 44 L. J., C. P. 83; 31 L. T., N. S. 475; 23 W. R. 78.

#### 4. Damages.

**Measure of damages; in general.**—In an action for willful negligence the jury may take into consideration the motives of the defendant, and if the negligence is accom-

panied with a contempt of the plaintiff's rights and conveniences the jury may give exemplary damages. *Embley v. Myers*, 6 H. & N. 54; 30 L. J., Exch. 71. See *Bell v. Midland Railway Company*, 9 W. R. 613; 16 C. B., N. S. 287; 30 L. J., C. P. 272.

In an action to recover damages for the upsetting of a barge laden with coal belonging to the plaintiff, it appeared that a small steam-vessel belonging to the defendant, called the *Water Lily*, was proceeding down the river, preceded by a larger one, called the *Ramona*, and that, in consequence of the swell occasioned by one or both of these vessels, the barge was swamped, and the coals lost. The amount of damage was about 80*l.* The jury returned a verdict for the plaintiff for 20*l.*, assigning, as a reason for giving that sum only, that they did not think the *Water Lily* to have been the sole cause of the accident. The court refused to interfere with the verdict. *Smith v. Dobson*, 3 Scott, N. R. 336; 3 M. & G. 59.

In an action against an owner of a brig for an injury done to a sloop belonging to the plaintiff, the amount of damage proved was upwards of 500*l.*; the jury gave a verdict for 250*l.* only, and on being asked how they made up their verdict, replied, that in their opinion there were faults on both sides:—Held, that, notwithstanding this, the plaintiff was entitled to the verdict, as there might be faults in the plaintiff to a certain extent, and yet not to such an extent as to prevent his recovering. *Raisin v. Mitchell*, 9 C. & P. 613—Tindal.

—In actions for injuries to lands, buildings and other property.]—In order to entitle the owner of land to succeed in an action against a neighbor for excavating near his boundary, it is necessary that appreciable damage should have been caused thereby. *Smith v. Thackeray*, 1 L. R., C. P. 564; 12 Jur., N. S. 545; 35 L. J., C. P. 276; 1 H. & R. 615; 14 W. R. 832; 14 L. T., N. S. 761.

If by negligence of A. in building his house adjoining that of B., the house of B. is thrown down, A. is liable only to such sum in damages as was the value of the old house, and not the whole expense of building a new one. *Lukis v. Godsall*, Peake's Add. Cas. 15—Kenyon.

In an action for an injury to the plaintiff's premises, in consequence of the pulling down of the defendant's house adjoining, the plaintiff may recover damages for any injury actually caused by the negligence of the defendant, although he has not himself used those precautions which it was his duty to adopt against such injury. *Walters v. Pfeil*, M. & M. 362—Tenterden.

Where it is alleged and proved that the defendant so negligently, unskillfully, and improperly dug his own soil, that the plaintiff's house was thereby injured, an action lies; and, although it is shown that the house was infirm, and could at all events have stood only a few months, still the plaintiff may recover, in proportion to the loss actually

suffered, if the jury finds that the injury to the house was the consequence of the defendant's negligence; and in determining the question of negligence, the jury ought to consider the state of the plaintiff's house. *Dodd v. Holme*, 3 N. & M. 379; 1 A. & E. 493.

A. and B. were the owners of adjoining lands, and the house of A. had for more than twenty years been supported by the adjoining land of B., who dug a foundation for some intended buildings so near the house of A. that it fell:—Held, that if A.'s house had been so supported and both parties knew it, the plaintiff had a right to such support as an easement, and that the defendant could not withdraw that support without being liable in damages for any injury that the plaintiff might sustain thereby, which damages should be such as to put the plaintiff in the same state in which he was before; but the jury ought not to give him a new house for an old one. *Hild v. Thornborough*, 2 C. & K. 250—Parke.

In an action for negligent driving, whereby the plaintiff's horse was injured, it appeared that the horse was sent to a farrier's for six weeks for the purpose of being cured, and that at the end of that time it was ascertained that the horse was permanently damaged to the extent of 20l.:—Held, that the proper measure of damages was the keep of the horse at the farrier's, the amount of the farrier's bill, and the difference between the value of the horse at the time of the accident and at the end of the six weeks; but that the plaintiff ought not to be allowed also for the hire of another horse during the six weeks. *Hughes v. Quentin*, 8 C. & P. 703—Abinger.

The defendant made a profit by collecting messages, and transmitting them by telegraph to America. He received a message from the plaintiff for transmission to their correspondent at New York, containing an order for goods, but the message was in cipher, wholly unintelligible to any but the plaintiff and his correspondent at New York. Through the defendant's negligence the message was not sent, and the plaintiff thereby lost profits which he would have made had the order been executed:—Held, in an action for such negligence, that the plaintiff could not recover more than nominal damages. *Sanders v. Stuart*, 45 L. J., C. P. Div. 682; 1 L. R., C. P. Div. 826; 24 W. R. 949; 85 L. T., N. S. 370.

— in actions for personal injuries.]—A. effected with a railway assurance company a contract, which stated that he was thereby assured by the company in 1,000l., to be payable to his legal representatives in the event of death happening to the assured from railway accident while traveling in any class carriage on any line of railway in Great Britain or Ireland, or a proportionate part of the 1,000l. to be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The assured was traveling in a railway carriage,

and on the arrival of the train at a station, and after it had stopped, he, in stepping out of the carriage, without any negligence on his part, slipped off the iron step, whereby he sustained an injury:—Held, that this was a railway accident, and that the damages could not be estimated by the proportion which the injury bore to the amount payable on loss of life. *Theobald v. Railway Passengers Assurance Company*, 10 Exch. 45; 2 C. L. R. 1034; 18 Jur. 583; 23 L. J., Exch. 249.

Held, also, that the assured was entitled to recover damages for the expenses and suffering occasioned by the injury, but not for loss of time or loss of profit. *Id.*

In an action for a personal injury arising from indisputable negligence, the injury being permanent, and recovery apparently hopeless, the court will not reduce the damages if the judge is not dissatisfied with the verdict. *Britton v. South Wales Railway Company*, 27 L. J., Exch. 355.

In an action for injuring the plaintiff's apprentice, whereby he was disabled from serving, the jury may give damages for the loss of service, not only before action brought, but afterwards down to the time when, as it appears in evidence, the disability may be expected to cease. *Hodgson v. Stallebrass*, 11 A. & E. 301; 3 P. & D. 200; 9 C. & P. 63; 8 D. P. C. 482.

A declaration, stating the apprentice to have been permanently crippled, is supported by evidence that the injured party is still disabled, and likely to remain so, but with care will be restored in time. *Id.*

Although a plaintiff, through the negligence of the defendant, is disabled for life from performing the duties of the office to which he has been accustomed, yet the measure of his damages is by no means to be taken from the amount of an annuity which would replace the annual salary of the plaintiff; for non constat that he would have retained his situation for life. *Rapson v. Cubitt*, Car. & M. 64—Abinger.

When a jury is called upon to assess damages for personal injuries occasioned by negligence, they should take into consideration two matters—first, the pecuniary loss occasioned by the accident; and secondly, the injury the party sustains in his person, or in his physical capacity of enjoying life; and, as regards the first, they should take into account, not only his present loss, but his incapacity to earn a future improved income. *Fair v. London and North Western Railway Company*, 21 L. T., N. S. 326; 18 W. R. 66—Q. B.

In an action for injuries caused by the negligence of a railway company, a sum received by the plaintiff on an accident insurance policy cannot be taken into account in reduction of damages. *Bradburn v. Great Western Railway Company*, 10 L. R., Exch. 1; 44 L. J., Exch. 9; 31 L. T., N. S. 464; 23 W. R. 48.

In an action by an infant for a personal injury, he cannot recover for expenditures paid

by his parents for his cure. *Collins v. Lefevre*, 1 F. & F. 436.—Coleridge.

In an action by a child to recover damages for injuries purely personal, where the jury assessed the damages, presumably on the ground that the child would never be capable of earning his own living, the court refused to grant a new trial on account of the death of the child after verdict given and before judgment signed. *Kramer v. Waymark*, 4 H. & C. 427; 1 L. R., Exch. 241; 12 Jur., N. S. 305; 85 L. J., Exch. 148; 14 W. R. 659; 14 L. T., N. S. 868.

As to damages recoverable in actions for causing death by negligence,—see this title, V., 4.

#### V. ACTIONS FOR CAUSING DEATH BY NEGLIGENCE.

##### 1. When maintainable; Nature of Action; and Jurisdiction.

**Statutes.**—[The 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act), after reciting that no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts, that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

By s. 2, every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased;

And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; to the parties respectively for whom and for whose benefit such action shall be brought;

And the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

By s. 3, provided always, that not more than one action shall be for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

By s. 4, in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his

attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

By s. 5, the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word person to bodies politic and corporate, and parent shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word child shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

By 27 & 28 Vict. c. 95, s. 1, if and so often as it shall happen at any time or times in any of the cases intended and provided for by the 9 & 10 Vict. c. 93, that there shall be no executor or administrator of the person deceased, or, there being such executor or administrator, no such action as in the said act mentioned shall, within six calendar months after the death of such deceased person as therein mentioned, have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator.

By s. 2, it shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under the said act for his wrongful act, neglect or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.]

**Nature and form of the action; and when maintainable, generally.**—The 9 & 10 Vict. c. 93, gives an action to the representative of a person killed by negligence only where, had he survived, he himself at common law could have maintained an action against the person guilty of the negligence. *Senior v. Ward*, 5 Jur., N. S. 172; 28 L. J., Q. B. 139; 7 W. R. 261; 1 El. & El. 885.

Therefore, where a miner was killed by the neglect of a rule made under 18 & 19 Vict. c. 108, for testing the sufficiency of the rope by which the miners were let down the shaft into the mine, which neglect, being known by the

owner of the mine, would have rendered him liable, though the death was chiefly caused by the negligence of a fellow-servant:—Held, that the deceased having known of the rule for testing the rope, and of the violation of it, and having been warned to examine the rope, an action could not be maintained against the owner of the mine for compensation. *Id.*

A master builder, having contracted to build a certain building, employed A. as a bricklayer. The scaffolding was erected under the superintendence of the master's foreman, he not being present, and was constructed by men in his employ, who used an unsound ladder pole, in consequence of which the scaffold broke while A. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman:—Held, that no action could be maintained against the master builder, there being no evidence that the foreman was an improper person to employ for that purpose. *Wigmore v. Jay*, 5 Exch. 854; 14 Jur. 837; 19 L. J., Exch. 290.

An action on the above statute can only be maintained where the deceased could have maintained the action if alive; therefore, if in an action where the death is alleged to have been caused by the negligence of the defendant's servants, it is shown that the deceased, by his own negligence or carelessness, contributed to the accident, the defendant would be entitled to a verdict. *Tucker v. Chaplin*, 2 C. & K. 730—Denman.

The 9 & 10 Vict. c. 93, gives to the personal representative of the person killed by the wrongful act, neglect, or default of another, not an independent cause of action, but a right of action, when there was a subsisting cause of action at the time of the death. *Read v. Great Eastern Railway Company*, 9 B. & S. 714; 37 L. J., Q. B. 278.

To a declaration on that statute, accord and satisfaction with the deceased in his lifetime is a good plea. *Id.*

When a passenger on a railway was injured by an accident, and after an interval died in consequence:—Held, that his executrix might recover, in an action for breach of contract against the company, the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. *Bradshaw v. Lancashire and Yorkshire Railway Company*, 10 L. R., C. P. 189; 44 L. J., C. P. 148; 31 L. T., N. S. 847.

**Jurisdiction.**—The provisions of the act extend to a case where the person in respect of whose death damages are sought to be recovered was an alien, and was at the time of the wrongful act, neglect, or default which caused his death on board a foreign vessel on the high seas. *The Explorer*, 3 L. R., Adm. 289; 40 L. J., Adm. 41.

In an action under 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, where the death of a

person occurred in the course of his employment on board a steamer belonging to a railway company, during the passage from Milford to Waterford, it was alleged that the boiler explosion, which occasioned the accident, was caused by the corrosion of part of the machinery, and that the process of corrosion extended over a period during which the steamer had been several times in Ireland:—Held, that no part of the cause of action was shown to have arisen within the jurisdiction of the Irish court. *Walsh v. Great Western Railway Company*, 6 Ir. R., C. L. 532—Exch.

**Effect of recovery as bar or estoppel to subsequent actions.**—The widow and administratrix of a man who was alleged to have died in consequence of a railway accident, brought an action against the railway company for the benefit of herself and his children, and recovered damages. She afterwards brought another action, suing again as administratrix, for the benefit of the estate, to recover costs of medical attendance during his lifetime. The company having raised again certain issues which had been determined against them in the former action, she replied that they were estopped from so doing:—Held, that they were not estopped, as the two actions were not brought by her in the same right, the action under Lord Campbell's Act being a statutory action in which she sued as trustee for a specific class of persons, and therefore not brought in the same right as an ordinary action by an administratrix. *Leggott v. Great Northern Railway Company*, 45 L. J., Q. B. Div. 557; 24 W. R. 784; 1 L. R., Q. B. Div. 599; 35 L. T., N. S. 334.

A judgment recovered by a widow, as an administratrix of her husband, for damages for his death, through the negligence or breach of duty of the defendant, is no bar to a subsequent action by her as administratrix of her husband, to recover damages for injuries arising from the same cause to his personal property. *Barnett v. Lucas*, 6 Ir. R., C. L. 247—Exch. Cham.; affirming *R. C.*, 5 Ir. R., C. L. 140—C. P.

A claim by an administratrix to recover damages for injuries to personal chattels of the intestate, is sustained by proof of injuries to machinery firmly attached, by bolts and screws, to the walls and floors of a building held by the intestate as a tenant from year to year, and in the nature of trade fixtures removable as between landlord and tenant. *Id.*

## 2. Parties.

**Who entitled to sue, in general.**—In order to maintain an action under 9 & 10 Vict. c. 93, Lord Campbell's Act, the persons upon whose behalf it is brought must prove that during the lifetime of the deceased a pecuniary advantage accrued to them owing to their relationship with him; they are not entitled to compensation under that statute, if the

by his parents for his cure. *Collins v. Lefevre*, 1 F. & F. 436—Coleridge.

In an action by a child to recover damages for injuries purely personal, where the jury assessed the damages, presumably on the ground that the child would never be capable of earning his own living, the court refused to grant a new trial on account of the death of the child after verdict given and before judgment signed. *Kramer v. Waymark*, 4 H. & C. 427; 1 L. R., Exch. 241; 12 Jur., N. S. 395; 35 L. J., Exch. 148; 14 W. R. 659; 14 L. T., N. S. 868.

As to damages recoverable in actions for causing death by negligence,—see this title V., 4.

#### V. ACTIONS FOR CAUSING DEATH BY NEGLIGENCE.

##### 1. When maintainable; Nature of and Jurisdiction.

**Statutes.**—[The 9 & 10 Vict. commonly called Lord Campbell's reciting that no action at law maintainable against a person who, by a wrongful act, neglect, or default, causes the death of another person, and right and expedient that the case should be answerable in respect thereof, then the person who would not ensue shall have damages, notwithstanding the death of a person injured, and entitling him to sue for the same.] *Sykes v. North*, 44 L. J., C. P. 191; 19 Q. B. 199; 23 W. R. 473. But *benefit of the Act*—*Johnson v. Johnson*, 4 H. & N. 630; 29 L. J., Exch. 25.

**By a 2.** *Sykes v. North*, 44 L. J., C. P. 191; 19 Q. B. 199; 23 W. R. 473. But *benefit of the Act*—*Johnson v. Johnson*, 4 H. & N. 630; 29 L. J., Exch. 25.

**caused, and wife.**—A., being possessed of a building on a public footway, in the person building a house on such land ex-  
An area, which by the negligence of such people was left unfenced, so that to the night being dark, without any negligence or default of her own, fell into the area and was killed:—Held, that A. was liable to an action by her husband, as administrator, for the benefit of himself and B.'s infant children. *Barnes v. Ward*, 9 C. B. 208; 3 C. & K. 661; 14 Jur. 324; 19 L. J., C. P. 195.

As to parties to actions for negligence, generally,—see this title, IV., 1.

##### 3. Pleading.

**Declaration.**—In an action by the representatives of a deceased party, the declaration need not negative the existence of any rela-

attorney a full persons for who action shall be claim in respect to be recover

By s. 2. are in signed inga not

negligence  
been satisfied in  
his death did not  
cause of action to his  
Great Eastern Railway Com-  
B. 555; 16 W. R. 1040; 18  
s. 82.  
sued as widow of K. The declara-  
stated that K. in his lifetime was law-  
fully in and upon a railway station at W.,  
and was there employed in unloading, and as  
servant of the consignees, stone from a truck  
in which it had been conveyed to W. by the  
company, as carriers for the consignees for  
reward to the company, and was unloading it  
by means and by the use of a crane with  
tackle connected therewith, by the company  
provided, as such carriers for the use of such  
consignees, and their servants working the  
same in unloading the stone for reward to the  
company; yet the crane and tackle connected  
therewith were, through the negligence of  
the company, in such bad order and so badly  
adjusted, and kept adjusted,\* that K., in  
using the same,† became and was greatly  
wounded and injured, and by reason of the  
wounds and injuries thereby occasioned to  
him, he afterwards and within twelve calen-  
dar months next before this suit died:—Held,  
that on the words "that the same were  
dangerous to those who used them," being  
added after\*, and the words "by reason of  
the crane and tackle being in such bad order  
and so badly adjusted, and kept adjusted as  
aforesaid," after†, being added, the declaration  
was good. *King v. Great Western Railway  
Company*, 24 L. T., N. S. 583—C. P.

The omission, in an action under 9 & 10  
Vict. c. 93, to furnish particulars with the  
plaint, is ground for setting aside the service  
of the writ, but not for setting aside the writ  
itself. *McCabe v. Guinness*, 9 Ir. R., C. L. 510  
—Exch.

**Plea.**—In an action against engineers for  
so negligently constructing and erecting a  
machine that it exploded, and killed the  
husband of the plaintiff, they pleaded, that  
at the time of the accident the machine was  
unfit for use, by reason of the dampness of



which it was set; that deceased, and cautioned that by reason of the explosion:—Held, that present a confession and whole cause of action, but reverse of a part only, and *Jakin v. Brown*, 8 C. B. 92; 8 L. J., C. P. 344. On alleging that by reason of the defendant's servant the latter and servant was killed, damages for loss of services, burial expenses paid by the defendant pleaded, first, that and servant was killed on the not complained of, so that the not, and could not, sustain damages him to sue; and, secondly, that complained of was a felonious act on the defendant's servant, and that it had not, before the action had, committed or prosecuted in any respect of the same:—Held, that the plea afforded no answer to the declaration; and held by Kelly, C. B., and B., that the first plea afforded a good defence on the ground that, apart from 9 & 10 Vict. c. 93, no civil action is maintainable against a person who has by negligence caused the death of another. But by Bramwell, J., that the first plea afforded no defence, and that the action was maintainable. *v. Gillett*, 42 L. J., Exch. 53; 8 L. J. 88; 21 W. R. 409; 28 L. T., N.

pleading in actions for negligence, y.—see this title, IV., 2.

#### Damages; and how apportioned.

damages recoverable; and how generally.—In an action founded on 10 Vict. c. 93, by the wife, husband or child of a person killed by the defendant, the jury, in estimating the damages, take into consideration mental suffering or loss of society, but must give no award for pecuniary loss only. *Blake v. Railway Company*, 18 Q. B. 93; 21 L. J., Q. B. 233. and the injury sustained by the death of a relative must, in order to be compensated by a jury, be of a pecuniary character, and the jury cannot give damages. In Scotland the jury award solatium for injured feelings. *Wallace*, 1 Macq. H. L. Cas. 748. Damages are not to be estimated according to the value of the deceased's life, calculation tables, but the jury should consider a fair compensation. *South Eastern Railway Company v. Parke*. The question for the jury in such cases is whether the circumstances are such that, if the deceased, instead of meeting his death, was only wounded in consequence of the defendant, he would

have been entitled to damages for the injury. *Id.*

Damage of a pecuniary nature must be shown; but the damages are not to be given merely in reference to the loss of a legal right; they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased. *Franklin v. South Eastern Railway Company*, 8 H. & N. 211; 4 Jur., N. S. 565.

In an action by a father for the death of his son, the father was an old man, getting infirm, who lived in the lodge of an hospital, and was employed to carry coals round the wards, for which he was paid 8s. 6d. a week—whether under a contract or by way of gratuity did not appear. The son was a young man, earning good wages, who did not live with his father, but was in the habit of gratuitously assisting him by carrying the coals round the wards for him; but the father, not being in need, was not supported by him in any other way:—Held, that the father had such reasonable expectation of pecuniary benefit from the continuance of his son's life as would enable him to maintain the action. But the jury having found a verdict for him with 75l. damages:—Held, excessive. *Id.*

Legal liability alone is not the test of injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relation remaining alive, may be taken into account by the jury; and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. *Dalton v. South Eastern Railway Company*, 4 C. B., N. S. 296; 4 Jur., N. S. 711; 27 L. J., C. P. 227.

But compensation for the funeral expenses or for family mourning is not recoverable. *Id.* Actual damage must have accrued from the death of the deceased. Proof of the death and of relationship of the parties does not give a right to nominal damages. *Duckworth v. Johnson*, 4 H. & N. 653; 5 Jur., N. S. 630; 29 L. J., Exch. 25.

In an action by a father for injury resulting from the death of his son, it appeared that the father was a working mason, and that the son was a boy of fourteen, who had earned four shillings a week for about a year or two, but at the time of his death was without employment. There was no evidence of the cost of boarding and clothing the boy. The judge having left it to the jury, to say whether the father had sustained any pecuniary loss by the death of his son, the jury found a verdict with 50l. damages:—Held, that as there was evidence for the jury, the father was entitled to retain the verdict for the amount. *Id.* But see *Sykes v. North Eastern Railway Company*, 44 L. J., C. P. 191; 32 L. T., N. S. 199; 23 W. R. 473.

In an action for an injury resulting from death, the expectation of a reasonable probability of pecuniary benefit from the income

commencement of the suit, been entitled to have access to and from the river and the Blockhouse Dock, and to land their timber at Blockhouse Dock, and that the defendants obstructed Blockhouse Dock by placing piles thereon, and deprived the plaintiff of free access thereto. The venue in the margin was, London. Plea, not guilty:—Held, that whether it was a local action or not (and semble it was) there was nothing in the declaration which made it necessary to prove that the cause of action arose in the city of London. *Simmons v. Lillystone*, 9 Exch. 431; 22 L. J., Exch. 217.

A declaration stated that the defendant wrongfully caused to be kept and continued quantities of dirt and rubbish, before wrongfully placed upon a public highway, near a wall and a canal; by means whereof the plaintiff, passing along the highway, was induced and caused to walk over the rubbish, and to fall into the canal:—Held, on motion in arrest of judgment, that the declaration was good. *Goldthrope v. Hardman*, 2 D. & L. 442; 13 M. & W. 377; 14 L. J., Exch. 61.

A declaration alleged that the plaintiff was possessed of a house, and that the defendant was possessed of a house next adjoining to that of the plaintiff, and that the defendant conducted himself so carelessly, negligently and improperly, in pulling down the house of the defendant, and in neglecting to use due and proper precaution in that behalf, that quantities of bricks, tiles, &c., fell from the house of the defendant into and upon divers parts of the house of the plaintiff, and upon and through the windows and skylights of the plaintiff:—Held, that the declaration disclosed a sufficient cause of action, for that it complained, not of a mere omission on the part of the defendant, but of his doing certain acts, by the negligent performance of which the plaintiff was injured. *Bradbee v. Christ's Hospital (Governors)*, 2 D., N. S. 164; 4 M. & G. 714; 5 Scott, N. R. 79.

In an action against a railway company for an injury to the plaintiff's house by reason of an adjoining house falling against it, the breach alleged was, that the company did not use due care or skill, or take proper precautions in making the railway and excavations; and that they proceeded in making the railway and excavations without taking proper precautions to prevent the house so near to the house of the plaintiff, from falling upon and against the house of the plaintiff, by reason of the careless, negligent, unskillful and improper conduct of the company; and for want of proper precautions by them, the house gave way, and fell upon and against the house of the plaintiff:—Held, sufficient. *Davis v. London and Blackwall Railway Company*, 2 Scott, N. R. 74; 1 M. & G. 799; 2 Railw. Cas. 308; 1 Drink. 9.

A husband, as administrator to his wife, declared that the defendant was in occupation of a brewery and an office, and a passage leading thereto from the public street used by him for the reception of customers

in his trade of a brewer, which passage was the usual means of access from the office to the public street: yet he wrongfully and negligently permitted a trap door in the floor of the passage to lie and remain open without being properly guarded and lighted; and the wife, who had been to the office as a customer, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being open, and not properly guarded and lighted, whereby she was killed:—Held, that the duty of the defendant, and breach, sufficiently appeared. *Chapman v. Rothwell*, El., Bl. & El. 168; 4 Jur., N. S. 1180; 27 L. J., Q. B. 315.

A first count alleged that the plaintiff was engaged in loading a truck with stones, and was standing in the truck for that purpose, and a railway company by their servants so negligently backed, shunted, and managed certain trucks under the care and management of the company by their servants, that they were, by the negligence and carelessness, breach of duty and improper conduct of the company in that behalf, driven with great force and violence against the truck in which the plaintiff was standing, and he was thereby with force and violence cast out of the truck in which he was standing, and was greatly hurt. A second count repeated the allegations in the first count, with the addition that the plaintiff was "lawfully engaged in loading the truck":—Held, that the first count could not be supported; but that on the second count, although it would probably have been set aside as embarrassing, yet, inasmuch as it contained allegations showing some duty of care on the part of the company towards the plaintiff, to which he was entitled by being "lawfully" there, and a breach of that duty by an act of active negligence of the company, the plaintiff was entitled to judgment. *Bulman v. Furness Railway Company*, 32 L. T., N. S. 430—Exch.

**Pleas.**—In actions for torts, the plea of not guilty shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration: e. g., in an action for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial to the plaintiff's occupation of the house. Reg. Gen., Q. B., C. P. and Exch., T. T. 16 Vict. r. 61; 1 El. & Bl., App. lxxxi.

The plea of not guilty does not put in issue any material and traversable part of the inducement. *Dunford v. Trattles*, 1 D. & L. 554; 12 M. & W. 529; 8 Jur. 780; 13 L. J., Exch. 124.

A declaration alleged that the defendant was possessed of a wagon and horses, which were under the care of his servant, and the servant was driving them, and that the defendant, by his servant, so carelessly drove the same, that the plaintiff's carriage was injured:—Held, that under not guilty, the defendant could not prove that the servant and horses were not his; for the allegation that they are so is matter of inducement, and is admitted by the plea. *Hart v. Crowley*, 12 A. & E. 378.

In an action for running against the plaintiff's carriage, a plea that the damage was the result of the negligence of both parties, is bad in substance as well as form, for it amounts to the general issue. *Armitage v. Grand Junction Railway Company*, 6 D. P. C. 340; 3 M. & W. 244; 1 H. & H. 26. 8 P., *Woolf v. Beard*, 8 C. & P. 378.

To an action for negligence in fixing an apparatus for roasting coffee, so that the same exploded, the defendant pleaded that the explosion took place in consequence of the apparatus being used while the brickwork was in a damp state, and that they had given notice and warning to the plaintiff not to use the same until a sufficient time had elapsed for the drying thereof, and that by reason of the premises the apparatus upon and in the using of the same as aforesaid exploded:—Held, bad on special demurrer, as being an informal traverse of a part of the cause of action. *Dakin v. Brown*, 7 D. & L. 151; 8 C. B. 92; 18 L. J., C. P. 344.

In an action for negligence against the defendant, where the plaintiff is contributory to the mischief of which he complains, the defense is admissible under not guilty. *Holden or Holding v. Liverpool Gas Light Company*, 3 C. B. 1; 10 Jur. 883; 15 L. J., C. P. 801.

A declaration stated that the defendant was employed by commissioners of sewers to make a sewer in a public highway; and that he kept and continued in the highway two iron gratings lying thereon, in his custody and care, for forming the sewer, without placing any light to show that the gratings were there:—Held, that the averment that the gratings were in the custody and care of the defendant being immaterial, was not admitted by the plea of not guilty, and that the material averment, namely, that the defendant kept and continued the gratings on the highway without a light, having been negatived by the jury, the plaintiff ought to be nonsuited. *Grew v. Hill*, 6 D. & L. 664; 3 Exch. 801; 18 L. J., Exch. 317.

In an action against a defendant, for negligence by driving his cart and horse against the plaintiff's horse:—Held, that under the plea of not guilty, the defendant could not show that he was not the person driving when the injury happened, and that the cart did not belong to him; and, after trial, the court refused permission to amend by substituting another plea. *Taverner v. Little*, 5 Bing. N. C. 678; 7 Scott, 796; 3 Jur. 702. 8 P., *Emery v. Clark*, 2 M. & Rob. 260.

In an action for damage to goods, against a carrier, the defendant cannot, under not guilty, show that the statement of the plaintiff, as to the weight of the goods at the time of hiring the van in which they were conveyed, induced him to send a van unequal to carry them, such defense admitting that the insufficiency of the van caused the accident. *Webb v. Page*, 6 M. & G. 106; 6 Scott, N. R. 951; 1 D. & L. 531; 12 L. J., C. P. 327.

A declaration stated that H. was in the service of a railway company, and that in the discharge of his duty he became a passenger in a railway carriage of the company, drawn by a steam-engine under the guidance of their servants; that the company was possessed of another steam-engine, which was drawing other railway carriages, and which was under the guidance of their servants, yet the company conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed. Plea, that the collision took place solely through the negligence of the servants of the company, and that the engines and carriage were under the guidance of the servants of the company, who were fit and competent persons to have the guidance of the same, and that the negligence was wholly unauthorized by the company, and without their leave, license or knowledge:—Held, that the plea did not amount to the general issue. *Hutchinson v. York, Newcastle and Berwick Railway Company*, 5 Exch. 343; 14 Jur. 837; 19 L. J., Exch. 296.

A declaration in an action for running over a plaintiff stated, that while he was crossing a street, the defendants, by their servant, negligently drove against and injured him:—Held, that the defendants, under not guilty, might show that the driver was not at that time acting as their servant. *Mitchell v. Crassweller*, 13 C. B. 162; 17 Jur. 716; 22 L. J., C. P. 100.

As to pleading in actions for causing death by negligence,—see this title, V., 3.

### 3. Evidence; what Questions are for the Jury; and how Submitted and Found.

**Evidence of proprietorship.**—In an action for negligent driving by the defendant's servant, if it appears that the defendant holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which it belongs, the action is maintainable against him, although it is proved that he had for some days ceased to be the owner of the cart and not concerned in the business, having resigned both to his former partner. *Stables v. Eley*, 1 C. & P. 614—Abbott.

If the carriage of A. strikes against the cart of B., and a person who sees it demands the address of the owner of the carriage, the address given by a person in the carriage is admissible; but a statement that any dam-

5. *Inadequacy or Excessive Amount of Damages*, 9405.

(a) Nominal or Inadequate Damages, 9465.

(b) Excessive Damages, 9468.

6. *Newly discovered Evidence*, 9469.

III. MOTIONS; PROCEDURE; AND RULES, 9470.

1. *In what Court Motion may be made*, 9470.

2. *Who may move; Parties; and how Right to apply may be Precluded or Restricted*, 9472.

3. *Time for making Application; and Notice*, 9474.

4. *Affidavits and other Evidence; Argument and Determination of Motion; when granted and on what Terms; Operation and Effect*, 9477.

5. *Costs*, 9482.

6. *Appeal*, 9489.

IV. IN COUNTY COURTS. See COUNTY COURT.

V. IN CRIMINAL CASES. See CRIMINAL LAW.

I. IN WHAT CASES GRANTED; POWERS OF COURTS, IN GENERAL.

**Penal actions.**—The court has authority to, and will, grant a new trial in a penal action, though the verdict is for the defendant, where the court is satisfied that the verdict is in contravention of law, whether the error has arisen from the misdirection of the judge, or from a misapprehension of the law by the jury, or from a desire on their part to take the exposition of the law into their own hands. *Att. Gen. v. Rogers*, 11 M. & W. 670; 2 D., N. S. 1037; 7 Jur. 704; 13 L. J., Exch. 395.

It is a settled rule of practice, that a rule nisi for a new trial is not granted on the ground of the verdict being against the evidence in an action on a penal statute where the defendant has obtained the verdict. *Hall v. Green*, 9 Exch. 247; 23 L. J., M. C. 15; 2 C. L. R. 427. S. P., *Gough v. Hardman*, 6 Jur., N. S. 402.

The court will grant a new trial in a penal action, on account of a mistake or misdirection of the judge. *Wilson v. Rastall*, 4 T. R. 753. S. P., *Calcraft v. Gibbs*, 5 T. R. 19.

But not for any other cause. *Brooks q. t. v. Middleton*, 10 East, 268; 1 Camp. 450.

After a verdict for the defendant in a penal action, the court will not grant a new trial, where the verdict was contrary to the judge's direction, and founded on a mistake, if there has been no misconduct in the jury. *Rauston v. Ettaridge*, 2 Chit. 273.

**Replevin.**—Where, in replevin, the plaintiff obtained a verdict, with damages 4l. 4s., the court refused to grant a new trial, which was moved for on the ground that the verdict was against evidence, although it was insisted

that the rule, as to trifling damages, could not apply to an action of this nature. *Brown v. Ray*, 9 Moore, 583.

The rule that a new trial will not be granted for either party, where the sum given or recoverable is under 20l., does not apply to replevin. *Edgson v. Cardwell*, 8 L. R., C. P. 647; 28 L. T., N. S. 819. See *S. C.*, 7 L. R., C. P. 647.

In replevin, when the verdict is for the plaintiff, the court will not grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs. *Parry v. Duncan*, 7 Bing. 243; 5 M. & P. 19; M. & M. 533.

**Action for mesne profits.**—A new trial will not be granted in an action for mesne profits after a recovery in ejectment. *Holfast v. Morris*, 2 Wils. 115.

**Cases involving questions of general importance or great value.**—Value and importance are not of themselves sufficient grounds for granting a new trial, unless there is also some doubt in the question, though they frequently weigh in obtaining a rule to show cause why there should not be a new trial. *Vernon v. Hankey*, 2 T. R. 113.

Where there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the court does not think the verdict wrong, yet, if the inheritance is to be bound forever by the verdict, the court will grant a new trial on payment of costs. *Swinnerton v. Stafford*, 3 Taunt. 91.

The court refused to grant a rule for a new trial in an action of trespass, on the ground that the verdict was against evidence, where the damages fell below 20l., though the case was stated to be of general importance, as relating to the boundaries of a jurisdiction. *Sowell v. Champion*, 6 A. & E. 407; 2 N. & P. 627; W., W. & D. 667.

**Causes of action less than 20l.**—The rule of practice, limiting new trials to causes of action above 20l., is founded on the reason that it must be purchased by payment of costs, and applies to the plaintiff and the defendant. The only exception is, where there has been a misdirection of the jury by the judge. *Young v. Harris*, 2 C. & J. 14; 2 Tyr. 167.

Where the judge misdirected the jury, by submitting for their consideration a fact not proved nor deducible from the evidence, the court granted a new trial, though the amount in question was less than 1l. *Haine v. Davey*, 4 A. & E. 892; 6 N. & M. 356; 2 H. & W. 80.

After a verdict for less than 20l., a new trial is only granted where it can be granted without costs, e. g., for misdirection, and not where it could only be granted on payment of costs, e. g., for a verdict against evidence. *Bryan v. Phillips*, 8 Tyr. 181; 1 C. & M. 26.

Where a verdict is under 20*l.*, the court will not grant a new trial, although it be against evidence, and contrary to the opinion of the judge. *Scott v. Wilkinson*, 4 M. & P. 237. S. P., *Roberts v. Karr*, 1 Taunt. 495.

Unless the conduct of the jury has been quite outrageous. *Manning v. Underwood*, M'Clel. & Y. 266.

The rule, if the damages are under 20*l.*, applies to cases of surprise and to actions of trover. *Banson v. Didsbury*, 4 P. & D. 441; 12 A. & E. 631.

But not to actions of replevin. *Edgorn v. Cardwell*, 8 L. R., C. P. 647; 28 L. T., N. S. 819.

Where a verdict for the plaintiff is under 20*l.*, the circumstance, that other actions depend on the result of such verdict, is no reason for granting a new trial on the ground of its being against the evidence. *Leese v. Sylvester*, 12 L. J., C. P. 250.

Where the verdict is perverse, the court will grant a new trial, although the damages are less than 20*l.* *Freeman v. Price*, 1 Y. & J. 402.

To an action claiming special damage for the non-delivery of goods within a reasonable time, the defendant, admitting negligence to have been the cause of the non-delivery, paid 10*l.* into court. The judge left it to the jury to say whether this sum was a sufficient compensation for the pecuniary loss the plaintiff had sustained, pointing out that the law did not entitle him to recover under some of the heads of his claim, and that on the evidence there was no pretense for saying that he had sustained any substantial loss. The jury having given a verdict for 5*l.* beyond the sum paid into court:—Held, that the amount of damages was a question for the jury, and had been properly left to them; and although the court might think the verdict wrong, and 10*l.* enough, yet the damages recovered being less than 20*l.*, the verdict could only be disturbed on the ground of its being perverse; and as the jury had not disobeyed any directions of the judge, the verdict could not be said to be perverse, and the court could not interfere to disturb it. *Adams v. Midland Railway Company*, 81 L. J., Exch. 35; 10 W. R. 84.

As to granting new trial for inadequacy of damages recovered,—see this title, II., 5, a.

**Amendment of pleadings.**—Where, by mistake, the damages had been laid at 10*l.*, and the jury at the trial had found for the plaintiff damages 150*l.*, the court granted a new trial on payment of costs, with liberty to the plaintiff to amend. *Tebbs v. Barron*, 5 Scott, N. R. 837.

**After trial of plea in abatement.**—After a plea in abatement has been found against a defendant, the court will not grant a new trial, even on payment of costs. *Shaw v. Bishop*, 4 D. & R. 241.

**Issues from equity.**—Whether in a trial at

law, ordered by a court of equity, there has or has not been misdirection, equity is not bound by one verdict, but for its better satisfaction may direct a new trial. *Boyes v. Rosborough*, 6 H. L. Cas. 2; 3 Jur., N. S. 873.

The circumstance that the plaintiff was dead when the issue was tried, being unknown at the trial, does not afford a ground for a new trial. *Bird v. Kerr*, 4 Kay & J. 270.

The court, upon the weight of evidence, refused to grant a new trial of an issue *devisavit vel non*, although in many parts the evidence was conflicting and contradictory. *Swinfen v. Swinfen*, 5 Jur., N. S. 1276; 28 L. J., Chanc. 849; 27 Beav. 148.

**Powers of inferior courts.**—Inferior courts have, generally speaking, no right to grant new trials without the aid of a statutory power to do so. *Great Northern Railway Company v. Mossop*, 17 C. B. 130; 2 Jur., N. S. 21; 25 L. J., C. P. 22.

An inferior court cannot grant a new trial, except on the ground of fraud, or irregularity in obtaining the verdict. *Rea v. Oxford (Mayor)*, 3 N. & M. 877.

As to court in which application for new trial should be made,—see this title, III., 1.

As to new trial in county courts,—see COUNTY COURTS.

**Granting more than one new trial.**—There is no limit to the discretionary jurisdiction of the court in granting as many new trials as may seem to be proper, where the jury either mistake, or neglect, or abuse their duty, by finding from prejudice, &c. *Lopes v. De Tastet*, 8 Taunt. 712.

But where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by any rule or practice to a third trial. *Parker v. Ansel*, 2 W. Bl. 963.

Although it would be otherwise after two concurring verdicts. *Goodwin v. Gibbons*, 4 Burr. 2108.

In an action on a policy of insurance, a verdict was found for the plaintiff. A new trial was granted, on the ground that this verdict was contrary to the weight of the evidence; the plaintiff again had a verdict, upon the same evidence. On application for a third trial:—Held, that this second verdict ought not to be disturbed, as this would amount to superseding the functions of the jury, and should only be granted in a case of perverseness; *Vaughan, J., and Colman, J., dissentientibus. Foster v. Steele*, 3 Bing. N. C. 892; 5 Scott, 25; 3 Hodges, 231.

Where the circumstances of a case had been fully put into possession of a jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the judge who last tried the cause thought the evidence against the verdict preponderated, the court refused to grant a second new trial on the same ground. *Swinerton v. Stafford*, 3 Taunt. 232.

It is no ground for a new trial, that another

jury in a cause nearly similar gave a different verdict. *Spung v. Hagg*, 3 W. Bl. 803.

Where a defendant on two successive trials of the same cause of action obtained a verdict, the court set aside the last verdict, and entered a nonsuit, in order that the plaintiff, who claimed title to property which savored of the realty, might not be forever concluded from agitating his right. *Lee v. Shore*, 3 D. & R. 198.

So, after a verdict found for the defendant, the court will, in its discretion, order a nonsuit to be entered, in order that the plaintiff may not be precluded from bringing another action. *Hodgson v. Forster*, 3 D. & R. 221; 1 B. & C. 110.

## II. GROUNDS.

### 1. Surprise; Absence of Parties, Counsel, Attorneys or Witnesses; False or Unexpected Testimony.

**Surprise, in general.**—Surprise may be, not must be, a ground for a new trial. *Edie v. E. I. Company*, 1 W. Bl. 298; 2 Burr. 1216.

Unless practice or fraud on the part of the plaintiff is shown, the court will not disturb the verdict on the ground of surprise. *Bransdon v. Didsbury*, 9 D. P. C. 199; 1 W. P. C. 46.

**Trial without notice or out of turn; or in absence of parties, counsel or attorneys.**—Where a cause, which was expected to last the whole day, was postponed, and an indictment for libel, which stood next in the paper, was tried out of its turn, and the defendants were found guilty, the court refused a new trial, on the ground of surprise. *Reg. v. Richardson*, 8 D. P. C. 511.

Where a verdict was obtained in the absence of the defendant, on account of no notice of trial being given, the court set aside the verdict, though he did not swear positively to a good defense on the merits. *Williams v. Williams*, 2 D. P. C. 350.

Where a cause which stood thirty off was taken out of its turn, as undefended, in the absence of the defendant's attorney, who was casually absent, no notice having been given that it would be taken as an undefended cause, the court set the verdict aside, and granted a new trial. *Aust v. Fenwick*, 2 D. P. C. 246.

The court will not grant a new trial upon an affidavit by the defendant, stating that he was kept in ignorance by his late attorney of the state of the action, that he had a good defense upon the merits, and that the verdict passed against him by reason of the negligence of such attorney. *Moody v. Dink*, 4 N. & M. 348.

If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the court will grant a new trial, compelling his attorney to pay the costs as between attorney and client out of his own pocket. *De Rouffigney v. Peale*, 3 Taunt. 484.

A cause being entered, in a written list of the day, at nisi prius, is notice to the attorney that it may be tried at any time in the course of the day: therefore, where a cause had been for several days in that list, and tried out of its order as an undefended cause, in the absence of the defendant's attorney, the court granted a new trial, on the terms of payment of the costs of the former. *Fourdrinier v. Bradbury*, 3 B. & A. 328.

At the assizes in Yorkshire, the causes are entered by the marshal in two lists, one for the E. R. and the other for the W. R. A cause having by mistake been entered in the wrong list, was tried as an undefended cause, the defendant's attorney having searched only one list, without finding it; the court granted a new trial, and held, that the attorney was not bound to search both lists. *Hunter v. Hornblower*, 3 D. P. C. 491.

Where a cause was set down in the written list at nisi prius, and taken out of its turn as an undefended cause, and was tried as such, in the absence of the defendant's counsel and attorney, who were instructed to defend; the court refused to grant a new trial, without an affidavit of merits, though moved for on payment of costs. *Blackhurst v. Bulmer*, 1 D. & R. 553; 5 B. & A. 907.

A cause in which counsel had been instructed for the defendant, having been called on out of its turn, upon an allegation of the plaintiff's counsel that it was undefended, and a verdict taken for the plaintiff before the defendant's counsel arrived, the court granted a new trial, the costs of the application to abide the event of the cause. *Dorrien v. Hensell*, 6 Bing. N. C. 245; 8 Scott, 508; 8 D. P. C. 277.

Where a cause was called on in its turn for trial, and no attorney being present, and no counsel instructed, on behalf of the plaintiff, he was nonsuited, the court granted a new trial, on payment of the costs of the day by the attorney for the plaintiff out of his own pocket, together with the costs of the application, to the defendant. *Townley v. Jones*, 6 Jur., N. S. 1158; 20 L. J., C. P. 299.

When a defendant has appeared by attorney and has not regularly displaced him, notice to such attorney, after an intimation from him that he has no instructions to defend the action, that it will be taken as an undefended case, will, if there is time for a counter-notice of an intention to defend, warrant the plaintiff in taking the case as undefended, although out of its order, on the morning of the day after the opening of the commission. *Lett v. Watkins*, 27 L. J., Exch. 319.

At the sittings after term in London, a cause was entered in the list of causes for trial in the second court of nisi prius. Notice was given in that court, during the temporary absence of the defendant (who appeared in person), that it would be taken in the first court, and after some interval of time, it was accordingly then called on, and (the defendant not appearing) was taken as undefended. It did not appear that the defend-



ant had been called in the second court. The court granted a new trial. *Cook v. Bearlself*, 29 L. J., Exch. 35.

The court will not grant a new trial, even on payment of costs, where the defendant or his attorney, having an opportunity of trying, permits a verdict to be taken against him, as in an undefended cause. *Breach v. Custerton*, 7 Bing. 242; 4 M. & P. 867.

The court refused to grant a new trial, on the ground that the cause had been called in the absence of the defendant's attorney, and that the plaintiff's case had been gone into, no one appearing on the other side, the affidavits on which the motion was founded not stating that any briefs had been prepared for counsel. *Gwilt v. Cranley*, 1 M. & Scott, 229; 8 Bing. 144.

While a cause stood on the paper for trial, the plaintiff having obtained an order to amend (which was, in fact, unnecessary), the defendant took out a summons to rescind that order for irregularity, and an order to that effect was obtained; while the second order was in discussion at chambers, the cause was tried, and the plaintiff obtained a verdict: the court refused to grant a new trial, without an affidavit of merits. *Clark v. Manns*, 1 D. P. C. 656.

Where a cause was taken out of its turn, and in the absence of the defendant, at the suggestion of the plaintiff, that it was a short one, the court refused to set aside the verdict. *Cottam v. Banks*, 1 B. C. Rep. 902; 11 Jur. 148—Erie.

Where a cause has been regularly tried as undefended, and a verdict taken for the plaintiff, in the negligent absence of the defendant's attorney, the court will grant a new trial on an affidavit of merits, but only on payment of costs. *Third v. Goodier*, 1 L. M. & P. 717—Exch.

The plaintiff in an action for crim. con. having been nonsuited, in consequence of the accidental absence of his attorney, the court granted a new trial on payment of costs as between attorney and client, it appearing that another action might be barred by the Statute of Limitations, and plaintiff be thereby precluded from taking ulterior proceedings. *Ayling v. Goldring*, 1 C. B. 685.

Where a cause was tried in the absence of the defendant's attorney, before the time specified in the notice of trial, the court set aside the verdict without an affidavit of merits. *Hindlow v. Wilks*, 5 D. P. C. 295.

A new trial may be granted in ejectment, upon payment of costs, and other equitable conditions, where the cause coming on unexpectedly has been tried as an undefended cause. *Doct. Cooling v. Appleby*, 4 P. & D. 538; 9 D. P. C. 556.

The court refused to grant a new trial upon any terms where the cause had been taken (in its proper course) in the absence of the defendant's counsel, the defense intended to be set up being without equity. *Blogg v. Bouquet*, 6 C. B. 75.

Where a cause was taken out of its turn,

upon the statement of the plaintiff's counsel that it was undefended, and it appeared that counsel had been instructed for the defendant, but that notice that the cause would be defended was not served till late on the previous night, the court granted a new trial, upon payment of the amount of damages into court, the costs of the trial and of the application to abide the event. *De Medina v. Sharpnell*, 12 L. J., C. P. 37.

When a cause has been entered for trial as undefended, it is the duty of the plaintiff's attorney, upon notice from the defendant of his intention to defend, to inform the court that the cause will be defended; and if it afterwards is tried as undefended, out of its proper turn, a new trial will be granted without an affidavit of merits. *Wolff v. Goldring*, 44 L. J., C. P. 214; 23 W. R. 473; 32 L. T., N. S. 161.

**Absence of evidence at the trial.**—A new trial is never granted on the ground that a party did not give evidence which he might have produced. *Coke v. Berry*, 1 Wils. 98.

Nor to let the party into a defense of which he was apprised at the first trial. *Vernon v. Linkey*, 2 T. R. 113.

And it will be considered that papers, which were in the possession of the party, and which with due diligence might have been produced, are not in the nature of evidence subsequently discovered. *Dizon v. Graham*, 5 Dow, 267.

Where a plaintiff had been nonsuited on the ground of a non-production of a bill of exchange, the court granted a new trial, upon an affidavit stating that the bill had been out of the jurisdiction of the court; had been sent for in due time, but not received until too late for the trial; and that it was then in the plaintiff's possession. *Atkins v. Owen*, 4 N. & M. 123.

After a full trial by a competent jury, if no fresh light can be thrown in, a new trial will not be granted. *Camden v. Couley*, 1 W. Bl. 418.

So, if there appears on the whole evidence enough to sustain the verdict found, independently of the facts brought into doubt, the court will not interfere and order a new trial, although the right is bound. *Hartwright v. Budham*, 11 Price, 383.

But if the question has never been fully before the jury, a new trial will be granted. *Rees v. Malden*, 4 Burr. 2135.

The court will not grant a new trial to let in evidence negativing the consent of a minor's parent in an action depending on the validity of a marriage, when that evidence might have been produced at the first trial. *Doct. James v. Price*, 1 M. & R. 683.

A new trial will not be granted because the counsel thought it prudent to omit evidence which they had in their briefs. *Spong v. Hogg*, 2 W. Bl. 802.

For a client is bound by the conduct of his advocate; and the court will not grant a new trial on the ground that the witnesses were

by his parents for his cure. *Collins v. Leffore*, 1 F. & F. 436.—Coleridge.

In an action by a child to recover damages for injuries purely personal, where the jury assess the damages, presumably on the ground that the child would never be capable of earning his own living, the court refused to grant a new trial on account of the death of the child after verdict given and before judgment signed. *Kramer v. Waymark*, 4 H. & C. 427; 1 L. R., Exch. 241; 12 Jur., N. S. 395; 85 L. J., Exch. 148; 14 W. R. 659; 14 L. T., N. S. 868.

As to damages recoverable in actions for causing death by negligence,—see this title, V., 4.

#### V. ACTIONS FOR CAUSING DEATH BY NEGLIGENCE.

##### 1. When maintainable; Nature of Action; and Jurisdiction.

**Statutes.**—[The 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act), after reciting that no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts, that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

By s. 2, every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased;

And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; to the parties respectively for whom and for whose benefit such action shall be brought;

And the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

By s. 3, provided always, that not more than one action shall be for and in respect of the same subject-matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

By s. 4, in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his

attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

By s. 5, the following words and expressions are intended to have the meanings hereby assigned to them respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter; that is to say, words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word person to bodies politic and corporate, and parent shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word child shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

By 27 & 28 Vict. c. 95, s. 1, if and so often as it shall happen at any time or times in any of the cases intended and provided for by the 9 & 10 Vict. c. 93, that there shall be no executor or administrator of the person deceased, or, there being such executor or administrator, no such action as in the said act mentioned shall, within six calendar months after the death of such deceased person as therein mentioned, have been brought by and in the name of his or her executor or administrator, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator.

By s. 2, it shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under the said act for his wrongful act, neglect or default, without specifying the share into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.]

**Nature and form of the action; and when maintainable, generally.**—The 9 & 10 Vict. c. 93, gives an action to the representative of a person killed by negligence only where, had he survived, he himself at common law could have maintained an action against the person guilty of the negligence. *Senior v. Ward*, 5 Jur., N. S. 172; 25 L. J., Q. B. 139; 7 W. R. 261; 1 El. & El. 883.

Therefore, where a miner was killed by the neglect of a rule made under 18 & 19 Vict. c. 108, for testing the sufficiency of the rope by which the miners were let down the shaft into the mine, which neglect, being known by the

owner of the mine, would have rendered him liable, though the death was chiefly caused by the negligence of a fellow-servant:—Held, that the deceased having known of the rule for testing the rope, and of the violation of it, and having been warned to examine the rope, an action could not be maintained against the owner of the mine for compensation. *Id.*

A master builder, having contracted to build a certain building, employed A. as a bricklayer. The scaffolding was erected under the superintendence of the master's foreman, he not being present, and was constructed by men in his employ, who used an unsound ladder pole, in consequence of which the scaffold broke while A. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman:—Held, that no action could be maintained against the master builder, there being no evidence that the foreman was an improper person to employ for that purpose. *Wigmore v. Jay*, 5 Exch. 354; 14 Jur. 837; 19 L. J., Exch. 290.

An action on the above statute can only be maintained where the deceased could have maintained the action if alive; therefore, if in an action where the death is alleged to have been caused by the negligence of the defendant's servants, it is shown that the deceased, by his own negligence or carelessness, contributed to the accident, the defendant would be entitled to a verdict. *Tucker v. Chaplin*, 2 C. & K. 790—Denman.

The 9 & 10 Vict. c. 93, gives to the personal representative of the person killed by the wrongful act, neglect, or default of another, not an independent cause of action, but a right of action, when there was a subsisting cause of action at the time of the death. *Read v. Great Eastern Railway Company*, 9 B. & S. 714; 37 L. J., Q. B. 378.

To a declaration on that statute, accord and satisfaction with the deceased in his lifetime is a good plea. *Id.*

When a passenger on a railway was injured by an accident, and after an interval died in consequence:—Held, that his executrix might recover, in an action for breach of contract against the company, the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. *Bradshaw v. Lancashire and Yorkshire Railway Company*, 10 L. R., C. P. 189; 44 L. J., C. P. 148; 31 L. T., N. S. 847.

**Jurisdiction.**—The provisions of the act extend to a case where the person in respect of whose death damages are sought to be recovered was an alien, and was at the time of the wrongful act, neglect, or default which caused his death on board a foreign vessel on the high seas. *The Explorer*, 3 L. R., Adm. 289; 40 L. J., Adm. 41.

In an action under 9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95, where the death of a

person occurred in the course of his employment on board a steamer belonging to a railway company, during the passage from Milford to Waterford, it was alleged that the boiler explosion, which occasioned the accident, was caused by the corrosion of part of the machinery, and that the process of corrosion extended over a period during which the steamer had been several times in Ireland:—Held, that no part of the cause of action was shown to have arisen within the jurisdiction of the Irish court. *Walsh v. Great Western Railway Company*, 6 Ir. R., C. L. 532—Exch.

**Effect of recovery as bar or estoppel to subsequent actions.**—The widow and administratrix of a man who was alleged to have died in consequence of a railway accident, brought an action against the railway company for the benefit of herself and his children, and recovered damages. She afterwards brought another action, suing again as administratrix, for the benefit of the estate, to recover costs of medical attendance during his lifetime. The company having raised again certain issues which had been determined against them in the former action, she replied that they were estopped from so doing:—Held, that they were not estopped, as the two actions were not brought by her in the same right, the action under Lord Campbell's Act being a statutory action in which she sued as trustee for a specific class of persons, and therefore not brought in the same right as an ordinary action by an administratrix. *Leggott v. Great Northern Railway Company*, 45 L. J., Q. B. Div. 557; 24 W. R. 784; 1 L. R., Q. B. Div. 599; 35 L. T., N. S. 334.

A judgment recovered by a widow, as an administratrix of her husband, for damages for his death, through the negligence or breach of duty of the defendant, is no bar to a subsequent action by her as administratrix of her husband, to recover damages for injuries arising from the same cause to his personal property. *Barnett v. Lucas*, 6 Ir. R., C. L. 247—Exch. Cham.; affirming *A. C.*, 5 Ir. R., C. L. 140—C. P.

A claim by an administratrix to recover damages for injuries to personal chattels of the intestate, is sustained by proof of injuries to machinery firmly attached, by bolts and screws, to the walls and floors of a building held by the intestate as a tenant from year to year, and in the nature of trade fixtures removable as between landlord and tenant. *Id.*

## 2. Parties.

**Who entitled to sue, in general.**—In order to maintain an action under 9 & 10 Vict. c. 93, Lord Campbell's Act, the persons upon whose behalf it is brought must prove that during the lifetime of the deceased a pecuniary advantage accrued to them owing to their relationship with him; they are not entitled to compensation under that statute, if the

**Rulings as to stamps on documents.**—[By 17 & 18 Vict. c. 125, s. 81 no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp.]

This provision does not apply where, on an objection being taken to the sufficiency of the stamp on a document, the judge, with consent of the parties, abstains from expressing an opinion on the point, and reserves it for decision in banc. *Eames v. Smith*, 1 Jur., N. S. 1025—Exch.

A judge holding a document admissible which has been objected to for insufficiency of stamp, ought not to reserve the question of sufficiency for the court. *Siordet v. Kucinski*, 17 C. B. 251; 25 L. J., C. P. 2.

**Improper admission or rejection of evidence.**—The court will not permit a party to move for a new trial on an objection to the applicability of evidence, unless the objection was taken before the judge commenced his summing up. *Abbott v. Parsons*, 7 Bing. 563; 5 M. & P. 521.

The court will not grant a new trial on the ground that evidence has been admitted which ought to have been rejected, if, exclusive of such evidence, there is enough to warrant the finding of the jury. *Doe d. Teynham v. Tyler*, 6 Bing. 561; 4 M. & P. 877.

Where improper evidence is received, and a verdict given for the party adducing it, the court will grant a new trial, although there is no other evidence on the same point in favor of the same party, unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence. *Wright v. Doe d. Tatham*, 7 A. & E. 313. S. P., *Baron de Buteau v. Farr*, 4 A. & E. 53; 5 N. & M. 617; 1 H. & W. 735.

Where, in ejectment, evidence was received in favor of the plaintiff, which was inadmissible, but all objections and exceptions were reserved for the opinion of the court, by the consent of both parties:—Held, that the defendant was not entitled to a new trial without payment of costs, on the ground of the reception of this evidence, if the legal evidence admitted showed the title to be in the lessors of the plaintiff; as, upon such a reservation, the court is called upon to decide whether the lessors of the plaintiff are entitled to recover or not. *Doe d. Gilbart v. Ross*, 7 M. & W. 102.

Where an objection is taken to the admissibility of evidence, but such objection is not afterwards pressed, and no subsequent application is made to have it struck out, the circumstance of its having gone to the jury is no ground for a new trial, even though it should appear in the result to have been on particular grounds open to objection. *Ferrand v. Miligan*, 10 Jur. 6; 15 L. J., Q. B. 103.

When an instrument in writing, legiti-

mately admitted in the course of a case, raises a latent ambiguity, evidence to explain such ambiguity is admissible; but if there is, in truth, no latent ambiguity, and the evidence to explain is consequently inadmissible, still the improper admission of such evidence would not be a ground for a new trial, because the writing would then be for the court to construe without regard to the evidence. *Bruff v. Conybeare*, 13 C. B., N. S. 268; 9 Jur., N. S. 78.

Where evidence is rejected which is tendered for one purpose, and it is inadmissible for that purpose, but is admissible in another view of the case not alluded to at the trial, the court will not grant a new trial upon an improper rejection of evidence. *Rea v. Grant*, 3 E. & M. 106; 5 B. & Ad. 1081.

The rejection of evidence, which, if admitted, would not alter the case, or establish any fact not already proved by other means, is not a ground for a new trial. *Alexander v. Barker*, 2 Tyr. 140; 2 C. & J. 133.

Where evidence has been improperly rejected, the court will grant a new trial, unless with the addition of the rejected evidence a verdict given for the party offering it would be clearly and manifestly against the weight of evidence. *Crace v. Barrett*, 1 C., M. & R. 919; 5 Tyr. 458.

When evidence tending to establish a point already supported by more direct proof is improperly rejected, the court will not grant a new trial on that ground, if it sees that the case would not have been advanced further by admitting the particular piece of evidence. *Doe d. Welsh v. Langfield*, 16 M. & W. 497.

The mere fact of a document being admitted, though not legal evidence, the items enumerated in which were proved by other evidence, is no ground for granting a new trial. *Stindt v. Roberts*, 2 B. C. Rep. 212; 5 D. & L. 460; 12 Jur. 518; 17 L. J., Q. B. 166—Erie.

If a document is offered on one ground which is untenable, and is rejected, and after the trial it is discovered that the document might have been offered on another ground, which was a good one, the court will not grant a new trial. At all events, not unless manifest injustice would ensue, and the party could not by due diligence have offered the document on the proper ground at the trial. *Doe d. Kinglake v. Bovies*, 7 C. B. 450; 18 L. J., C. P. 128.

In trespass quare clausum fregit, on a plea of a right over the locus in quo, a witness for the plaintiff, in cross-examination, spoke of the exercise of the same right by other persons besides the defendant; on his re-examination he gave evidence of the exercise of the right over places other than the locus in quo, and the jury found for the plaintiff:—Held, that the improper reception of this evidence was no ground for a new trial on the part of the defendant; the judge ought to have been requested to expunge it from his notes at the

**al.** *Blewitt v. Tregonning*, 3 A. & E. 554; 11. & W. 432.

To entitle a party to a new trial on the ground of the rejection of evidence, it must appear not merely that it was offered and not received, but that the judge was given to understand that its reception was pressed, and that he deliberately rejected it. *Whitehouse v. Hemmant*, 27 L. J., Exch. 295.

A new trial cannot be granted on the ground that documents have been improperly held protected from production, if it appears that they were irrelevant to the issue, or not admissible. *Beatson v. Skene*, 29 L. J., Exch. 480; 5 H. & N. 838.

The court refused to go into the question of improper rejection of a document, on the ground that it did not appear by the judge's notes that the document had been formally tendered in evidence. *Campbell v. Loader*, 3 H. & C. 520; 11 Jur., N. S. 286; 84 L. J., Exch. 50; 13 W. R. 848; 11 L. T., N. S. 608.

Where an objection is taken to the reception of a document on the ground of the want of a stamp, and the objection is allowed by the judge and the evidence rejected, it is the duty of counsel, intending to rely on such rejection as a ground for a new trial, to object to the rejection of the document after the judge's decision that it requires a stamp, and formally to tender the document in evidence, and to require a note to be taken of the tender and its rejection; and failing to do so, the rejection cannot afterwards be made available as a ground for a new trial. *Id.*

Where documents are put as the defendant's evidence in the course of the plaintiff's case, without objection on the part of the plaintiff, they are to be taken as the defendant's evidence, and as received by consent, and their reception cannot be subsequently made a ground for a new trial; the question whether the issue raised on the record called for any evidence on the particular point, being quite a distinct and separate question. *Id.*

In an action for false imprisonment, where a verdict with 200*l.* damages was given for one night's confinement in a prison, evidence of a trespass by the defendant on the goods of the plaintiff, arising out of the same transaction, committed on the following day, was admitted, for the purpose of showing that the defendant was actuated by malice:—Held, to be no ground for granting a new trial. *Edgell v. Francis*, 1 M. & G. 222.

A verdict ought not to be disturbed for the reception of illegal evidence which had no effect whatever upon the result of the trial. *McCreesh v. McGeough*, 7 Ir. R., C. L. 234—Exch.

A new trial will not be granted for evidence prematurely admitted, but which becomes admissible in the course of a trial. *Found v. Wallace*, 35 L. T., N. S. 861—Q. B. Div.

In an action against the defendant for non-payment of money for a machine, the defense was that the machine was faulty in its construction. In opening the case plaintiff's

counsel, in order to show that the defense was not bona fide, proposed to read in evidence a letter written by W., the defendant's son, who had the management of the machine, and alone corresponded with the plaintiff. Subsequently, W., who was in court, was called as a witness by the defendant, but asked no question; the judge then ruled that the letter was receivable in evidence against the defendant. A verdict was found for the plaintiff, and the defendant having applied for a new trial:—Held, that whether or not the evidence was admissible in the first instance, it subsequently became so by W. being called as a witness, and the fact that W. was not examined by the party calling him, nor asked whether he had acted bona fide, made no difference. *Id.*

### 8. Other Rulings upon Trial; Nonsuits; Directions to Jury.

**Ruling as to right to begin.**—An incorrect ruling as to the proper party to begin is no ground for a new trial, unless it also appears that substantial injustice or manifest injury has resulted from it. *Brandford v. Freeman*, 5 Exch. 784; 14 Jur. 987; 20 L. J., Exch. 36; *Hickman v. Fernie*, 3 M. & W. 506; *Edwards v. Matthews*, 4 D. & L. 721; *Doe d. Bather v. Brayne*, 5 C. B. 635; *Booth v. Milne*, 4 D. & L. 52; 15 L. J., Exch. 354.

**Granting or refusing nonsuit.**—Where a plaintiff had been nonsuited upon the opening speech of his counsel, and it was afterwards shown by affidavit that his witnesses could have proved a good cause of action, not stated in the opening speech, the court granted a new trial upon payment of costs. *Edger v. Knapp*, 5 M. & G. 753; 6 Scott, N. R. 707; 1 D. & L. 73; 7 Jur. 583.

Where a defendant applies to the judge for a nonsuit, on the ground that the contract declared on is not proved, and he declines to nonsuit, but reserves the point, and the jury finds for the defendant, it is competent to him to set up the objection taken at the trial, in answer to a rule for a new trial obtained by the plaintiff, on the ground that the verdict is against evidence. *Mummary v. Paul*, 1 C. B. 316.

A plaintiff who chooses to be nonsuited in order to avoid an impending verdict for the defendant, cannot have a new trial on the ground that there was evidence to go to the jury. *Austin v. Evans*, 2 M. & G. 430.

In an action by an allottee in a projected railway, upon the failure of the scheme, for the recovery of his deposit, where he had executed the subscribers' deed, there being no evidence that such execution was obtained by fraud, the defendant, under the direction of the judge, obtained a verdict:—Held, that as the plaintiff should have been nonsuited, a rule for a new trial ought not to be granted, although some observations made by the judge to the jury, as to what would constitute fraud, might not be legally correct; but in such

a case the court will grant a rule to enter a nonsuit. *Atkinson v. Pocock*, 1 Exch. 796.

Where a judge reserves facts for the opinion of the court with the consent of the parties, such facts are in the nature of a special case; and if the verdict can stand consistently with those facts, though they might lead to an opposite conclusion, the court in its discretion will order the verdict to stand rather than grant a new trial, which could only end in the same verdict with additional expense. *Dyer v. Cowley*, 12 Jur. 776; 17 L. J., Q. B. 360.

**Instructions to jury; misdirection or non-direction of judge, generally.**—To entitle a party to a new trial on the ground of misdirection, it must be shown that the jury has been thereby induced to form a wrong conclusion. *Newcastle v. Broxtowe*, 1 N. & M. 598; 4 B. & Ad. 273.

Where a new trial is moved for on the ground of a misdirection in point of law, if the court sees that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmonson v. Machell*, 2 T. R. 4.

It is no ground for a new trial that the judge, in his summing up, omitted specially to leave to the jury a point made in the course of the trial, if the whole case was substantially left to them. *Robinson v. Gleadow*, 2 Scott, 250; 2 Bing. N. C. 156; 1 Hodges, 245.

It is not a misdirection, if the judge refers the jury to their own knowledge of any particular facts, which have been proved as matter of illustration only, and not as matter of evidence. *Rez v. Sutton*, 4 M. & S. 582.

A direction, partially incorrect, is not a ground for a new trial, where the verdict is consistent with the justice of the case. *Wickes v. Clutterbuck*, 2 Bing. 488; 10 Moore, 68.

If the plaintiff's counsel acquiesces in the judge's ruling, whereby the defendant takes a verdict without going into his case, the plaintiff will not be afterwards permitted to move for a new trial on the ground of a misdirection. *Robinson v. Cook*, 6 Taunt. 336.

If upon the judge directing the jury to give nominal damages, the plaintiff elects to be nonsuited, he will not be permitted to have a new trial, upon the ground of a misdirection in that point. *Butler v. Dorant*, 3 Taunt. 229.

It is no ground for a new trial for misdirection, that the judge expresses a strong opinion upon the facts either way; the whole being left to the discretion of the jury, where the question is one peculiarly for their consideration. *Belcher v. Prittie*, 4 M. & Scott, 295; 10 Bing. 408. S. P., *Foster v. Steele*, 5 Scott, 38.

Where a jury had not acted according to a misdirection, but had given damages, the court would not grant a new trial, on the ground of the misdirection. *Twigg v. Potts*, 1 C., M. & R. 89.

The judge directed the jury, if they came to a certain conclusion, to give their verdict for the plaintiff; but if they came to either of two other conclusions, which he pointed out, to find for the defendant, and state on which ground their judgment was formed. The plaintiff then chose to be nonsuited.—Held, that he was not entitled to a new trial on account of misdirection, if either of the two latter points was rightly put to the jury. *Vacher v. Cocke*, 1 B. & Ad. 145; M. & M. 353.

In trespass *quare clausum fregit*, there was a plea claiming a right by custom, and another by prescription, and several others by non-existing grants; the judge called the attention of the jury to the nature of the mode of claim, and told them that, in order to support the prescription, exclusive enjoyment was necessary.—Held, that it was no misdirection, as the expression "exclusive" was used to point their attention to the different nature of the claim by custom as a public right, and by prescription as a private right. *Blowitt v. Tregonning*, 3 A. & E. 554; 1 H. & W. 432.

If a judge, on leaving to the jury a question partly depending upon the construction of an act of parliament, does not give the jury an explanation of the meaning of the act sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection. *Elliott v. South Devon Railway Company*, 17 L. J., Exch. 262; 2 Exch. 725.

It is no misdirection if the judge states in strong terms the impression which the evidence has made upon his mind, unless it is clearly shown that the impression was not warranted by such evidence. *Davidson v. Stanley*, 3 Scott, N. R. 49; 2 M. & G. 721.

Where the plaintiff's case was clearly supported by a qualified admission made by the defendant.—Held, no misdirection, that the judge did not distinctly tell the jury that the whole admission must be taken together. *Beckham v. Osborn*, 6 M. & G. 771; 7 Scott, N. R. 520.

The court will not grant a defendant a new trial where there has been a misdirection with respect to one item only of the plaintiff's demand, and the plaintiff consents to reduce the damages by the whole sum in respect of which the misdirection took place. *Mere v. Tuckwell*, 1 C. B. 607; 15 L. J., C. P. 153.

Where a judge mistakes the law upon a collateral point, upon which a bill of exceptions would not lie, a new trial will not be granted as of right, but the court will exercise its discretion according to its opinion of the result being in accordance with the justice of the case. *Black v. Jones*, 6 Exch. 218; 20 L. J., Exch. 152.

A mistaken ruling as to a matter collateral to the issue, not being ground for a bill of exceptions, will never be made ground for a new trial, unless the court can see that injustice has been occasioned by the mistake. *Honman v. Lester*, 12 C. B., N. S. 776; 9 Jur., N. S. 601.



It is no ground for a new trial that the judge leaves to the jury as a question of fact at which he should himself have decided a matter of law, unless the objection is presented to the notice of the judge. *Doe d. Strickland v. Strickland*, 8 C. B. 724.

A wrong observation by a judge on a matter of fact, which is left as a question of fact to the jury, is no ground for a new trial. *Taylor v. Ashton*, 11 M. & W. 401; 13 L. J., Exch. 363.

It is no ground for setting aside a verdict but the judge in summing up has commented, however strongly, on the arguments made use of by the counsel for the unsuccessful party in his address to the jury. *Darby v. Ouseley*, 1 H. & N. 1; 2 Jur., N. S. 497; 25 L. J., Exch. 227.

The defendant's counsel rested the defense exclusively on one issue, and after verdict on that, objected that the judge had omitted to notice a point of law not arising on that issue but on another:—Held, that he had precluded himself from the objection, and could not afterwards treat the judge's omission as a misdirection. *Hurler v. Carpenter*, 27 L. J., C. P. 1.

When counsel at a trial does not ask that a point should be submitted to the jury, but gets leave to move reserved, he cannot afterwards ask for a new trial on the ground that that point was not submitted to the jury. *Morgan v. Couchman*, 14 C. B. 100; 23 L. J., C. P. 36.

The circumstance of the judge having left an immaterial question to the jury, with a direction that, if they find it one way, they must return a verdict for the defendant, does not entitle the plaintiff to a new trial, if upon all the other undisputed facts of the case the defendant is clearly entitled to the verdict. *Clarke v. Allen*, 16 C. B. 227; 1 Jur., N. S. 710; 24 L. J., C. P. 162.

When counsel for the defendant advisedly abstained from submitting to the jury a question of fact which was open upon the pleadings, and which, if answered in his favor, would have entitled him to the verdict, and the judge also abstained from noticing it in his summing up, the court refused to grant the defendant a new trial as for a misdirection. *Martin v. Great Northern Railway Company*, 16 C. B. 179; 1 Jur., N. S. 613; 24 L. J., C. P. 209.

On the trial of an action for slander, before the plaintiff's counsel stated his case, the judge, in the hearing of the jury, suggested to the parties that it would be better to withdraw a juror. This was declined, and the jury found a verdict for the defendant:—Held, that this observation of the judge was not calculated improperly to sway the jury to give their verdict for either of the parties. *Lloyd v. Jones*, 6 B. & S. 475.

Non-direction is only a ground for granting a new trial where the verdict is against the weight of evidence. *Ford v. Lacey*, 30 L. J., Exch. 852; 7 Jur., N. S. 684. S. P., *Great Western Railway Company of Canada v. Braid*,

1 Moore P. C. C., N. S. 101; 9 Jur., N. S. 839; 11 W. R. 444; 8 L. T., N. S. 81.

The refusal by a judge to direct a jury to find for the plaintiff or for the defendant does not constitute misdirection. The evidence on which his refusal was founded and the reasons for impeaching it must be stated to him at the time. *Greene v. Baleman*, 5 L. R., H. L. Cas. 591.

In an interpleader issue B. claimed iron as his property. The iron had been seized under a fi. fa. issued at the suit of F., a judgment creditor of a railway company, in whose possession the iron was when the seizure took place. The evidence showed that the company had obtained possession of the iron through the act of G. and K. These persons had purchased it from B., and had given bills for it, which were in danger of not being honored. In that state of circumstances they represented to B. that if he would allow them to have possession of it and to hand it over to the company, the company would become in a position to exercise its borrowing powers under its act, and G. and K.'s bills could then be honored. B. said that he would consent, provided that his rights were not impaired. B.'s agent accordingly delivered the iron to G. and K., who then put it into the possession of the railway company, after which it was taken in execution under the fi. fa. At the trial of the interpleader issue the defendant's counsel contended that by the transfer of the iron with the bills of lading the property had completely passed to the railway company, and on that ground called on the judge to direct a verdict for that company. The judge refused, and the jury found a verdict for B. This verdict was sustained in the Queen's Bench on motion for a new trial; and the Exchequer Chamber affirmed that decision. On appeal it was contended that B.'s permission to allow the iron to be put into the possession of the railway company was an illegal contrivance to evade the provisions of the company's act, and thus enable a cheat to be practiced upon the persons from whom the company proposed to borrow money, and being so, deprived B. of the right to assert his title to the iron, which he had, for such fraudulent purpose, allowed to be transferred to the company, and that the judge had been guilty of a misdirection in not directing on this ground a verdict for the defendant:—Held, that this objection, which had not been raised at the trial, could not now be received; that such objection ought to have been presented and substantiated by evidence at the trial; that on it the judge should have been called on to give his direction to the jury; and that as nothing of this sort had been done there was no misdirection. *Id.*

It is for a party showing cause against a rule for a new trial on the ground of misdirection to show that the alleged misdirection did not cause a miscarriage of justice; and he must show it by authentic evidence. *Anthony v. Halstead*, 37 L. T., N. S. 438.

**Directions as to damages and costs.**—It is no ground for setting aside a verdict, that the jury has given only a shilling damages, under a mistaken impression that it would carry costs. *Mears v. Griffin*, 2 Scott, N. R. 15; 1 M. & G. 796.

In an action for a libel tending to ridicule the plaintiff, a sheriff's officer, in his calling, the judge told the jury that the publication was libelous. The jury asked what sum would carry costs, and being told that a shilling would, returned a verdict for the defendant: the court granted a new trial. *Levy v. Miles*, 12 Moore, 418; 4 Bing. 195.

If the judge does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the court will direct a new trial, although the point was not taken by the plaintiff's counsel. *Knight v. Egerton*, 7 Exch. 407.

Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley v. Buxendale*, 9 Exch. 241; 9 O. L. R. 517; 18 Jur. 353; 23 L. J., Exch. 179.

In an action for breaking and entering the plaintiff's close, the plaintiff relied upon the bare possession, though it appeared that he had originally become possessed as tenant to W. under a written agreement. The defendant proved that five days after the commencement of the trespass he obtained a lease of the close from W., which he produced. The judge told the jury that in the absence of proof of the quantum of the plaintiff's interest in the premises he was only entitled to nominal damages:—Held, no misdirection. *Twyman v. Knowles*, 13 C. B. 223.

The judge told the jury that if they gave the plaintiff more than 40s., he could not influence the costs, but if they gave him less than 40s. each party would have to pay his own costs:—Held, no misdirection. *Id.*

The counsel for the plaintiff told the jury that unless they gave damages for 5l. 5s., in all probability the costs would be thrown upon the plaintiff:—Held, that he was wrong in so doing, and that the jury, in estimating damages, had no right to take into their consideration what amount will carry costs, the question of costs being with the judge. *Poole v. Whitcombe*, 3 F. & F. 79; 10 W. R. 782; 6 L. T., N. S. 783—C. P.

Although if a jury asks what amount of damages will carry costs, there is no reason why the judge should not inform them, yet giving a verdict in ignorance that it will not carry costs, is no reason why, after an application for a certificate which implies that the verdict is recorded, the verdict should be disturbed. *Kilmore v. Abdoolah*, 27 L. J., Exch. 807.

Where the judge, in the presence of the counsel, directs a verdict for the defendant, but at the same time tells the jury to assess

damages for the plaintiff contingently, and the counsel do not object, it is not competent to the plaintiff afterwards to move for a new trial on the ground of a misdirection; he can only move to enter a verdict for the damages so contingently assessed. *Booth v. Clive*, 10 C. B. 827. S. P., *Morris v. Murray*, 13 M. & W. 52.

#### 4. *Disqualification, Irregularities or Mischance of or affecting Jury; Verdict against Evidence or Law.*

**Disqualification of or irregularities in summoning or impaneling jurors.**—The attorney for the defendant being the under-sheriff, and having summoned the jury, is no ground for a new trial after verdict for the defendant in a case of contradictory evidence. *Mason v. Vickery*, 1 Smith, 304.

The fact of the person acting as deputy for the sheriff, being the attorney for the defendant, is not a ground for a new trial. *Drigg v. Sowton*, 9 D. P. C. 105; 1 W. P. C. 3; 4 Jur. 1014.

After a trial has been had, the court will not grant a venire de novo, on an allegation that the jury has been convened by the partner of the plaintiff's attorney; at least without proof that the party who objects was not aware of the fact at the trial. *Brundell v. Giles*, 9 Bing. 13; 2 M. & Scott, 41.

A jury retired to consider their verdict, and upon their returning into court, and their names being called over, one of the jurors, whose name was on the panel, did not answer to the name which the officer of the court had marked as the name of the party called and sworn:—Held, upon objection taken before the verdict was recorded, that it was not a mis-trial. *Torbock v. Lainy*, 5 Jur. 318—Q. B.

A mistake in a juror's name in the panel is no ground for a new trial. *Dickman v. Blake*, 7 Bro. P. C. 177.

The son of a jurymen summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial. *Hill v. Yates*, 13 East, 229.

But when a person not summoned on the jury was sworn on a jury at nisi prius in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded; the irregularity being noticed before verdict, the court awarded a venire de novo. *Dovey v. Bolton*, 6 Taunt. 460; 2 Marsh. 154.

Where it was not distinctly sworn that the disqualification of a juror, being a town councillor of the borough in which the cause was tried, was not discovered till after verdict, the court refused to grant a rule for a new trial. *Peermain v. Masbury*, 9 Jur. 491—C. Williams.

In an action against a provisional committee-man of a proposed railway company

goods supplied in the course of the formation of the company, and which resulted in a verdict for the defendant, the foreman of the special jury was himself a provisional committee-man of the company. He did not make any affidavit that he was unaware of the question to be tried when he entered the jury-box:—Held, a ground for a new trial; but it was granted only on payment of costs by the plaintiff, as it appeared that his attorney had been aware of the jurymen's interest. *Bailey v. Macaulay*, 18 Q. B. 815; 14 Jur. 30; 19 L. J., Q. B. 78.

Where a public company is a party to an action, the mere fact that one of the jurymen was a shareholder in the company is no ground for granting a new trial. *Williams v. Great Western Railway Company*, 8 H. & N. 869; 28 L. J., Exch.

Where R. the elder was summoned on a special jury, and R. the younger was sworn and sat as one of such jury, he not being qualified to sit either on a special or a common jury:—Held, that it was discretionary with the court to grant or refuse a new trial; and it appearing that the clerk of the defendant's attorney was present at the trial, and knew of the mistake, and that the attorney himself did not make affidavit that he was ignorant of it, the court discharged a rule for a new trial on that ground. *Falmouth v. Roberts*, 1 D., N. S. 633; 9 M. & W. 460.

After a special jury had been sworn for the trial of a defendant for a misdemeanor, one of the jury stated that he had sat on the grand jury which found the bill. It was proposed on behalf of the prosecution that the jurymen should retire from the box, but the defendant refused to assent to that course; the trial proceeded, and the defendant was convicted. The defendant afterwards moved for a new trial on the ground of a mis-trial, but the court refused to grant him a rule. *Reg. v. Sullivan*, 1 P. & D. 96; 8 A. & E. 31; 1 W., W. & H. 610.

At the trial of a cause by a special jury, it having been discovered during the examination of the first witness that there were thirteen jurors in the box, the judge offered to dismiss one, but the defendant's counsel refusing to consent, and it being impossible to ascertain which one of the jurors was sworn last, he discharged the jury, directed the special jurymen to be called over again, and tried the cause by the first twelve that answered:—Held, regular. *Muirhead v. Evans*, 2 L., M. & P. 204; 6 Exch. 447; 15 Jur. 385; 20 L. J., Exch. 211.

On the trial of a special jury cause, when the names of the special jurymen, who had retired to consider their verdict, were called over on their return into court, it was discovered that a person on the impaneling of the jury, summoned as a special jurymen on another cause, had answered by mistake to the name of a jurymen summoned for the cause on trial, and had served in his stead. The defendant then objected to take the ver-

dict of the jury so impaneled; the plaintiff insisted on taking it; and they gave a verdict for the plaintiff:—Held, a mis-trial, as the objection was taken before verdict; and that there must be a venire de novo. *Doe d. Ashburnham v. Michael*, 10 Q. B. 320; 15 Jur. 677; 20 L. J., Q. B. 266.

It is in the discretion of the court to grant a new trial in a case where a person not impaneled has served upon the jury, and the court will not grant such new trial unless substantial injustice has been done by a wrong juror having served. *Wells v. Cooper*, 30 L. T., N. S. 721—C. P.

An action came on to be tried before a common jury, and the name of Thomas Fox, being on the common jury panel, was called among others by the associate, whereupon one Thomas Cox, who was on the special jury panel, went into the box by mistake, served upon the jury, and took part in the verdict, which was given for the plaintiff. The defendant alleged afterwards that Cox was a friend of the plaintiff, and had purposely, and in the interest of the plaintiff, tendered himself as a juror, but this was denied by Cox in a letter written in answer to inquiries by the attorney of the plaintiff:—Held, that it was in the discretion of the court to grant a new trial, and a rule for a new trial discharged. *Id.*

**Improper influence on jury; partiality or prejudice.**—Where, in a qui tam action for usury, the principal witness, the borrower, had distributed a printed memoir containing a statement of the case, which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them:—Held, that the discovery of this circumstance after the trial was not a sufficient cause for a new trial. *Spenceley q. t. v. De Willott*, 3 Smith, 321.

But where a plaintiff swore that hand-bills reflecting on his character had been distributed in court, and shown to the jury at the trial, the court would not receive affidavits of the jury in contradiction, but granted a new trial, although the defendant denied all knowledge of the circulation or distribution of the hand-bills. *Coster v. Merest*, 3 B. & B. 272; 7 Moore, 87; S. C., nom. *Coster v. Symons*, 1 C. & P. 148.

A witness called for the plaintiff, in answering a question put to him by the defendant's counsel on cross-examination, added a statement which was not evidence, and of which the judge did not make a note. The plaintiff's counsel, in his reply, observing upon the statement so made, was interrupted by one of the jury, who had understood the statement in a sense opposite to the truth. The plaintiff's counsel thereupon asked the judge to recall the witness, in order that the mistake might be corrected. The judge refused to do so, saying that the statement was not evidence, and told the jury that they must not take it into their consideration:—Held, that the decision of the judge was correct, and that the

**Directions as to damages and costs.**—It is no ground for setting aside a verdict, that the jury has given only a shilling damages, under a mistaken impression that it would carry costs. *Mears v. Griffin*, 2 Scott, N. R. 15; 1 M. & G. 796.

In an action for a libel tending to ridicule the plaintiff, a sheriff's officer, in his calling, the judge told the jury that the publication was libelous. The jury asked what sum would carry costs, and being told that a snilling would, returned a verdict for the defendant: the court granted a new trial. *Lery v. Milne*, 12 Moore, 418; 4 Bing. 195.

If the judge does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the court will direct a new trial, although the point was not taken by the plaintiff's counsel. *Knight v. Egerton*, 7 Exch. 407.

Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley v. Buxendale*, 9 Exch. 241; 3 O. L. R. 517; 18 Jur. 358; 23 L. J., Exch. 179.

In an action for breaking and entering the plaintiff's close, the plaintiff relied upon the bare possession, though it appeared that he had originally become possessed as tenant to W. under a written agreement. The defendant proved that five days after the commencement of the trespass he obtained a lease of the close from W., which he produced. The judge told the jury that in the absence of proof of the quantum of the plaintiff's interest in the premises he was only entitled to nominal damages:—Held, no misdirection. *Twyman v. Knowles*, 13 C. B. 223.

The judge told the jury that if they gave the plaintiff more than 40s., he could not influence the costs, but if they gave him less than 40s. each party would have to pay his own costs:—Held, no misdirection. *Id.*

The counsel for the plaintiff told the jury that unless they gave damages for 5*l.* 5*s.*, in all probability the costs would be thrown upon the plaintiff:—Held, that he was wrong in so doing, and that the jury, in estimating damages, had no right to take into their consideration what amount will carry costs, the question of costs being with the judge. *Pool v. Whitcombe*, 3 F. & F. 79; 10 W. 782; 6 L. T., N. S. 783—C. P.

Although if a jury asks what amount damages will carry costs, there is no reason why the judge should not inform them, giving a verdict in ignorance that it will carry costs, is no reason why, after an indication for a certificate which implies that the verdict is recorded, the verdict should be disturbed. *Kilmors v. Abdulah*, 27 I. Exch. 807.

Where the judge, in the presence of counsel, directs a verdict for the defendant but at the same time tells the jury to

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#### 4. Disqualification

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to grant a new trial, otherwise of costs. *Doe d. Smith v. Jones*, 1 M. & Ad. 788.

correctly, and conclusion, found for the plaintiff not grant a new trial to recover nominal damages. *Jones v. Jones*, 1 M. & Ad. 788.

the judge to be entitled to a new trial if the evidence is never suffered to be contrary to evidence, by which the jury states the opinion on which they find the verdict, and will not grant a new trial. *Plunket v. Kingland*, 7 M. & Ad. 788.

refused, though the chief justice thought the strength of evidence was sufficient for the verdict. *Swain v. Hall*, 8 M. & Ad. 788.

was evidence on both sides, a new trial was refused, although the verdict was against the opinion of the judge who gave the verdict. *Anon.*, 1 Wils. 22.

the jury finds a verdict in opposition to the evidence of a witness, and the opinion of the witness is left to the jury, a new trial will not be granted, though there is nothing to impeach the credit of the witness. *Lacey v. Forrester*, 8 D. P. C.

trespass for shooting a dog, the only evidence called to prove the value stated it to be 10s., and that was not contradicted; the jury found a verdict for 20s. The court refused to interfere either by increasing the damages or by granting a new trial. *Cann v. Facey*, 5 N. & M. 405; 1 H. & W. 482.

A new trial will be ordered after a verdict for the defendant, if the jury finds a verdict against all the evidence in a cause on a misapprehension of the law, whether arising from their own mistake, or the misdirection of a judge. *Gregory v. Tuff*, 1 C., M. & R. 800; 2 D. P. C. 711; 4 Tyr. 320.

The court will not grant a rule for a new trial on the ground that the verdict was contrary to evidence, when they can see that substantial justice has already been done, and that the verdict would be the same way if a new trial was granted. *Boulton v. Pritchard*, 1 B. C. Rep. 173; 4 D. & L. 117; 11 Jur. 64—B. C.—Wightman.

In a case involving no question of law, the plaintiff's claim was supported almost exclusively by his own testimony, and was encountered by circumstantial evidence on the part of the defendant. A common jury having found for the plaintiff, a new trial was granted on affidavits disclosing fresh evidence. At the second trial this evidence was adduced, but the second jury (a special one) found for the plaintiff. The judge certifying that the verdict was "a very wrong verdict," the court granted a third trial, on the ground of its being against the weight of evidence. *Davies v. Roper*, 2 Jur., N. S. 167—Exch.

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question for the evidence could say, and the jury the evidence, the

The rule, that, in determining whether a verdict ought to be set aside as against evidence, the court will be guided by the opinion of the judge by whom the cause was tried, must be understood of those cases where there is a conflict of testimony, and does not apply where the judge only expresses his opinion as to the value of evidence given on what may be called a special verdict. *Allaway v. Bennett*, 6 Jur., N. S. 347—Exch.

Granting a new trial on the ground of the verdict being against evidence, applies to interpleader issues. *Jones v. Whitbread*, L., M. & P. 407; 11 C. B. 406; 15 Jur. 612; 19 L. J., C. P. 130.

**Verdict against law.**—A new trial was granted where the jury had drawn a wrong conclusion on facts admitted on both sides. *Bright v. Eynon*, 1 Burr. 890; 2 Ld. Ken. 53.

Where the jury found generally that the defendant had paid the plaintiff a larger sum of money than was claimed in the declaration, but found a verdict for the plaintiff, the court refused a rule to set aside this verdict, and to enter a verdict for the defendant. *Freeman v. Crafts*, 1 H. & H. 188; 4 M. & W. 4.

Where, upon showing cause against a rule for a nonsuit or a new trial, it appears that the verdict has been entered for an amount not warranted by the evidence, the court will make the rule absolute, unless the parties consent that the damages shall be reduced. *Lesson v. Smith*, 4 N. & M. 304.

Where trespass is brought which involves a question of right to land, and evidence of acts of ownership is given on both sides, and a verdict is found contrary to the direction of the judge, in which he stated that he considered the evidence on one side to preponderate, the court will grant a new trial. *Cooke v. Green*, 11 Price, 736.

Where the judge recommends a verdict for the plaintiff with nominal damages, but the jury gives substantial damages, such verdict cannot be treated as perverse. *Chilvers v. Greaves*, 5 M. & G. 578; 6 Scott, N. R. 539.

### 5. Inadequacy or Excessive Amount of Damages.

#### (a) Nominal or Inadequate Damages.

**Principle.**—It is a general rule, that the court will not set aside a verdict in an action of tort, on account of the smallness of the damages. *Maurice v. Brecknock*, 2 Dougl. 509.

A new trial will not be granted in hard or trifling actions after a verdict for the defendant, except for a misdirection of the judge, or where a point has been reserved. *Brooks v. t. Middleton*, 10 East, 268; 1 Camp. 450.

A new trial will not be granted on the ground that from the small amount of damages the jury must have come to a compromise, unless, from the circumstances of the case, it is evident that there has been a total

refusal on the part of the jury to discharge their duty, and the verdict is necessarily wholly inconsistent. *Richards v. Rose*, 9 Exch. 218; 23 L. J., Exch. 3.

In an action of tort, where the jury has made a compromise, and, instead of deciding the issue of guilty or not guilty, has agreed to find for the plaintiff without substantial damages, or has evaded the duty of applying their minds to the consideration of the amount of damages, so that there has been no real assessment of them, the court will grant a new trial. *Kelly v. Sherlock*, 6 B. & S. 426; 1 L. R., Q. B. 696; 13 Jur., N. S. 937; 35 L. J., Q. B. 209.

**Actions for slander.**—The jury having given a verdict for only 20s. in an action for slander, the court refused to grant a new trial at the instance of the plaintiff. *Readell v. Maynard*, 5 Bing. N. C. 424; 7 Scott, 467; 1 Arn. 14; 3 Jur. 303.

In an action for slander, a new trial will not be granted on the ground that the damages are inadequate, unless there has been a mistake in point of law on the part of the judge, or a mistake in the calculation of figures, or misconduct by the jury. *Forde v. Stone*, 3 L. R., C. P. 607; 37 L. J., C. P. 301.

In an action for slander imputing that the plaintiff had committed perjury, the jury found a verdict for the plaintiff—damages one farthing. The verdict was not satisfactory to the judge who tried the cause:—Held, that there ought to be a new trial, inasmuch as the amount of damages seemed to have been arrived at by a compromise without duly weighing the circumstances of the case. *Foley v. Stanforl*, 44 L. J., Q. B. 7; 10 L. R., Q. B. 54; 23 W. R. 162; 31 L. T., N. S. 677.

**Actions for negligence.**—In an action for injury by negligence of the defendant's servant, the jury found a verdict for the plaintiff, with one farthing damages, though it appeared that the plaintiff's thigh was broken, and that he had paid 10l. for surgical attendance. The court granted a new trial on account of the lowness of the damages. *Armstrong v. Haley*, 4 Q. B. 917; D. & M. 139; 1 Jur. 671; 12 L. J., Q. B. 323.

The court refused, in an action for the negligent construction of a building, whereby it fell and injured the plaintiff, to grant a new trial, on the ground that the jury had given merely nominal damages, there being no reason for supposing them to have been actuated by improper motives. *Howard v. Barnard*, 11 C. B. 653.

So, in an action against a surgeon for negligence, whereby the plaintiff lost his leg, a verdict being found for him, with nominal damages, the court refused to grant a new trial, the judge having expressed himself satisfied with the verdict. *Gilks v. Tynley*, 1 C. B. 640. S. P., *Tedd v. Douglas*, 5 Jur., N. S. 1029.

In an action for negligently driving against and killing a horse, proved to be worth 30l.,



**jury**, there being strong evidence to **active** negligence on the part of defendant, **some** evidence the other way, contrary to **opinion** of the judge, found for the plaintiff **damages** 15*l.* The court refused to grant **new** trial on the ground of the verdict **ing** perverse. *Hawkins v. Alder*, 18 C. B. 0.

**Other instances.**—Action for an injury to **e** plaintiff's reputation, by the sale by the **endant** of gun-locks of an inferior fabric, **ith** the name of the plaintiff stamped thereon. The jury having returned a verdict for **ne** defendant upon an issue on damages **ultra** **l.** paid into court, on the ground that the **um** paid into court covered the pecuniary **amages** actually sustained by the plaintiff, **he** court declined to interfere. *Manton v. Sales*, 1 C. B. 444.

The court refused to grant a rule for a new **trial** on the ground of the insufficiency of the **damages**, where the jury had given only **one** farthing, in an action for taking the **plaintiff** before a magistrate on an unfounded **charge** of felony, merely because a question of **character** was involved. *Apps v. Day*, 14 C. B. 112.

The jury having found a verdict for five **guineas** in an action for a trifling assault, **evidently** acting upon information given to **them** by the plaintiff's counsel that a verdict for **less** would not give the plaintiff her costs, the court granted a new trial without **imposing** any terms. *Pool v. Whitcomb*, 12 C. B., N. S. 770.

Where the defendants lost a verdict through the **negligence** of their attorney, and the verdict was for 7*l.*, one of the defendants having **been** in court during the trial:—The court refused to grant a new trial, on the grounds of the smallness of the sum, and the presence of the defendant in court, where he might have heard the whole of the evidence. *Watson v. Reeve*, 5 Bing. N. C. 112; 6 Scott, 783; 7 D. P. C. 127; 1 Arn. 388; 2 Jur. 991.

In an action against a bailee for injury to and destruction of goods, the jury returned a verdict for the plaintiff, with nominal **damages**:—Held, that it was no ground for a new trial that, according to the evidence, the **damage**, if any, must have been more than nominal, and that there was uncontradicted evidence of a loss of goods to the extent of 2*l.* *Mostyn v. Coles*, 7 H. & N. 872; 31 L. J., Exch. 151.

It is no ground for a new trial, in an action for an assault and false imprisonment, that the plaintiff had incurred an expense of 7*l.* 14*s.* in procuring his discharge from custody, and the jury has awarded him a farthing only. *Bradlaugh v. Edwards*, 11 C. B., N. S. 377.

As to new trial of causes involving less than 20*l.*,—see this title, I.

As to direction of the judge in respect of **damages**,—see this title, II., 8.

## (b) Excessive Damages.

**Principles.**—The court may, in any case, grant a new trial upon the ground of excessive damages. *Ducker v. Wood*, 1 T. R. 277.

And there is no species of action in which the court will not grant a new trial for excessive damages, if the circumstances require it. *Hewlett v. Crutchley*, 5 Taunt. 277.

Even in trespass for assault and battery. *Jones v. Sparrow*, 5 T. R. 257. S. P., *Goldsmith v. Sefton*, 3 Anst. 808.

But in personal torts the courts will look narrowly into the circumstances, as they very rarely grant a new trial for excessive damages. *Fabrigas v. Mostyn*, 2 W. Bl. 929. S. P., *Gilbert v. Burtenshaw*, Cowp. 230; Loft, 771; *Farmer v. Darling*, 4 Burr. 1971.

Except in case of outrageous damages. *Sharpe v. Brice*, 2 W. Bl. 942. S. P., *Leith v. Pope*, 2 W. Bl. 1327.

In actions for tort the court will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained. *Williams v. Currie*, 1 C. B. 841.

To induce the court to grant a new trial on the ground of excessive damages, it must be shown that they are very excessive, or that a perverted view of the case has been taken by the jury. *Edgell v. Francis*, 1 M. & G. 223.

The court will not grant a new trial on the ground that the damages are excessive, unless it is very manifest that the jury in assessing them have either been actuated by an improper motive, or that they have proceeded on a wrong principle. *Creed v. Fisher*, 9 Exch. 472; 18 Jur. 228; 23 L. J., Exch. 143.

In estimating the damages for breach of promise to marry where the defendant has seduced the plaintiff, the jury may take into consideration that her prospect of marrying has become less by reason of such seduction, and the mortification to her feelings in ceasing to be a respected member of her family. The court will not interfere with the discretion of the jury as to the amount of damages, if they have not acted in error, or from misconception, or from undue motives. *Berry v. Da Costa*, 1 H. & R. 291; 1 L. R., C. P. 191; 12 Jur., N. S. 588; 35 L. J., C. P. 191; 14 W. R. 270. S. P., *Tullidge v. Wade*, 3 Wils. 18.

The court will not, in an action for a breach of promise of marriage, grant a new trial on the ground of excessive damages, unless they are so large as to induce the court to infer that the jury was actuated by undue motives, or acted upon a misconception of the facts. *Gough v. Farr*, 1 Y. & J. 477.

**What amounts are excessive.**—300*l.* are not necessarily excessive damages for a few hours' imprisonment. *Leeman v. Allen*, 2 Wils. 160.

So, 250*l.* are not excessive damages for a malicious prosecution for nuisances. *Farmer v. Darling*, 4 Burr. 1971.

In an action for diverting a watercourse,

where the jury, under circumstances of aggravation, gave 3,000*l.* damages, the court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved; but they directed that the former verdict should stand as a security in the meantime for the damages which might be given on the second trial. *Pleydell v. Dorchester*, 7 T. R. 529.

Where a landlord had caused considerable injury to the crops of his tenant, by selling, felling and removing timber, without applying for leave to enter, and the jury assessed the damages at 800*l.*, the court refused to interfere, although the net value of the entire crops did not exceed 200*l.* *Williams v. Currie*, 1 C. B. 841.

3,500*l.* having been awarded by a jury as damages in an action against an attorney for breach of promise of marriage, the court refused to set aside the verdict on the ground that the damages were excessive. *Wood v. Hurd*, 2 Bing. N. C. 166.

The plaintiff, a person in an humble station of life, had a relation, a lady of fortune, residing at the defendant's house. The plaintiff being importunate in his demands for relief, and refusing to leave the premises, the defendant ordered a constable to take him into custody, which he did, and the plaintiff remained in custody at an inn. On the following morning he was brought before the defendant, who offered him two sovereigns, which the plaintiff accepted. The defendant also gave him money to pay for the hire of a horse, and refreshment. In an action for false imprisonment, the jury having found a verdict for the plaintiff, with 100*l.* damages, the court considered them to be excessive, and directed a new trial. *Price v. Severne*, 5 M. & P. 125; 7 Bing. 816.

An action for negligence was brought by a child of seven years old, by his next friend, to recover damages for injuries done to him by the horse of the defendant. The jury found a verdict for 150*l.* Nine days after the trial the child died. Judgment was afterwards signed by the next friend. An application for a new trial was then made, on the ground of the death of the plaintiff since the trial:—Held, that although the damages were presumably given on the supposition that the child would continue to live, the case was not one in which the court would grant a new trial. *Kramer v. Waymark*, 4 H. & C. 427; 1 L. R., Exch. 241; 12 Jur., N. S. 395; 85 L. J., Exch. 148; 14 W. R. 659; 14 L. T., N. S. 368.

#### 6. Newly-discovered Evidence.

**What sufficient, in general.**—A new trial will not be granted on the ground of the discovery of fresh evidence, unless the proposed fresh evidence is such that there is a reasonable probability that if brought before a jury a different verdict to that in the former trial would be given. *Anderson v. Titmas*, 86 L. T., N. S. 711—Exch. Div.

A new trial will not be granted on the ground of newly discovered evidence, if it appears that the party might by reasonable diligence have procured the evidence for the former trial. *Caldwell v. Johnston*, 6 L. R. C. L. 233—Q. B.

—**particular instances.**—A new trial was granted on affidavits disclosing a conspiracy by the plaintiff to defraud the defendants, an insurance company, by setting fire to his house, which they had endeavored, but had not had sufficient evidence, to prove at the trial. *Thurtell v. Beaumont*, 8 Moore, 612; 1 Bing. 339.

But refused on the ground that the grand jury had found a bill against the plaintiff for the conspiracy. *Ib.*

The discovery of new witnesses to impeach the testimony of a witness examined on the former trial is not sufficient ground to grant a new trial. *Dickenson v. Blake*, 7 Bro. P. C. 177.

Discovery of new evidence by the attorney of an executor defendant (then absent from England) though in the actual custody of the attorney himself, yet not known by him so to be, is a ground for a new trial. *Broadhead v. Marshall*, 2 W. Bl. 955.

A new trial of an ejectment was granted when a verdict had been found for the defendant, where the lessors of the plaintiff had, since the trial, discovered that they had conclusive evidence of a material fact (the marriage of their ancestor), which they failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married, and where it was expected that they might be obliged to enter, to avoid a fine intended to be levied before a new ejectment could be brought; but the new trial was granted only on the terms of payment of the costs of the former trial. *Weak d. Burge v. Callaway*, 1 Price, 677.

As to new trial in cases of absence of evidence or surprise in respect of evidence,—see this title, II., 1.

### III. MOTIONS; PROCEDURE; AND RULES.

#### 1. In what Court, Motion may be made.

**Cause in superior court tried in county court.**—Where a cause, commenced in a superior court, is tried in a county court, under a judge's order, in pursuance of 19 & 20 Vict. c. 108, s. 26, an application for a new trial should be made to the superior court, in whose jurisdiction the cause remains. *Balmforth v. Pledge*, 1 L. R., Q. B. 427; 13 Jur., N. S. 644; 85 L. J., Q. B. 169; 14 L. T., N. S. 361; 6 B. & S. 425.

**Causes in Palatine courts.**—[By 4 & 5 Will. 4, c. 62, s. 26, it shall be lawful for any party, in any action depending in the Court of Common Pleas at Lancaster, to apply by motion to any one of the superior courts at Westminster sitting in banco, within such period of time after

a trial as motions of the like kind shall from time to time be permitted to be made in the said superior court, for a rule to show cause why a new trial should not be granted or nonsuit set aside, and a new trial had, or a verdict entered for the plaintiff or defendant or a nonsuit entered, as the case may be, in such action; which court is authorized and empowered to grant or refuse such rule, and afterwards to proceed to hear and determine the merits thereof, and to make such orders thereupon as the same court shall think proper.

By 2 & 3 Vict. c. 16, s. 23, a similar provision is made with respect to obtaining new trials in the Court of Common Pleas at Durham.]

A motion for a new trial under 4 & 5 Will. 4, c. 62, s. 26, in an action in the Common Pleas at Lancaster, must be made in the court of which the judge who presided at the trial is a member. *Foster v. Jolly*, 1 C., M. & R. 703; 5 Tyr. 239. S. P., *Forster v. Jolliffe*, 1 Scott, 54.

A motion for a new trial in an action in the Common Pleas at Lancaster may be made under 4 & 5 Will. 4, c. 62, s. 26, in any of the courts at Westminster. *Smethurst v. Taylor*, 1 D. & L. 375; 12 M. & W. 190, n.; 13 L. J., Exch. 38.

But where a cause has been tried in a borough court on a writ of trial issuing out of the Common Pleas at Lancaster, a motion for a new trial cannot be made to a judge sitting in banco at Westminster under the 4 & 5 Will. 4, c. 62, s. 26. *Bury v. Peers*, 4 D. & L. 163.—B. C.—Wightman.

On application to a superior court in Westminster Hall, for a new trial of a cause in the Common Pleas at Lancaster, the recognizance to make and prosecute such application is satisfied by obtaining a rule nisi, whatever afterwards becomes of the rule. *Hayworth v. Ormerod*, 6 Q. B. 300; 18 Jur. 775; 13 L. J., Q. B. 265.

When an action is brought in the Court of Common Pleas of Lancaster, and tried at the assizes, the motion and rule for a new trial must be made in the Court of Westminster, of which the judge who tried such cause is a member; and when, therefore, such an action was tried by Kelly, C. B., and a nonsuit was entered, the Queen's Bench refused to entertain a motion to set aside the nonsuit, and for a new trial. *Cox v. Sillen*, 25 L. T., N. S. 425—Q. B.

**Under The Judicature Acts.**—After a trial by a judge without a jury any application for a new trial must be made to the Court of Appeal under Ord. XXXIX., r. 1, whatever the ground of it may be. *Oastler v. Henderson*, 2 L. R., Q. B. Div. 575; 37 L. T., N. S. 22—C. A.

Under Ord. XXXIX., r. 3, the court may refuse a new trial on the ground of the improper admission of evidence, although a rule nisi has been obtained before the Judicature Acts came into operation. *Earp v. Faulkner*, 24 W. R. 774—Exch. Div.

As to powers of courts to grant new trials, generally,—see this title, I.

## 2. Who may move; Parties; and how Right to apply may be Precluded or Restricted.

**One or more of several parties.**—The court cannot grant a new trial as to one defendant, where a verdict has been found against him, and for the other defendants. *Doe d. Dudgeon v. Martin*, 2 D. & L. 678; 13 M. & W. 811; 14 L. J., Exch. 128.

Where, in an action against five defendants, a verdict has been found against four, and in favor of one, a rule by the four for a new trial ought to be drawn up calling upon the other defendant, as well as the plaintiff, to show why a new trial should not be granted. *Belcher v. Magnay*, 13 M. & W. 815, n.; 3 D. & L. 70; 9 Jur. 475; 14 L. J., Exch. 305.

In an action for false imprisonment against two, where a verdict has been given against one, it is no ground for refusing a new trial to him, that the other has obtained a verdict. *Green v. Elgie*, 2 Q. B. 99; 8 Jur. 187.

Where a rule nisi for a new trial is obtained by one only of two defendants, although it must be served upon the other, he cannot be heard in support of the rule, but he may show cause against its being made absolute. *Wakley v. Healey*, 18 L. J., Exch. 426.

In an action of tort against seventeen defendants, two suffered judgment by default, fifteen pleaded the general issue; the plaintiff entered a nol. pros. against one of the two, obtained a verdict of 900*l.* against the other, and the jury found their verdict in favor of the fifteen. The verdict as to five of the fifteen being unwarranted, the court granted a new trial against them, leaving the verdict against the others, and that against the defendant who suffered judgment by default untouched. *Price v. Harris*, 10 Bing. 831; 3 M. & Scott, 833.

A verdict having been found for two defendants, in an action for work and labor done, a rule for a new trial was moved for on the ground of misdirection; but it being admitted that there was no evidence against one of the defendants, the court, in granting the rule nisi, imposed as a term that his name should be struck out of the declaration, and the plaintiff should pay his costs. *De Bernardy v. Harding*, 8 Exch. 824; 23 L. J., Exch. 340.

An action was brought against A. and B. to recover damages for tort, and a verdict was returned against A. and in favor of B. A. obtained an order calling upon the plaintiff only to show cause why a new trial should not be granted, which order was subsequently discharged. A. appealed:—Held, that an order for a new trial would not be made in the absence of B., and B. was ordered to be served with notice of the appeal, and directed to show cause to the Court of Appeal why a new trial should not be granted against him, although the time for moving for a new trial had expired. *Purnell v. Great Western Rail-*

*way Company*, 24 W. R. 720; 1 L. R., Q. B. Div. 686; 45 L. J., Q. B. Div. 687—C. A.

**Effect of death of party.]**—Where the plaintiff has died after verdict, the court may grant a new trial on the application of the defendant, and would, in such a case, impose terms on him to prevent his taking advantage of the plaintiff's death. *Griffith v. Williams*, 1 C. & J. 47.

If after a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff dies, no cause can be shown against the rule until there is a personal representative. *Sloman v. Allen*, 1 M. & G. 96, n.

Cause cannot be shown on behalf of the attorney who claims a lien on the verdict for his costs. *Ib.*

A verdict having been found for the defendant, the plaintiff obtained a rule nisi for a new trial; but the defendant having died since the trial, the rule was drawn up, calling upon his legal representatives or their attorneys to show cause, and it was served upon the latter:—Held, that cause might be shown against the rule by counsel instructed by the attorneys acting for the executors named in the will, though there had been no probate. *Thomas v. Dunn*, 1 C. B. 139.

**How right to move may be lost or precluded by other proceedings.]**—Submission to the opinion of a judge, declared by him at the trial to be for a nonsuit, does not estop a motion for a new trial, if his opinion is incorrect. *Alexander v. Barker*, 2 Tyr. 140; 2 C. & J. 133.

After an unsuccessful motion in arrest of judgment, a party is not at liberty to move for a new trial, even within the first four days of term; for, by moving to arrest the judgment, he affirms the verdict. *Chilpot v. Cage*, 6 D. & R. 281; 4 B. & C. 110.

While a rule nisi was pending for a new trial, in an action for invading the plaintiff's patent, the defendant sued out a scire facias for the purpose of trying the same right, but the court would not defer the discussion of the rule until a decision on the scire facias should be obtained. *Haworth v. Hardcastle*, 4 M. & Scott, 448; 10 Bing. 551; 2 D. P. C. 802.

**Restriction of motion to particular grounds, in general.]**—Where a party is entitled to move for a new trial as a matter of right, the court cannot limit the inquiry to one particular point, but must grant it generally. *Mahony v. Frost*, 1 C. & M. 325; 1 D. P. C. 703; 3 Tyr. 264.

Where a bill of exceptions might be tendered, but an application for a new trial is made instead, it must be granted generally, and cannot be restrained to a particular point. *Iernasconi v. Farebrother*, 3 B. & Ad. 372.

But where a new trial is not a matter of right, but of discretion, it may be restrained to one point. *Mitchinson v. Piper*, 4 Taunt. 555.

**— on tender of bill of exceptions.]**—Where there is a bill of exceptions, a new trial can-

not be moved for on the point of law contained therein. *Fabrigas v. Mostyn*, 2 W. Bl. 329.

Unless such bill is abandoned. *See d. Roberts v. Roberts*, 2 Chit. 272; 2 B. & A. 367; 1 Daniel, 143.

A party who has tendered a bill of exceptions cannot move for a rule nisi for a new trial on a ground of misdirection which might have been included in the bill of exceptions, unless he abandons the bill of exceptions. *Andrews v. Adams*, 15 Q. B. 1001; 15 Jer. 149; 20 L. J., Q. B. 39.

**— on reservation of leave.]**—In an action in the mayor's court, the recorder directed a verdict for the plaintiff, with leave to the defendant to move, for misdirection:—Held, that the defendant was confined to the leave reserved, and was not entitled to insist on a new trial upon the ground that his own evidence had been improperly excluded. *Ellis v. Marriott*, 8 W. R. 192—B. C.—Crompton.

### 3. Time for making Application ; and Notice.

**When motion to be made; under practice before The Judicature Acts.]**—No motion for a new trial, or to enter verdict or nonsuit, motion in arrest of judgment, or for judgment non obstante verdicto, shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term when the cause is tried out of term, unless entered in a list of postponed motions by leave of the court. Reg. Gen., Q. B., C. P. and Exch., II. T. 16 Vict. r. 50; 1 El. & Bl., App. xii.

No suitor who appears in person shall be at liberty to set down any motion in such list of postponed motions, without the express leave of the court. R. 51.

No affidavit shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the limited time for making such motion, without the special permission of the court for that purpose. R. 52.

If such motion as above mentioned be entered in such list of postponed motions, or if such motion be postponed by leave of the court in the case of a cause tried in term, the attorney who has instructed counsel to make the motion shall give notice of it to the attorney of the opposite party, otherwise judgment signed on behalf of the opposite party shall be deemed regular, and every suitor who appears in person shall give a similar notice. R. 53.

**— under The Judicature Acts.]**—In computing the time within which a motion for a new trial of a cause tried in the Queen's Bench, Common Pleas, or Exchequer Divisions must have been made under Ord. XXXIX. r. 1, days on which the divisional court was not actually sitting were not to be reckoned before the Rules of Court of 1st December, 1876, Ord. XXXIX., repealing the first-mentioned order. *Hallums v. Hills*.

W. R. 956; 46 L. J., Q. B. Div. 88—

A.

The time for an application for a new trial on the ground of misdirection under Ord. XXIX., r. 6, begins to run from the time when the jury is discharged. *Shaw v. Hope*, 3 W. R. 729—Exch. Div.

**Notice of motion.**—Leave was given to a defendant to move for a new trial after the first four days of a term; but the name of the case was not inserted in the new trial motion paper, nor was any notice of the circumstances given to the plaintiff. The plaintiff signed judgment on the fifth day of the term. A rule for a nonsuit or a new trial was afterwards served on the plaintiff's attorney. A rule was granted to discharge that rule, but was ordered to stand over till the merits of the first-granted rule should be disposed of. The defendant's proper course would have been to have moved to set aside the judgment. *Lloyd v. Berkovits*, 16 M. & W. 81; 16 L. J., Exch. 278.

When a rule nisi for a new trial has been moved for after the first four days of term, and granted, but judgment has been regularly signed on the ground that notice of the motion was not given, the party obtaining the rule cannot be heard in support of it while the judgment stands. *Dos d. Whitty v. Carr*, 16 Q. B. 117; 15 Jur. 285; 20 L. J., Q. B. 83.

Where, on account of the pressure of business, a motion for a new trial cannot be heard within the first four days of the term, and the case is put down in the list of reserved motions, notice of that fact should be given to the opposite party, or he will be entitled to the costs of signing judgment if he proceeds to do so. *Emblin v. Dartnell*, 12 M. & W. 830.

When a motion for a new trial is not made within the prescribed time, but by leave of the court is postponed, or put into a list of reserved motions, notice thereof must be given to the attorney of the opposite party, or the rule obtained will be discharged. *Shaw v. Lancashire and Yorkshire Railway Company*, 14 L. T., N. S. 623—Q. B.

**Moving after expiration of time.**—The plaintiff, on the 24th of March, gave notice of trial for the first sittings for London in Easter Term, and on the 20th of April gave notice of his intention to enter and try the cause as undefended at the second sittings. The defendant accordingly did not appear at the first sittings on the 22d of April, when the cause was tried, and a verdict found for the plaintiff. The defendant, on the 6th of May, moved for a rule to set aside the proceedings for irregularity:—Held, that he ought to have moved within four days from the day of trial. *Ellaby v. Moore*, 22 L. J., C. P. 253.

Where the courts rose unexpectedly at eleven o'clock in the morning on the last day for moving for a new trial, and counsel was in consequence prevented from moving with-

in the four days, he was allowed to move on a subsequent day. *Bolton v. Pritchard*, 4 D. & L. 117; 11 Jur. 64—B. C.—Wightman.

The court will not permit the motion to be made after the proper time, upon a mere suggestion that the delay was occasioned by the attorney mistakenly supposing that affidavits, which it was impossible to obtain in time, would be necessary. *Price v. Duggan*, 2 M. & G. 641; 8 Scott, N. R. 47.

The court permitted a motion for a new trial to be made more than a year after the verdict was pronounced, a bill of exceptions, which had been tendered, not being sealed in consequence of the judge's death. *Newton v. Boodle*, 4 D. & L. 664; 16 L. J., C. P. 135.

A suggestion of perjury on the part of a defendant and his witnesses, and that fresh evidence has been discovered by the plaintiff since the expiration of the time for moving for a new trial, affords no ground for asking the court to dispense with the rule of court. *Gambart v. Mynne*, 14 C. B., N. S. 820.

A cause was tried on the last day but two of Easter Term. The court refused to allow a motion for a new trial to be suspended until the first day of Trinity Term, on the ground that the attorney had not had time since the trial to prepare himself with affidavits of surprise. *Cooper v. Lloyd*, 6 C. B., N. S. 519.

It is too late for a defendant to move for a new trial after judgment non obstante verdicto. *Pim v. Reid*, 6 M. & G. 1; 6 Scott, N. R. 1010.

The court will not entertain a motion for a new trial in the term subsequent to that during which the cause has been tried, on the ground that the trial took place on the last day but one of the term, and that the defendant's attorney had not time to consult his principal, who lives in the country, and to receive his instructions to move during the same term. *Pain v. Terry*, 11 Jur., N. S. 351; 34 L. J., Exch. 224; 12 L. T., N. S. 269.

A rule for a new trial having, by mistake of counsel, been moved in the Queen's Bench instead of the Common Pleas, the latter court permitted the motion to be renewed after the expiration of the four days. *Johnson v. Warwick*, 17 C. B. 516.

**Time for filing affidavits.**—The court will not allow additional affidavits to be filed in support of a motion for a new trial, after the expiration of the time for moving. *Gilbs v. Tunaley*, 1 C. B. 640.

An affidavit in support of a rule nisi for a new trial must be sworn within the first four days of term, although the court is not able to hear the motion until after that term. *Williams v. Mortimer*, 2 D., N. S. 509—Exch. S. P., *Osmar v. Riches*, 2 Gale, 191.

When a rule for a new trial had been moved for on behalf of a plaintiff on the ground of surprise, and had been granted, the court would not afterwards, when cause was shown against the rule, allow fresh affidavits to be used, made since the motion, for the purpose of

**Directions as to damages and costs.**—It is no ground for setting aside a verdict, that the jury has given only a shilling damages, under a mistaken impression that it would carry costs. *Mears v. Griffin*, 2 Scott, N. R. 15; 1 M. & G. 796.

In an action for a libel tending to ridicule the plaintiff, a sheriff's officer, in his calling, the judge told the jury that the publication was libelous. The jury asked what sum would carry costs, and being told that a shilling would, returned a verdict for the defendant: the court granted a new trial. *Levy v. Miles*, 12 Moore, 418; 4 Bing. 195.

If the judge does not inform the jury what is the proper measure of damages on an issue on which it is admitted that the plaintiff is entitled to a verdict and to damages, the court will direct a new trial, although the point was not taken by the plaintiff's counsel. *Knight v. Egerton*, 7 Exch. 407.

Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley v. Buxendale*, 9 Exch. 241; 9 O. L. R. 517; 18 Jur. 358; 23 L. J., Exch. 179.

In an action for breaking and entering the plaintiff's close, the plaintiff relied upon the bare possession, though it appeared that he had originally become possessed as tenant to W. under a written agreement. The defendant proved that five days after the commencement of the trespass he obtained a lease of the close from W., which he produced. The judge told the jury that in the absence of proof of the quantum of the plaintiff's interest in the premises he was only entitled to nominal damages:—Held, no misdirection. *Twyman v. Knowles*, 13 C. B. 222.

The judge told the jury that if they gave the plaintiff more than 40s., he could not influence the costs, but if they gave him less than 40s. each party would have to pay his own costs:—Held, no misdirection. *Id.*

The counsel for the plaintiff told the jury that unless they gave damages for 5l. 5s., in all probability the costs would be thrown upon the plaintiff:—Held, that he was wrong in so doing, and that the jury, in estimating damages, had no right to take into their consideration what amount will carry costs, the question of costs being with the judge. *Pools v. Whitcombe*, 3 F. & F. 79; 10 W. R. 732; 6 L. T., N. S. 783—C. P.

Although if a jury asks what amount of damages will carry costs, there is no reason why the judge should not inform them, yet giving a verdict in ignorance that it will not carry costs, is no reason why, after an application for a certificate which implies that the verdict is recorded, the verdict should be disturbed. *Kilmore v. Abdoolah*, 27 L. J., Exch. 807.

Where the judge, in the presence of the counsel, directs a verdict for the defendant, but at the same time tells the jury to assess

damages for the plaintiff contingently, and the counsel do not object, it is not competent to the plaintiff afterwards to move for a new trial on the ground of a misdirection; he can only move to enter a verdict for the damages so contingently assessed. *Booth v. Clive*, 10 C. B. 827. S. P., *Morris v. Murray*, 13 M. & W. 52.

#### 4. Disqualification, Irregularities or Misconduct of or affecting Jury; Verdict against Evidence or Law.

**Disqualification of or irregularities in summoning or impaneling jurors.**—The attorney for the defendant being the under-sheriff, and having summoned the jury, is no ground for a new trial after verdict for the defendant in a case of contradictory evidence. *Mason v. Vickery*, 1 Smith, 304.

The fact of the person acting as deputy for the sheriff, being the attorney for the defendant, is not a ground for a new trial. *Brigg v. Sowton*, 9 D. P. C. 105; 1 W. P. C. 3; 4 Jur. 1014.

After a trial has been had, the court will not grant a venire de novo, on an allegation that the jury has been convened by the partner of the plaintiff's attorney; at least without proof that the party who objects was not aware of the fact at the trial. *Branahill v. Giles*, 9 Bing. 13; 2 M. & Scott, 41.

A jury retired to consider their verdict, and upon their returning into court, and their names being called over, one of the jurors, whose name was on the panel, did not answer to the name which the officer of the court had marked as the name of the party called and sworn:—Held, upon objection taken before the verdict was recorded, that it was not a mis-trial. *Torbock v. Laine*, 5 Jur. 218—Q. B.

A mistake in a juror's name in the panel is no ground for a new trial. *Dickinson v. Blake*, 7 Bro. P. C. 177.

The son of a jurymen summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial. *Hill v. Yates*, 13 East, 229.

But when a person not summoned on the jury was sworn on a jury at nisi prius in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded; the irregularity being noticed before verdict, the court awarded a venire de novo. *Dovey v. Holmes*, 6 Taunt. 460; 2 Marsh. 154.

Where it was not distinctly sworn that the disqualification of a juror, being a town-councilor of the borough in which the cause was tried, was not discovered till after verdict, the court refused to grant a rule for a new trial. *Peermain v. Masbury*, 9 Jur. 491—R. C.—Williams.

In an action against a provisional committee-man of a proposed railway company



what occurred in the box during the trial not receivable. *Bailey v. Macaulay*, 18 Q. B. 815; 14 Jur. 80; 19 L. J., Q. B. 78.

And the affidavit of a jurymen, to the effect that he would not have agreed to the answers given by the foreman of the jury to the court if he had known they would have entitled the plaintiff to a verdict, is, if admissible, no ground for disturbing the verdict. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 33.

The court refused to grant a rule for a new trial upon an affidavit stating that one of the jury declared in open court, in the presence and hearing of the others, that the verdict had been decided by lot. *Burgess v. Langley*, 5 M. & G. 722; 1 D. & L. 21; 6 Scott, N. R. 518; 12 L. J., C. P. 237.

Where a rule for a new trial is drawn up on reading affidavits imputing personal misconduct and partiality to some of the jurymen, affidavits of such jurymen, denying and explaining the conduct attributed to them, may be read on showing cause against the rule. *Standewick or Standewicke v. Hopkins or Watkins*, 2 D. & L. 502; 9 Jur. 161; 14 L. J., Q. B. 16—B. C.—Patteson.

A subsequent confession of a jurymen to the defendant's attorney, that the jury drew lots which six of them should determine the verdict, and not otherwise proved to the court, is no ground for a new trial. *Aylett v. Jewel*, 2 W. Bl. 1299.

Nor is an admission by jurymen, that the verdict was given by mistake, when made after they had separated, though on the day of trial. *Davis v. Taylor*, 2 Chit. 268.

Nor are subsequent declarations of jurymen after a general verdict given according to the merits of the case. *Clark v. Stevenson*, 2 W. Bl. 803.

An affidavit to contradict the statement of a judge as to what occurred at the trial before him is inadmissible. *Res v. Grant*, 3 N. & M. 106; 5 B. & Ad. 1081.

Upon an application to set aside a verdict on the ground of excessive damages, the court will not receive the affidavits of the defendant's witnesses, either to explain or to add to evidence given by them at the trial. *Phillips v. Hatfield*, 8 D. P. C. 882.

As to time for filing affidavits,—see this title, III., 2.

Inspection of documents.]—The court will not grant a rule for an inspection of documents which were produced in evidence at the trial, for the mere purpose of furnishing materials to the other side for moving for a new trial. *Pratt v. Goswell*, 9 C. B., N. S. 706; 3 L. T., N. S. 669.

The court will not order a party to permit his opponent in the cause to inspect and take a copy of a deed of conveyance, with a view only to the discussion of a rule for a new trial. *Wood v. Morewood*, 2 Scott, N. R. 204; 9 D. P. C. 44.

Copy of judges' notes.]—Practice as to bespeaking judges' notes. *Cockerell v. Aucumpte*,

2 C. B., N. S. 445, n. See also *Evans v. Roe*, 7 L. R., C. P. 188; 26 L. T., N. S. 70.

It is not necessary to have a copy of the judge's notes at the time of moving for a new trial in a case tried, under a judge's order, before a county court. *Morrison v. Wookey*, 15 C. B., N. S. 457.

Where a cause in a superior court has been tried before a judge of a county court pursuant to 19 & 20 Vict. c. 108, s. 26, upon motion for a new trial the notes of the judge must be produced, unless the motion is made by counsel who was present at the trial. *Taylor v. Holt*, 3 H. & C. 454, n. S. P., *Dene v. Sawyer*, 26 L. T., N. S. 646.

But where the judge had refused to furnish a copy of his notes in the first instance, and the time for moving for a new trial had nearly expired, the court permitted the rule to be drawn up upon that affidavit, the party undertaking that the notes should be produced upon argument of the rule. *Id.*

In moving in the Court of Exchequer for rules for a new trial or to enter a nonsuit in cases tried in the Liverpool Court of Passage, a rule to show cause will not be granted unless either the counsel moving was present at the trial, or the assessor's notes are produced, with an affidavit verifying the assessor's signature. When cause is shown, the assessor's notes must be produced with a similar affidavit. *Welsh v. Mercer*, 42 L. J., Exch. 52; 28 L. T., N. S. 358; 8 L. R., Exch. 71.

A copy of the notes taken by the judge at the trial of a cause in the Passage Court of Liverpool is not needed in order to support a motion in a superior court for a new trial; and such motion may, according to the established practice, be made by counsel who did not appear in the court below. *Bridge v. Daine*, 29 L. T., N. S. 477—C. P.

Affidavits cannot be used to supply alleged omissions in a judge's notes of evidence in a trial before him. *Coles v. Bullman*, 12 Jur. 586; 17 L. J., C. P. 302.

Argument.]—It is no ground for taking a new trial out of the new trial paper, and bringing it on as a motion, that several of the witnesses are infirm, and of an advanced age; but the court will, in its discretion, make it a term of the new trial, that the evidence of any witness who may die in the interim shall be read from the judge's notes of the former trial. *Anon.*, 1 D. & L. 725; 13 L. J., Q. B. 80—B. C.—Wightman.

Where at a trial the defendant's counsel relied upon one particular point, and advisedly abstained from raising others which might have been raised, on the argument of a rule for a new trial on the ground of misdirection, the court confined the counsel to the point raised at the trial. *Jones v. Provincial Insurance Company*, 26 L. J., C. P. 273.

On a motion for a new trial, counsel cannot present a point which does not appear by the judge's notes to have been raised at the trial. *Gibbs v. Pike*, 1 D., N. S. 409; 9 M. & W. 351; 6 Jur. 465.

When a nonsuit was directed by the judge, but leave reserved to the plaintiff to move to enter the verdict for him upon the findings of the jury upon certain questions left to them, the defendant, in showing cause against such a rule, may contend that the findings of the jury were against the weight of evidence; and it is not necessary for the defendant to give notice of an intention to raise such question within the time allowed for moving for a new trial. *Walker v. Cory*, 38 L. J., Exch. 123; 4 L. R., Exch. 152; 20 L. T., N. S. 453.

**When new trial will be granted, and upon what terms.]**—When a legal objection is taken, and overruled by the judge, without reserving the point, and the court is afterwards of opinion that that objection was a good ground of nonsuit, it will grant a new trial only, and will not permit a nonsuit to be entered. *Minchin v. Clement*, 1 B. & A. 252.

Where counsel obtained a rule nisi to enter a verdict for the defendant or for a new trial, and the defendant's attorney subsequently went to the Rule Office and had the rule altered, by striking out that part of it which related to a new trial, the court refused to make the rule absolute for a new trial. *James v. Hull*, 10 Jur. 569—B. C.—Williams.

Where a rule nisi for a new trial is granted, on the terms of bringing the amount of the verdict into court, the money must be brought in before the rule nisi is drawn up. *Clare v. Fivestel*, 2 D. P. C. 617.

Where a bankrupt sued for the benefit of his assignees, the court refused to grant a new trial, unless his assignees would abide by the verdict and become responsible for the costs. *Noble v. Adams*, 7 Taunt. 59; 2 Marsh. 306; Holt, 248.

Where in trespass there were several issues, one of them on a plea of liberum tenementum, and the judge improperly rejected evidence applicable to that issue only, the court discharged a rule for a new trial after a verdict for the defendant on several issues, on his consenting to the verdict being entered for the plaintiff on that issue; and gave no costs of the rule to either party. *Hughes v. Hughes*, 15 M. & W. 701.

Where a verdict is taken for the plaintiff subject to a special case, and before the case is settled the defendant becomes bankrupt, the court will not order that a verdict shall be entered for the defendant unless the plaintiff will proceed with the case; but they will set aside the nominal verdict and direct a new trial, unless both parties consent to a stet processus. *Cottam v. Partridge*, 2 M. & G. 843; 3 Scott, N. R. 174; 1 W. P. C. 174; 9 D. P. C. 629.

As to imposing costs as a condition of new trial,—see this title, III., 5.

**Operation of rule.]**—Where a new trial is obtained ex debito justitiæ on one of several issues, the rule re-opens the whole record. *Macclesfield v. Bradley*, 7 M. & W. 570.

When a new rule is granted ex debito justitiæ, the party is not bound to proceed upon the rule within any limited time. *Harbottle v. Shardlow*, 8 M. & W. 265.

The court will not allow a rule for a new trial to be amended, by providing that the suit should not abate in the event of the death of the defendant, where a surety had previously entered into a bond for payment of the damages and costs of the second trial. *Lopez v. De Tastet*, 8 Taunt. 712.

### 5. Costs.

**When and to whom allowed, and payment of costs as condition, on granting rule for new trial.]**—A new trial after a perverse verdict of the jury is granted without costs; secus, after a mistaken or an erroneous verdict. *Howorth v. Samuel*, 1 Chit. 633, n.; 1 B. & A. 586. S. P., *Shillito v. Claridge*, 3 Chit. 426.

Where a cause was taken by mistake, the court refused to make the payment of costs a condition for a new trial. *Etherington v. Kemp*, 1 Chit. 634.

If a jury finds an insufficient verdict, upon which the court can give no judgment, and a new trial is granted, the party ultimately successful is not entitled to the costs of the former trial. *Worcestershire Canal Company v. Trent and Mersey Navigation Company*, 2 Marsh. 475.

A verdict obtained by a trick was set aside without costs. *Anderson v. George*, 1 Burr. 352.

A new trial was granted to the plaintiff without costs, when he had been improperly nonsuited. *Bunsell v. Hogg*, 3 Wils. 146.

The court will not make the payment of the costs of the day a condition precedent to the plaintiff's proceeding to a second trial. *Doe d. Evans v. Edwards*, 2 D. P. C. 572.

Where a jury gave a general verdict for the defendant on three issues, having been misdirected on one, the court granted a new trial on payment of costs. *Lord v. Wurdle*, 3 Bing. N. C. 680; 4 Scott, 402; 1 Jur. 382.

A new trial was granted without payment of costs, where the judge had misdirected the jury upon an important matter of fact. *Haine v. Davey*, 6 N. & M. 356; 4 A. & E. 892; 2 H. & W. 30.

Where the Court of Queen's Bench grants a rule to set aside a trial and verdict, in a cause that has been taken as undefended, on an affidavit of merits by the defendant, it is not the practice to make the payment of costs by the defendant on a particular day a condition in the rule. *Bland v. Warren*, 2 N. & P. 97; 6 D. P. B. 21.

Where a mistaken verdict was given in consequence of the omission of the judge to draw the attention of the jury to a material feature in the case, the court imposed the terms of the payment of costs on the granting of a new trial, the judge not having been requested to enter into a fuller explanation. But the costs of the former trial, where the verdict was set

aside for misdirection, and of an intermediate postponement, by making the cause a remanet, were to abide the event. *Gibbins v. Phillips*, 2 M. & R. 238; 8 B. & C. 437.

When there were three verdicts, the first in favor of the plaintiff, the second in favor of the defendant by reason of a misdirection, and the third in favor of the defendant upon the merits, and the rule for the first new trial reserved the consideration of costs, the court allowed the defendant to take the costs of the first or second at his option, and the costs of the third. *Boddy v. Esdaile*, 8 Bing. 174; 10 Moore, 569.

In granting a new trial, it is no ground for refusing to annex the condition of payment of costs by the party obtaining the rule, that the attorney of the adverse party was not on the roll when those costs were incurred. *Punter v. Grantley*, 3 M. & G. 295; 3 Scott, N. R. 647.

**Costs to abide the event.**—[By 17 & 18 Vict. c. 125, s. 44, when a new trial is granted, on the ground that the verdict was against evidence, the costs of the first trial shall abide the event, unless the court shall otherwise order.]

This provision does not apply where a new trial is granted for no fault of the jury, but on fresh matter disclosed by affidavit. *Abbott v. Bull*, 1 Jur., N. S. 93—Exch.

A new trial was granted, on the ground of the verdict being against the weight of evidence, and was also moved on affidavits; the court directed the costs to abide the event, excepting those of the affidavits, which the party who succeeded on the rule ought to pay in any event. *Id.*

Where, on the first trial of a cause, the plaintiff obtains a verdict and a rule is afterwards made absolute for a new trial, the costs to abide the event, and the defendant succeeds on the second trial, neither party is entitled to the costs of the rule for a new trial. *Eccles v. Harper*, 14 M. & W. 248; 3 D. & L. 71; 14 L. J., Exch. 264.

When the court order a new trial, the costs to abide the event, such event means the ultimate event of the cause; therefore, if the verdict on the second trial is set aside, and, on a third, the ultimate event is the same as at the first trial, the party succeeding at the last will be entitled to the costs of the first trial. *Meule v. Goddard*, 5 B. & A. 706.

When the costs of the former trial are to abide the event of a new trial, if the same party succeeds on the new trial, he has costs of both trials; if his opponent, he has only the costs of the new trial. *Sherlock v. Barned*, 8 Bing. 21; 1 M. & Scott, 58.

If costs are directed to abide the event, neither party has the costs of the first trial, if the event of the second is different from that of the first trial. *Canham v. Fisk*, 2 C. & J. 120; 2 Tyr. 155.

When a new trial is granted on the ground that the verdict is against evidence, the party who succeeds on the second trial but fails on the first, is not entitled to the costs of the

first trial, without a special order of the court. *Evans v. Robinson*, 11 Exch. 40; 24 L. J., Exch. 212.

In an action for the wrongful dismissal of a clerk, with a count for wages, the plaintiff obtained a verdict on the first count, and, no claim being urged on the second count, the verdict on that was entered for the defendant. A rule for a new trial was afterwards granted, "the plaintiff's costs of and occasioned by the trial already had, and of and occasioned by this application, to abide the event of this cause." On the second trial the defendant obtained a verdict on the first count, and the plaintiff (who had then discovered that there had been a mistake in the calculation of the wages due to him at the time of the dismissal) had a verdict on the second count:—Held, that the event contemplated by the rule being the event in respect of which the contest took place upon the first trial, the plaintiff was not entitled to the costs mentioned in the rule. *Dawson v. Harris*, 11 C. B., N. S. 801; 31 L. J., C. P. 168; 10 W. R. 230; 5 L. T., N. S. 680.

If a rule for a new trial contains the term "costs to abide the event," the event whereon the costs will depend is the event of the fresh contest as to the particular ground of dispute in respect of which the court granted the rule. *Jones v. Williams*, 8 L. R., Q. B. 280; 42 L. J., Q. B. 48; 28 L. T., N. S. 122; 21 W. R. 390.

**Rule silent as to costs.**—If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second. Reg. Gen., 16 Vict., H. T. r. 54, Q. B., C. P. and Exch.; 1 El. & Bl., App. xii. (Similar to r. 64 of H. T. 2 Will. 4.)

The rule applies only to cases where a new trial is granted upon the whole record. *Bower v. Hill*, 2 Scott, 540; 1 Hodges, 334; 5 D. P. C. 183.

A rule was made absolute for a new trial without any mention of costs in the rule:—Held, that the master was right in allowing the successful party all such costs of the first trial as were available for the second. *Lambert v. Lyddon*, 4 D. & L. 400; 2 B. C. Rep. 233; 11 Jur. 44; 16 L. J., Q. B. 34—Patteson.

Where a rule is made absolute for a new trial, and no mention is made of the costs of the rule, neither party is entitled to them. *Eccles v. Harper*, 3 D. & L. 71; 14 M. & W. 248; 14 L. J., Exch. 264.

After verdict for the plaintiff a new trial was granted, on the ground of the reception of improper evidence. The defendant then withdrew his plea, and suffered judgment by default. The rule for a new trial was silent as to the costs of the first trial:—Held, that the plaintiff was not entitled to the costs of the first trial. *Penock v. Harris*, 1 N. & P. 240; 5 A. & E. 449; 2 H. & W. 456.

If a new trial is granted on the ground

that the verdict was imperfect, without any mention of costs in the rule, the costs of the first trial will not be allowed to the successful party, though he succeeds on the second. *Horsay v. Graham*, 23 L. T., N. S. 495—C. P.

**On discharge of rule.**—Where a rule nisi has been obtained for a new trial, or to enter a verdict for the defendant, unless the plaintiff consents to reduce the verdict, and the plaintiff does consent to reduce the verdict, and the rule is thereupon discharged, each party pays his own costs of the rule. *Thompson v. Bailey*, 4 Exch. 86; 7 D. & L. 234.

After verdict for a plaintiff, a rule nisi for a new trial or for arresting the judgment was obtained; the rule for a new trial was made absolute, the question of costs being reserved. After verdict for the plaintiff on the second trial, a rule nisi for a new trial, or for arresting the judgment, was obtained, and afterwards discharged:—Held, that the plaintiff was entitled to the costs of the first trial. *Hunter v. Caldwell*, 10 Q. B. 88; 11 Jur. 1056.

Judgment for the defendants was signed on the 14th of November, 1846, and on the 9th of March, 1847, the costs in the cause were taxed:—Held, that it was competent to the defendants afterwards to tax their costs of a rule for a new trial, obtained by the plaintiffs on the 20th November, 1846, and discharged with costs on the 15th of January, 1847, the costs of such rule not being costs in the cause. *Newton v. Boodle*, 4 C. B. 359.

When, upon a verdict being returned for the plaintiff, the defendant obtains a rule nisi for a new trial, which is afterwards discharged in consideration of the plaintiff consenting to a reduction of his damages, neither party pays to the other the costs of the rule. *Russey v. Metropolitan Railway Company*, 20 L. T., N. S. 612.

**On discontinuance.**—When the court granted a rule for a new trial on the application of the defendant, in a case where the plaintiff succeeded, and the latter applied to amend his declaration, but discontinued the action, not choosing to pay the costs of the former trial, as the condition of the amendment:—Held, that the defendant was not entitled to the costs of the trial, notwithstanding the discontinuance. *Gray v. Coz*, 8 D. & R. 220; 5 B. & C. 458.

Where after a verdict for a defendant, and a rule absolute for a new trial, the plaintiff discontinues the action, the defendant is entitled to the costs of the trial. *Sweeting v. Hale*, 4 M. & R. 545; 9 B. & C. 869.

Where a defendant had a verdict on one of two issues, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the latter issue, on the ground of misdirection, whereupon the plaintiff discontinued:—Held, that the defendant was not entitled to the costs of the trial. *Macclesfield v. Biddleley or Bradley*, 7 M. & W. 570; 9 D. P. C. 812.

**After reference of cause.**—Where a cause is referred by order of nisi prius, and the award is afterwards set aside on the ground of the arbitrator not having adjudicated on all the matters referred, and the cause is tried again, the party ultimately succeeding is not entitled to the costs of the first trial. *Wood v. Dunson*, 5 M. & W. 87; 7 D. P. C. 344; 3 Jur. 583.

The arbitrators to whom a cause was referred at nisi prius were unable to decide, and they suffered the time for making their award to expire, upon which the plaintiff carried the cause down to a second trial, and obtained a verdict:—Held, that each party must pay his own costs upon the first trial. *Thomas v. Lewis*, 6 D. P. C. 395; W., W. & D. 67; 1 Jur. 104.

After verdict for the plaintiff, the defendant obtained a rule for a new trial, which was made absolute, no mention being made of costs. The parties then agreed to a reference, and the order of reference stipulated that the costs were to abide the event. The arbitrator having decided the cause in favor of the defendant:—Held, that he was not entitled to the costs of the trial. *Thomas v. Hueken*, 9 M. & W. 53; 1 D., N. S. 346; 5 Jur. 1115.

A rule nisi for a new trial was obtained after a verdict for the defendant, and the cause was then referred, and the costs left in the discretion of the arbitrator. He awarded in favor of the plaintiff, and directed the defendant to pay the costs of the cause:—Held, that it meant such costs as the defendant would have been liable to pay, if, on a new trial, there had been a verdict for the plaintiff. *Rigby v. Okell*, 7 B. & C. 57.

**Upon discharge of jury.**—On the trial of a cause, the jury was unable to agree, and was in consequence discharged by the judge, without having given a verdict, and the associate indorsed the record as a remanet, and the cause being tried again, the plaintiff had a verdict:—Held, that he was not entitled to the costs of the first trial. *Brown v. Clarke*, 12 M. & W. 25; 1 D. & L. 409; 7 Jur. 1048; 13 L. J., Exch. 36.

Where a jury, being unable to agree, is discharged with the consent of counsel, the party who obtains the verdict on the second trial is not entitled to the costs of the first trial. *Bostock v. North Staffordshire Railway Company*, 18 Q. B. 777; 16 Jur. 726; 21 L. J., Q. B. 884.

So, where the jury, being unable to agree upon their verdict, is discharged by the judge, and the plaintiff afterwards discontinues, the defendant is not entitled to the costs of the trial. *Wall v. London and South Western Railway Company*, 11 Exch. 696; 25 L. J., Exch. 93.

Where a jury was discharged by the judge, of his own authority, from finding a verdict, they being unable to agree, the ultimately successful party is not entitled to the costs of the first attempt at trial. *Waite v. Spurgin*, 4 D. P. C. 575.

**What costs allowed.]**—Where a rule nisi is granted for a new trial, the successful party is entitled to recover in costs his attorney's term fee, 1*l.* per term, until the giving of judgment. *Bourne v. Alcock*, 4 Q. B. 621.

When a new trial is granted upon payment of costs, remanet fees, although incurred before the unsatisfactory trial, are to be paid by the party impugning the verdict. *Robinson v. Day*, 2 N. & M. 670; 5 B. & Ad. 814.

When a new trial is granted on payment of costs, such costs do not include the costs of summonses to obtain admissions, they being costs in the cause; nor do they include expenses of briefs, where the same will be used on the second trial. *Lord v. Wardle*, 5 Scott, 398; 6 D. P. C. 174.

Costs of opposing an unsuccessful application for a new trial are costs in the cause. *Eyre v. Thorpe*, 6 D. P. C. 768.

If an attorney shows cause on his own behalf, against a rule for a new trial, or a stet processus, his client not appearing, the costs of the attorney are not costs in the cause, but must be made the subject of a special application to the court; and if that application is not made when the rule is disposed of, the court will not afterwards amend the rule as to them. *Southes v. Terry*, 2 D. P. C. 522.

The party who succeeds at a second trial, will not be allowed on taxation the costs he has incurred for copies of a short-hand writer's notes of the evidence given at the former trial. *Crease v. Barrett*, 2 C., M. & R. 738; 1 Tyr. & G. 112.

Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the master may allow fees on the second trial, with reference to those given on the first. *Wilkinson v. Malin*, 2 D. P. C. 65.

A plaintiff obtained a verdict, and a new trial was granted on account of the admission of improper evidence. The plaintiff drew up the rule for the new trial, and served it on the defendant, who informed the plaintiff that he would not avail himself of the rule. The court ordered that the *postea* should be delivered to the plaintiff, and that he should have his costs of the trial. But the court allowed neither party the costs of the rule for a new trial, or of the rule for giving the *postea* and costs to the plaintiff. *De Ruusen v. Lloyd*, 5 A. & E. 456; W., W. & D. 473; 2 N. & P. 213.

On the trial of a cause in which there were several issues, the plaintiff had a general verdict, leave being reserved to the defendant to move to enter a nonsuit, or a verdict for the defendant. A rule was obtained accordingly, and thereupon it was agreed, that the facts should be stated in a special case for the opinion of the court. On the argument of the case the court gave judgment for the defendant, and the verdict was accordingly entered for him, and this judgment was afterwards affirmed in the Exchequer Chamber:—Held, that he was entitled to the costs of the

trial, and that although one of the issues was given up by him at the trial. *Todin v. Crawford*, 10 M. & W. 602; 2 D., N. S. 541; 12 L. J., Exch. 77.

The defendants in replevin having obtained a verdict, a rule for a new trial was granted, on the ground that evidence had been improperly admitted. This rule was made absolute. The plaintiff gave a fresh notice of trial, but afterwards gave notice of discontinuance, and the cause was not re-tried. On the taxation, the costs of searches for documentary evidence (not including the evidence objected to), which had been made use of on the first trial, were allowed to the defendants, as well as the charge of drawing and copying the old briefs:—Held, that as these matters would have been available if the cause had been tried again, such costs were properly allowed. *Daniel v. Wilkin*, 8 Exch. 156; 22 L. J., Exch. 78.

The plaintiff brought an action for three parcels carried by three ships belonging to the defendant, and which were lost during transit. As regards two of these parcels, a verdict was found for the plaintiff; as to the other, the defendant succeeded. The defendant subsequently applied for and obtained a new trial, the result of which was that he got an entire verdict:—Held, that as there had been no default on the part of the defendant, and the plaintiff had not exercised the power which he possessed of entering a *nolle prosequi*, or of intimating that he did not intend to pursue further the particular issue found against the defendant on the first trial, the defendant was entitled, under the circumstances, to recover the costs of the first trial, relating to the issue found in his favor. *Marcus v. General Steam Navigation Company*, 35 L. T., N. S. 858—C. A.

On taxation of costs, the master declined to allow the costs incurred by the defendant at the second trial for shorthand writer's notes:—Held, that it was entirely within the discretion of the master to allow or disallow these items, and that it was not the practice of the court to interfere with that discretion, except in cases of gross abuse. *Ib.*

When on the trial of an action a nonsuit is directed which is set aside and a new trial granted, and on the second trial the plaintiff has a verdict and judgment, the plaintiff is entitled to the costs of the first trial and of the rule for a new trial as part of the costs which follow the event under the latter part of Order LV. *Green v. Wright*, 2 L. R., C. P. Div. 354; 40 L. J., Chanc. Div. 427; 30 L. T., N. S. 355; 25 W. R. 502—C. A.

**Enforcing payment; discharge of rule for new trial, on non-payment of costs.]**—A rule absolute for a new trial, obtained in Easter Term by the defendant, upon payment of costs, not having been served upon the plaintiff, the court, upon the application of the plaintiff in Michaelmas Term, discharged the rule for a new trial. *Olase v. Goble*, 3 M. & G. 635.

A rule to discharge a rule for a new trial, on the ground that the party has neglected to pay costs, is, in the Court of Exchequer, a rule nisi which makes itself absolute, unless cause be shown within a limited time. *Phillips v. Warren*, 8 D. & L. 801; 14 M. & W. 780; 15 L. J., Exch. 3; 9 Jur. 980.

A rule was made absolute for a new trial on payment of costs by the plaintiff. The costs were taxed and demanded on the 4th of May. On the 8th, the defendant obtained a rule nisi to discharge that rule, unless the costs were paid before the fourth day of the ensuing term. The plaintiff having in the meantime paid the costs, the court discharged the rule, but ordered the plaintiff to pay the costs of the application. *Solly v. Langford*, 2 D. & L. 250; 13 M. & W. 151—Exch.

Where a rule for a new trial upon payment of costs is granted, a rule to rescind that rule, upon the ground that the costs have not been paid, is, in the Common Pleas, a rule nisi only in the first instance. *Spear v. Ward*, 1 L., M. & P. 248.

Where a rule absolute for a new trial on payment of costs had been granted, but the costs were not paid within a reasonable time, the court made a rule absolute in the first instance for discharging the rule. *Champion v. Griffiths*, 1 D., N. S. 319; 5 Jur. 1182—B. C.

As to costs on appeal,—see this title, III., 6.

#### 6. Appeal.

**Statute.**—[By 17 & 18 Vict. c. 125, s. 35, in all cases of motions for a new trial upon the ground that the judge has not ruled according to law, if the rule to show cause be refused, or, if granted, be then discharged or made absolute, the party decided against may appeal, provided any one of the judges dissent from the rule being refused, or, when granted, being discharged or made absolute, as the case may be, or, provided the court, in its discretion, think fit that an appeal should be allowed; provided that where the application for a new trial is upon matter of discretion only, as on the ground that the verdict was against the weight of evidence, or otherwise, no such appeal shall be allowed.]

By s. 86, the Court of Error, Exchequer Chamber, and the House of Lords shall be courts of appeal for this purpose.

By s. 87, no appeal shall be allowed unless notice thereof is given in writing to the opposite party or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge.

By s. 88, notices of appeal shall be a stay of execution, provided bail to pay the sum recovered and costs or to pay costs where the appellant was plaintiff below, be given, in like manner and to the same amount as bail in error, within eight days after the decision complained of, or before execution delivered to the sheriff.

By s. 89, the appeal hereinbefore mentioned shall be upon a case to be stated by the parties (and in case of difference, to be settled by the

court, or a judge of the court appealed from), in which case shall be set forth so much of the pleadings, evidence, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the court of appeal.

By s. 40, when the appeal is from the refusal of the court below to grant a rule to show cause, and the court of appeal grant such rule, such rule shall be argued and disposed of in the court of appeal.

By s. 41, the court of appeal shall give such judgment as ought to have been given in the court below, and all such further proceedings may be taken thereupon as if the judgment had been given by the court in which the record originated.

By s. 42, the court of appeal shall have power to adjudge payment of costs and to order restitution, and they shall have the same powers as the Court of Error in respect of awarding process and otherwise.]

**When appeals allowed; and how heard and determined.**—Where the court below has refused to grant a rule nisi for a new trial, or to enter a verdict upon leave reserved, and there is an appeal against such refusal to the Exchequer Chamber, the court will grant a rule nisi, if they think fit to do so, against which cause must be shown in the first instance, only one counsel being heard on each side. *Kingsford v. Merry*, 1 H. & N. 303; 8 Jur., N. S. 68; 26 L. J., Exch. 83—Exch. Cham.

If the respondent wishes to take a preliminary objection to the appeal being heard, it should be made at once, before the rule nisi is moved for. The statement of the case will not prevent the respondent from taking such an objection. *Id.*

Where a motion for a new trial has been made, not only on the ground that the verdict was against the weight of evidence, but also on the ground that the judge had not ruled according to law, the alleged misdirection being in not directing the jury to find a verdict for the party applying, as to a certain part of the claim; if the rule is refused on the former ground, as to the weight of evidence, the judge certifying that he is not judicially dissatisfied with the verdict, and the point depends upon a question of fact, arising on the evidence, which he was not asked specifically to leave to the jury, an appeal will not be allowed. *Holden v. Mordack*, 21 L. J., Exch. 27.

When, on a rule to enter a nonsuit, and for a new trial, the court was equally divided in opinion, the court, instead of allowing the rule to drop, discharged it, in order to enable the parties to appeal. *Burnett v. Allen*, 4 Jur., N. S. 488—Exch.

If a rule for a new trial drops in consequence of the judges being equally divided in opinion, the party who obtained the rule may appeal. *Levi v. Green*, 4 Jur., N. S. 36—Q. B.

The court has a discretionary power, after the lapse of the four days for giving notice of ap-



peal from a judgment, upon an application for a new trial, to enlarge the time for giving such notice. *Ward v. Lumley*, 5 H. & N. 656; 6 Jur., N. S. 560; 29 L. J., Exch. 372; 8 W. R. 513.

Where the point had been reserved, and it was sworn that there was an intention to give the notice, and that it had been omitted within the four days by mere mistake, and there had been verbal notice of the intention, and the application was made promptly, the court allowed the formal notice to be given. *Ib.*

On an application for further time to deliver notice of appeal from a decision on a motion for a new trial, within four days from the time of the decision, it is necessary not only to show sufficient reason to account for the default, but likewise to satisfy the court, that, supposing the court had originally a discretionary power to allow an appeal, the court could have allowed it in the particular case. *Watson v. Lane*, 25 L. J., Exch. 240.

It is not a sufficient reason for the default, that the attorney inadvertently allowed the time to elapse. *Ib.*

The court having granted a rule nisi to enter a verdict for the defendant on a point reserved at the trial, or for a new trial on the ground of misdirection, and that the verdict was against evidence, afterwards made the rule absolute to the extent of granting a new trial. No leave to appeal was given:—Held, that no appeal lay. *Abbott v. Peary*, 6 H. & N. 118; 6 Jur., N. S. 1099; 8 W. R. 617—Exch. Cham.

Leave to appeal, in an action for infringement of a patent, was granted, and the court added to the leave, "and also on the ground that, taking the specification and disclaimer to be good, there was no evidence to go to the jury of infringement." This second point had not been discussed in the court below. The Exchequer Chamber affirmed the judgment of the court below, on the question of the sufficiency of the specification and disclaimer, but directed a new trial, on the ground that there was no evidence of infringement to go to the jury:—Held, that the Exchequer Chamber had authority to grant a new trial. *Seed v. Higgins*, 8 H. L. Cas. 550.

The plaintiff having obtained a verdict in an action for infringement of a patent, a rule nisi was obtained to enter the verdict for the defendant on a point reserved, and for a new trial for misdirection; and because the verdict was against evidence, the court made the rule absolute to enter the verdict for the defendant, without hearing any argument as to the new trial; and notice of appeal having been given, enlarged the rest of the rule until the decision of the court of error. *Betts v. Mensies*, 28 L. J., Q. B. 361.

A rule nisi being granted to a defendant for a new trial as against evidence, and also to enter the verdict for him on the ground of misdirection, and the rule being made absolute on that ground to enter the verdict for him, the rule as to a new trial standing over, notice

was given by the plaintiff of appeal, and the defendant signed judgment. The judgment was affirmed in error, and thereupon the defendant got an injunction in equity dissolved. The judgment was ultimately reversed in the House of Lords, and the court then, it not appearing that the plaintiff had been prejudiced, allowed the defendant to re-enter the case on the new trial paper, in the rule as against evidence. *Betts v. Mensies*, 11 W. R. 88—Q. B.

In ejectment for the recovery of premises by reason of a forfeiture for breach of covenant, for converting dwelling houses into shops, the court held that the user of the premises in their altered state for more than twenty years with the knowledge of the lessor, although occasionally complained of, was evidence from which a jury might presume a license:—Held, that the court might have granted a new trial, but as in its discretion it did not, the court of appeal would not exercise a counter-discretion by granting such new trial. *Gibson v. Doeg*, 7 L. T., N. S. 71—Exch. Cham.

A suggestion of error, under 15 & 16 Vict. c. 76, s. 152, and an appeal against a rule to enter a verdict, may be made at the same time and argued together. *Wheelton v. Hardisty*, 8 El. & Bl. 232; 5 Jur., N. S. 14—Exch. Cham.

Upon an appeal to the Exchequer Chamber from a decision of the court below, making absolute a rule for a new trial, the respondent cannot support that decision on the ground that the verdict was against the weight of evidence; for under the Common Law Procedure Act, 1854, the court of appeal has no jurisdiction to entertain that question in any form. *Morrison v. Universal Marine Insurance Company*, 42 L. J., Exch. 115—Exch. Cham.

**Costs on appeal.**—If the court is equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule. *Dansey v. Richardson*, 3 El. & Bl. 722; 2 C. L. R. 1467; 18 Jur. 957; 23 L. J., Q. B. 361.

Where the Exchequer Chamber confirms, on appeal, the decision of the court below, as to granting, discharging, or making absolute a rule, the appellant is liable for the costs both of the appeal and of the proceedings below. *Barker v. Windle*, 6 El. & Bl. 875; 2 Jur., N. S. 1069; 8 L. J., nom. *Windle v. Barker*, 23 L. J., Q. B. 249.

So, where the Exchequer Chamber reverses, upon appeal, the decision of the court below as to granting, discharging, or making absolute a rule, the appellant is, as a general rule, entitled to such costs as he would have had if the decision in the court below had been in his favor, but not to the costs of the appeal. *Young v. Moeller*, 6 El. & Bl. 681.

The rule with regards to costs in appeals under the above enactment, is the same as in cases in error. *Walker v. Bartlett*, 18 C. B. 845; 2 Jur., N. S. 643.

After the decision of the court below, and final judgment has been signed, such court has no power with reference to the costs of the appeal. *Parr v. Winteringham*, 5 L. T., N. S. 861—B. C.—Crompton.

## New Zealand.

See COLONIES.

## Newgate.

See PRISON AND PRISONER.

## Newspapers.

### I. STAMPING, 9493.

### II. RIGHTS AND LIABILITIES OF PROPRIETORS, 9498.

1. *In General*, 9493.
2. *For Libel*. See DEFAMATION.
3. *Criminal Information against Proprietors*. See CRIMINAL INFORMATION.

### III. PRINTING. See PRINTER.

### IV. COPYRIGHT. See COPYRIGHT.

#### I. STAMPING.

*Statutes.*—[The 16 & 17 Vict. c. 68, and 16 & 17 Vict. c. 71, were the acts relating to the stamp duties upon the publication of newspapers and supplements.

By 18 & 19 Vict. c. 37, the necessity of printing newspapers on stamped paper was repealed, except for the purpose of transmission by post.]

*What publication liable to duty.*—A publication containing public news, printed and published in London, for sale for less than sixpence, exceeding one sheet and not exceeding two sheets of paper of the dimensions of twenty-one inches in length and seventeen inches in breadth, and published periodically in parts or numbers at intervals exceeding twenty-six days, was not liable to stamp duty under 6 & 7 Will. 4, c. 76. *Att. Gen. v. Bradbury*, 7 Exch. 97; 16 Jur. 180; 21 L. J., Exch. 12.

### II. RIGHTS AND LIABILITIES OF PROPRIETORS.

#### 1. *In General.*

*Nature of right of publication.*—B. was the sole registered proprietor, under 6 & 7 Will. 4, c. 76, of certain newspapers published by him on premises of which he was rated occupier, and he was the owner of the

type and plant used in the publication. He mortgaged the newspapers, type, and plant to F., who took steps to alter the registration of proprietorship. The sheriff entered under an execution, issued by a creditor of B., and, though possession was demanded by F., remained in possession till B. had become bankrupt, which took place after two days:—Held, that the right of publishing a newspaper is goods and chattels within the meaning of the Bankrupt Act as to reputed ownership. *Foss, Ex parte*, 2 De G. & J. 230; 4 Jur., N. S. 522; 27 L. J., Bank. 17.

Held, also, that the type and plant were not within the order and disposition of the bankrupt, at the time of his bankruptcy, with the consent of the true owner, but that the right of publication of the newspapers was not capable of seizure by the sheriff, and that as the bankrupt continued the sole registered proprietor, and nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers. *Id.*

*Proof of proprietorship.*—A certified copy from the stamp office, of a declaration, filed under 6 & 7 Will. 4, c. 76, s. 8, that the person filing it was the publisher of a newspaper therein described, and the production of a paper corresponding with such newspaper in title, printer's and publisher's name, and place of publication, was sufficient proof of the publication by such person of the paper so produced. *Mayne v. Fletcher*, 4 M. & R. 811; 9 B. & C. 382; *Baker v. Wilkinson*, Car. & M. 399; *Brunswick v. Harmer*, 3 C. & K. 10; and see *Cook v. Ward*, 6 Bing. 409; 4 M. & P. 29. S. P., *Rea v. Donnison*, 4 B. & Ad. 698; *Reg. v. Woolmer*, 12 A. & E. 422; 4 P. & D. 137; *Rea v. Francis*, 4 N. & M. 251; 3 A. & E. 49.

[But the statute above mentioned is repealed by 32 & 33 Vict. c. 24, and this mode of proof is thereby rendered no longer available.]

*Liabilities on contracts.*—The fact of A.'s name appearing as the proprietor of a newspaper in the declaration filed at the stamp office, pursuant to the 6 & 7 Will. 4, c. 76, ss. 6, 8, does not render A. liable in respect of a contract entered into specifically with B., the real proprietor of the newspaper, after A. has ceased to be interested therein. *Holcroft v. Hoggins*, 3 C. B. 498; 15 L. J., C. P. 129.

On a contract to furnish intelligence to the proprietor of a morning newspaper, to be published therein only on the day after it was received, the defendant also publishing an evening edition of the same paper; the contract being that the plaintiff should be at liberty to send the intelligence to other morning newspapers:—Held, that the publication of it in the evening edition on the day on which it was received was a breach of contract, for which the plaintiff was entitled to recover the sums he would otherwise have received from the other morning papers. *Wood v. Johnson*, 1 F. & F. 455—Erie.

A., the proprietor of a newspaper, prevailed on B. to make and deliver at the stamp office an affidavit that he, B., was the proprietor of the paper; B. afterwards agreed to sell the paper to D. A. having become insolvent, his assignees filed a bill to set aside the sale for fraud:—Held, that as B. had, at A.'s instance, violated the statute, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, A.'s assignees were not entitled to the relief asked. *Harmer v. Westmacott*, 6 Sim. 284.

**Mortgages.**—Where a mortgagee of a newspaper, by an improper exercise of a power of sale, entered into possession, as purchaser, and printed the paper, receiving the profits and providing the necessary funds, a court of equity, having set aside the purchase, refused to allow him to charge credit prices for printing, even though on the mortgage account a balance might be found due to him. *Robertson v. Norris*, 1 Giff. 428.

## Nil Debet.

See PLEADING.

## Nisi Prius.

- I. OFFICERS. See OFFICE AND OFFICER.
- II. MATTERS OF PRACTICE. See PRACTICE.
- III. RECORD. See PRACTICE.

## Nolle Prosequi.

- I. IN ACTIONS, 9495.
- II. IN CRIMINAL PROSECUTIONS. See CRIMINAL LAW.

### I. IN ACTIONS.

**Entry.**—A nolle prosequi may be entered as to a defendant in trover, who ought not to have been joined. *Dale v. Eyre*, 1 Wils. 860.

Where one count is demurred to, the plaintiff may enter a nolle prosequi as to that count, and go to trial on the others. *Bertram v. Gordon*, 2 Marsh. 144; 6 Taunt. 444.

But where the demurrer to a declaration is, that the counts are improperly joined, he cannot enter a nolle prosequi as to some, and leave the others remaining. *Ross v. Bowler*, 1 H. Bl. 108.

So, after demurrer to two counts against two defendants, because one of them was not named in the last count, the plaintiff cannot enter a nolle prosequi on that count, and proceed on the other. *Drummond v. Dorant*, 4

T. R. 360. And see *Teed v. Elworthy*, 14 East, 210.

The court will not allow a defendant to strike out the entry of a judgment of nolle prosequi entered by the plaintiff, as to one count, after it has been demurred to. *Milliken v. Fox*, 1 B. & P. 157.

Where an action was brought against several, and a verdict taken against all, though it had been agreed that no evidence should be given against one of them, the court ordered a nolle prosequi to be entered as to him, though the assignee of the plaintiff, who had since become an insolvent, objected. *Bloomfield v. Blake*, 2 D. P. C. 237.

When a nolle prosequi is entered on a plea going to the whole cause of action, the defendant is entitled to judgment upon the whole record. *Peters v. Croft*, 6 Scott, 897; 1 Arn. 897.

A nolle prosequi as to part, entered up after judgment for the whole, is equivalent to a retraxit, and a bar to any future action for the same cause. *Bowden v. Horne*, 7 Ring. 716.

In an action of trespass the pleas were—first, not guilty; and secondly, a justification. Replication and new assignment. Demurrer to the replication and new assignment; 15*l.* damages on the first issue, and nominal damages on the second. The plaintiff entered a nolle prosequi to the new assignment, and gave the defendant judgment on demurrer. The court set aside the nolle prosequi. *Strother v. Randerson*, 5 D. P. C. 280.

A declaration for a penalty (consisting of one count only) concluded to the damage of the plaintiff of 100*l.* The defendant demurred specially, assigning for cause this and another ground. The plaintiff entered a nolle prosequi as to the damages. A judge ordered the nolle prosequi to be set aside; the court supported the order. *Butler v. Mapp*, 4 M. & Scott, 258.

**Effect.**—A declaration consisted of one special and several general counts. To the special count there were several special pleas; to the general counts the general issue. The plaintiff entered a nolle prosequi on the special count, and joined issue on the others:—Held, that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count, and the pleas to it. *Hayward v. Kain*, M. & M. 311—Tenterden.

A defendant having pleaded several pleas, to some of which the plaintiff demurred, and on others joined issue, the demurrers were argued, and judgment given for the defendant. The plaintiff not having proceeded to trial of the issue in fact, the defendant obtained a rule nisi for judgment as in case of a nonsuit, and on showing cause, the plaintiff offered a stet processus: at the suggestion of the court, a nolle prosequi was entered to so much of the declaration as applied to the issue in fact, the defendant waiving his right to costs upon such nolle prosequi. *Quarring-*

*ton v. Arthur*, 2 D., N. S. 1036; 11 M. & W. 491; 12 L. J., Exch. 311.

The effect of a nolle prosequi entered as to any portion of a plaintiff's demand, before trial, is to withdraw that part of his claim from the consideration of the jury; but such entry leaves the part of the claim so withdrawn so entirely unaffected by the verdict, as to enable the plaintiff to maintain a fresh action in respect of it. *Amor v. Cuthbert*, 3 M. & G. 1; 3 Scott, N. R. 325; 1 D., N. S. 160.

Where, in an action on contract against two, one pleaded never indebted, and the other never indebted and infancy, and the plaintiff took issue upon the other pleas, but to the plea of infancy entered a nolle prosequi against him who had pleaded it:—Held, that he having thereby admitted upon the record that there never was any joint binding contract, could not recover against either, and that he ought to have been nonsuited. *Boyle v. Webster*, 16 Jur. 683; 21 L. J., Q. B. 202; 17 Q. B. 950.

If, in an action on a bill of exchange by indorsee against acceptor, containing a count upon an account stated, he pleads to the first count that he did not accept, and does not plead to the second count, the judge will try the issue joined, and, if a verdict passes for the plaintiff, a nolle prosequi should be entered as to the count upon an account stated. *Luckie v. Gompertz*, Car. & M. 55—Abinger. S. P., *Allopp v. Smith*, 7 C. & P. 708.

In an action to recover 138*l.* 8*s.* 10*d.* balance due for work and labor, in which the particulars of demand consisted of a series of items, the defendant pleaded first, except as to 65*l.* 7*s.* 3*d.* parcel, &c., never indebted; secondly, except as to the parcel, payment; and he said nothing in bar of the claim as to the 65*l.* 7*s.* 3*d.* The plaintiff thereupon entered a nolle prosequi in respect of so much of his claim as the pleas were pleaded to, viz., 68*l.* 1*s.* 7*d.*, and signed judgment by nil dicit for 65*l.* 7*s.* 3*d.*, and costs of suit, which the defendant paid. Thereupon the plaintiff immediately brought a second action, to recover the 68*l.* 1*s.* 7*d.*, in respect of which the nolle prosequi was entered, to which the defendant pleaded, first, never indebted; secondly, payment before action; and thirdly, a special plea setting up the judgment recovered for 65*l.* 7*s.* 3*d.* in the previous action, in bar of and as an answer to the second action. The particulars in the second action were identically the same as those in the first action, with the addition of a credit for "65*l.* 7*s.* 3*d.* amount of judgment recovered," leaving a balance of 68*l.* 1*s.* 7*d.*, for which the second action was brought. At the trial, a verdict was, by direction of the judge, entered for the plaintiff:—Held, that he was entitled to the verdict. The nolle prosequi entered as to part of the claim, before final judgment in the first action, did not preclude him from bringing a second action for the balance of his claim, which was the subject of the nolle prosequi, and from recovering;

and the plea of judgment recovered was not supported or proved by the nolle prosequi. *Jones v. Brussey*, 24 L. T., N. S. 947—Exch.

**Costs.**—[By 8 Eliz. c. 2, s. 2, if after a declaration the plaintiff shall not prosecute his suit with effect, but shall willingly delay the same, the court shall award the defendant his costs.]

By 3 & 4 Will. 4, c. 42, s. 32, where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for, and recover his reasonable costs, unless the judge, before whom such case shall be tried, shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

By s. 33, where any nolle prosequi shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.]

If the plaintiff enters a nolle prosequi, the defendant is entitled to costs under 8 Eliz. c. 2, s. 2. *Cooper v. Tiffin*, 3 T. R. 511.

In trespass against two defendants, one suffered judgment by default, and a writ of inquiry was executed as against him, and the plaintiff entered a nolle prosequi as to the other:—Held, that the latter was entitled to costs under 8 Eliz. c. 2, s. 2. *Jackson v. Chambers*, 2 Moore, 718.

A defendant is entitled to costs under 3 & 4 Will. 4, c. 42, s. 33, on a nolle prosequi entered as to part of the sum claimed in the declaration, whether consisting of one or more counts. *Williams v. Sharwood*, 3 Scott, 761; 3 Bing. N. C. 331; 5 D. P. C. 371; 2 Hodges, 248

## Non Assumpsit.

See PLEADING.

## Non Joinder.

I. OF PARTIES. See ACTION AND SUIT.  
II. AMENDING. See AMENDMENT.

## Non Obstante Verdicto.

See VERDICT.

## Non Pros.

**Statute.**—[By 13 Car. 2, stat. 2, c. 2, s. 8. upon appearance entered in the term of which the process is returnable with the proper officer, if the plaintiff shall not declare before the end of the term next following after appearance, a nonsuit [i. e., non pros., non prosequitur] shall be entered for want of a declaration against the plaintiff, and the defendant shall have judgment to recover costs against the plaintiff.]

The statute extends to all cases. *Oldham v. Burrell*, 7 T. R. 26.

**Necessity of appearance by defendant.**—A defendant cannot sign judgment of non pros. before appearance. *Anon.*, 2 Chit. 87.

A defendant entered an irregular appearance within the eight days; the plaintiff gave him notice of the irregularity, and he promised to examine and correct it, but instead of doing so, entered a new appearance in the next term in a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of non pros. The court held, that the irregular appearance might have been corrected in the book, and set aside the judgment of non pros., the costs to be costs in the cause. *Bate v. Bolton or Botten*, 2 C., M. & R. 365; 4 D. P. C. 161, 677; 1 Tyr. & G. 148; 5 Tyr. 1065.

A writ of summons issued in an action intended to be brought against John G., by mistake described as Henry G., and was served upon Henry G. The mistake in the service being discovered, notice was given to Henry G. not to appear. A copy of a pluries summons was some months afterwards left at the residence of John G., the real defendant, still describing him as Henry G. The defendant gave this copy to Henry G., in whose name an attorney entered an appearance, demanded a declaration, and afterwards (with full knowledge that the appearance was no appearance in the cause) signed judgment of non pros. for want of a declaration:—The court set aside the judgment for irregularity, with costs to be paid by the attorney. *Belcher v. Goodered*, 4 C. B. 472; 4 D. & L. 814.

A writ was sued out against S., and the service was on her sister P., at their residence, who said she was not S. It was sworn on the part of the plaintiff, and denied on the part of the defendant, that the person serving directed her to deliver the copy of the writ to her sister. P., nevertheless, treated the service as having been effected on herself, and entered an appearance after the lapse of eight days, in the following terms:—"P. sued as S.," and having demanded a declaration, when it was stated to her she was not the person intended to be sued (the action being against S.), she ultimately entered judgment of non pros. Upon motion to set aside the judgment for irregularity, the court made the rule absolute, with costs. *Walker v. Medland*, 1 D. & L. 159; 7 Jur. 853—B. C.—Coleridge.

**When judgment of non pros. may be entered, in actions, generally.**—Judgment of non pros. for not declaring, cannot be signed before the end of the term next after an appearance is entered. *Foster v. Pryme*, 9 D. P. C. 749; 8 M. & W. 664.

Where a plaintiff does not declare after having obtained time, the defendant may sign judgment of non pros. without giving a rule to declare. *Towers v. Powell*, 1 H. Bl. 87.

A defendant cannot sign judgment of non pros. for not declaring after an order for particulars of the plaintiff's demand, with a stay of proceedings till they are delivered, unless the order is, that they should be delivered within a certain time. *Burgess v. Swayne*, 7 B. & C. 485.

A defendant by mistake pleaded to three instead of four counts; the plaintiff replied; the defendant then amended his plea by extending it to the fourth count; and the plaintiff not having replied to the amended plea, although ruled so to do, the defendant signed judgment of non pros. to the whole action:—Held, that this was irregular. *Dordsey v. Cook*, 4 B. & C. 185.

To a declaration to recover 30*l.*, the defendant pleaded, first, to the whole declaration, payment of 27*l.* 4*s.* 4*d.* into court, and that the plaintiff had not sustained damages to a greater amount; secondly, except as to 27*l.* 4*s.* 4*d.*, non assumpsit; thirdly, payment of 10*l.* before action; and fourthly, as to all except 27*l.* 4*s.* 4*d.*, a set-off. The plaintiff replied that he accepted the money paid into court, and was satisfied:—Held, that the defendant was not justified in signing judgment of non pros. for want of a replication to the pleas. *Coates v. Stephens*, 3 D. P. C. 784; 2 C., M. & R. 118; 1 Gale, 75.

In an action to recover a balance of 65*l.*, the defendant pleaded, except as to 10*l.* 18*s.*, parcel, &c., nunquam indebitatus; as to 10*l.*, parcel, &c., payment; and as to 10*l.* 18*s.*, payment into court of that sum in discharge of the causes of action in the declaration; which sum the plaintiff took out of court, replying that he accepted the same in satisfaction of the causes of action:—Held, that as the first two pleas were left unanswered, the defendant was entitled to sign judgment of non pros. even though the plaintiff had taxed his costs. *Emmott v. Standen*, 3 M. & W. 497; 6 D. P. C. 591; 1 H. & H. 173; 2 Jur. 874.

To a declaration for goods sold and delivered, the defendant pleaded, first, except as to 65*l.* 1*s.* 6*d.*, non assumpsit; as to 27*l.* 18*s.* 2*d.*, part of the last-mentioned sum, payment before action; as to 18*l.*, further parcel of the said sum, payment into court of that amount; as to the residue, a set-off. The plaintiff replied, accepting the 18*l.* in satisfaction, taking no notice of the other pleas. The court gave leave to the defendant to sign judgment of non pros., unless the plaintiff amended his replication on payment of costs, or consented to taxation of costs as upon a non pros., in respect of the unanswered

pleas. *Topham v. Kidmore*, 5 D. P. C. 676; W., W. & D. 251.

A defendant being in a condition to enter judgment of non pros. for want of a declaration, the plaintiff, with a view to prevent the non pros., obtained a rule to discontinue on payment of costs; however, instead of paying costs or discontinuing, as soon as the rule expired he served the defendant with a declaration:—Held, a fraud on the proceedings of the court; and the defendant having entered up judgment of non pros., the court refused to set it aside. *Ariel v. Barrow*, 8 Bing. 375; 1 M. & Scott, 581.

— in joint actions.]—It is not competent to one of several defendants to sign judgment of non pros. on behalf of all, unless the plaintiff is in default as to all. *Hamlet v. Bingham or Breckon*, 4 M. & G. 909; 5 Scott, N. R. 889. S. P., *Powell v. White*, 1 Dougl. 169.

In an action against several, a judgment of non pros. cannot be signed until all have appeared. *Palmer v. Feistel*, 2 D. P. C. 507.

But if the plaintiff declares against one of two defendants named in his writ, and does not proceed against the other, the latter may sign judgment of non pros. *Roe v. Cock*, 2 T. R. 257.

And whenever it can appear that the action is not a joint action, judgment of non pros. may be signed by all or any of the defendants named in the writ. *Butler v. Upton*, 2 T. R. 258, n.

Where a writ of summons has issued against several defendants, who enter a joint appearance, and the plaintiff declares against some of them only, the others may, after notice to declare, sign judgment of non pros. as against themselves. *Baneroft v. Greenwood*, 1 H. & C. 778; 9 Jur., N. S. 180; 32 L. J., Exch. 154; 11 W. R. 349; 7 L. T., N. S. 719.

**Setting aside.**—The court will not set aside a regular non pros. obtained by a defendant against a common informer. *Bennet q. t. v. Smith*, 1 Burr. 40; 2 Ld. Ken. 82.

Judgment of non pros. was set aside on an affidavit that the debt and costs had been paid previously to signing, although the defendant swore that the money was not paid with his privy. *Kibblewhite v. Jeffreys*, 1 Chit. 142.

**Costs.**—Where a defendant removes proceedings from an inferior court by certiorari, the plaintiff is not bound to follow the suit; and if the defendant signs judgment of non pros. for want of a declaration, he is irregular, and is not entitled to costs. *Clark v. Berwick*, 7 D. & R. 104; 4 B. & C. 649.

## Nonsuit.

I. ALLOWING AND SETTING ASIDE, GENERALLY, 9502.

II. UPON RESERVATION OF LEAVE TO ENTER, 9507.

III. COSTS, 9509.

IV. NEW TRIAL UPON IMPROPER NONSUIT.  
See NEW TRIAL.

### I. ALLOWING AND SETTING ASIDE, GENERALLY.

When a plaintiff may be nonsuited; in actions generally.]—A plaintiff cannot be nonsuited but by his own consent. *Dessez v. Purday*, 4 N. & M. 633; 3 A. & E. 166; 1 H. & W. 227.

It is a common law right of every plaintiff to be nonsuited if he pleases, at any stage of the proceedings, until the jury has given a verdict, or if the case is tried in a county court without a jury, until the judge has pronounced his judgment. *Standiford v. Clarke*, 7 Exch. 439; 16 Jur. 430; 21 L. J., Exch. 129. S. P., *Outwaits v. Hudson*, 7 Exch. 980; 21 L. J., Exch. 151.

It is a right of a plaintiff to be nonsuited at any stage of the cause, even after the defendant has put in evidence. *Stearns v. Billing*, 2 F. & F. 136—Martin.

If the judge directs a nonsuit, and the plaintiff does not appear when called, and judgment of nonsuit is therefore entered against him, he cannot tender a bill of exceptions and bring a writ of error, assigning for error that the judge improperly directed the nonsuit. The proper course is for the plaintiff to appear, and require the judge to direct the jury in point of law in his favor, and upon the judge refusing to permit him to appeal, and nonsuiting him against his will, or refusing to direct the jury in his favor, the plaintiff may tender a bill of exceptions and bring a writ of error. *Cosser or Corsar v. Reed*, 17 Q. B. 540; 2 L., M. & P. 646; 16 Jur. 57; 21 L. J., Q. B. 18.

Action in 20l. for work and labor and on an account stated. Plea, as to all the ~~sum~~ demanded, except 7l., never indebted; as to 7l., the defendant suffered judgment by default. The plaintiff proved work done to the amount of 4l. 4s. 10d., and materials provided to the amount of 8l. 4s., but gave no evidence applicable to the account stated:—Held, that the plaintiff was entitled to a nonsuit. *Heath v. Freeland*, 1 M. & W. 543.

If there is any evidence to support any count in a declaration, the judge will not nonsuit. *Harman v. Johnson*, 3 C. & K. 272—Campbell.

Or nonsuit a plaintiff, on the ground that to make out a case in his favor part of the testimony of his own witnesses must be disbelieved. *Briers v. Rust*, 3 C. & K. 294—Williams.

After a verdict given, though not recorded, it is too late to be nonsuited. *Blankin v. Great Central Gas Consumers Company*, 3 F. & F. 487—Cockburn.

In an action by a woman for assault, it appeared from her evidence that the assault amounted to a rape. The judge stated that he should direct a verdict for the defendant, on the ground either that a rape had been committed for which he had not been prosecuted, or that if the plaintiff had consented to assault had been committed. The plaintiff thereupon elected to be nonsuited:—Held, that the nonsuit was right. *Wollock v. Co-*



*stantine*, 32 L. J., Exch. 285; 2 H. & C. 146; 7 L. T., N. S. 751.

Where a plaintiff does not appear, a verdict cannot be taken against him, though the defendant pleads a tender. *Anderson v. Shaw*, 3 Bing. 290; 11 Moore, 44; 2 C. & P. 85.

But a plaintiff may be nonsuited after a plea of tender. *Ib.*

Even where the defendant takes down the record by proviso. *Ib.*

In prohibition, the issue lay upon the plaintiff, who did not appear at the trial; the defendant put in his record, entered into the merits and took a verdict:—Held, irregular; the plaintiff ought to have been called and nonsuited. *Gardener v. Davis*, 1 Wils. 300.

In replevin, if the defendant avows for rent in arrear, and the plaintiff replies non tenuit, on which issue is joined; if the plaintiff does not appear by himself or his counsel to open the pleadings, he may be nonsuited, although it is the defendant's record. *Symes v. Larby*, 2 C. & P. 358—Best.

So, where the plaintiff replies riens in arrear. *Prouett v. Cracknall*, 2 C. & P. 359, n.—Best.

Where a plaintiff in replevin does not appear, the defendant cannot take a verdict, though the record is brought down by his writ of nisi prius, but a nonsuit must be entered. *Mann v. Lovejoy*, R. & M. 357—Abbott.

If the counsel for a defendant has addressed the jury and examined witnesses, he has no right then to address the judge for a nonsuit. *Roberts v. Croft*, 7 C. & P. 370—Denman.

Where counsel regularly retained appear for the plaintiff in a penal action, and claim to proceed, the plaintiff himself cannot appear and claim to be nonsuited. *Marks v. Benjamin*, 2 M. & Rob. 225—Abinger.

But a plaintiff not appearing in a *qui tam* action, the defendant is entitled to a nonsuit. *Stovell v. Brown*, 1 F. & F. 256—Wightman.

An infant (the son of a baronet, and having an income of 500*l.* a year, with the prospect of 20,000*l.* on attaining his majority) bought on credit a pair of solitaires, or shirt-sleeve studs, composed of crystals adorned with diamonds and rubies, and a silver goblet for presentation to a friend, at whose house he had been staying. No evidence was given of anything peculiar in his station rendering it exceptionally necessary for him to have such articles. The jury, in answer to the questions put to them, found that the articles were necessaries, and suitable to his station and degree:—Held, that as the onus was on the plaintiff, and he gave no evidence to show that the articles were necessaries, the question ought not to have been left to the jury. *Ryder v. Wombwell*, 38 L. J., Exch. 8; 4 L. R., Exch. 32; 17 W. R. 167; 19 L. T., N. S. 491—Exch. Cham.

The question in all such cases is one of mixed law and fact, the preliminary question being (as in all other cases) whether there is any evidence on which the jury could properly find for the party on whom the onus of

proof lies. The judge (who must be supposed to know as well as a jury can know without evidence, what is the usual and normal state of things, and whether any particular article is of such a description that it may be a necessary under such usual state of things) must determine, first, whether the case is such as to cast on the plaintiff the onus of proving that the articles in question are necessaries, and then whether there is any sufficient evidence for the jury to satisfy that onus; and if there is not, he ought to direct a nonsuit. *Ib.*

The modern rule as to a nonsuit is that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the onus of proof is imposed. *Giblin v. McMullen*, 21 L. T., N. S. 214; 2 L. R., P. C. 317; 17 W. R. 445; 5 Moore P. C. C., N. S. 434.

A nonsuit may be directed even after the defendant has entered on his case, and evidence given by the latter may be used for the purpose of a nonsuit. *Ib.*

In an action against a bank for the recovery of some debentures deposited with the bank, at the close of the plaintiff's case, the defendant applied for a nonsuit, on the ground that the bank, being a gratuitous bailee, there was no evidence given of such negligence as to render them liable. The judge refused to stop the case, but reserved leave to move for a nonsuit. The jury found for the plaintiff. The defendant obtained a rule to set aside the verdict, and to enter a verdict for the defendant or for a judgment of nonsuit, and the court made the rule absolute for a nonsuit:—Held, that such course was regular, as it was the duty of the court to do what the judge ought to have done at the trial, when, at the close of the plaintiff's case there being no evidence upon which the jury could reasonably and properly find a verdict, the judge ought to have directed a nonsuit. *Ib.*

When a plaintiff has closed his evidence, and the judge is of opinion that there is no case to go to the jury, he ought to direct accordingly, giving leave, if necessary, for the plaintiff to move to enter a verdict in his favor. But it is erroneous under such circumstances to take a formal verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him should the court (to whom power is reserved to draw inferences of fact) be of opinion that on the facts the verdict ought to be so entered. *Daniel v. Metropolitan Railway Company*, 5 L. R., H. L. Cas. 45; 40 L. J., C. P. 121; 20 W. R. 37; 24 L. T., N. S. 815.

When at a trial for a civil injury a plaintiff proves facts which may amount to a felony, it is nevertheless not the duty of the judge to nonsuit the plaintiff or to direct the jury that if they find that a felony has been committed by the defendant they must find against the plaintiff. *Wells v. Abrahams*, 41 L. J., Q. B.

806; 7 L. R., Q. B. 554; 20 W. R. 659; 26 L. T., N. S. 326.

It does not lie in the mouth of the defendant after the trial, while denying the felony, to question the judge's ruling on the ground that he should have nonsuited or so directed the jury. *Id.*

As to entry of nonsuit after reservation of leave to move to enter,—see this title, II.

As to improper entry of nonsuit, for which a new trial may be granted,—see NEW TRIAL.

—in joint actions.]—In a joint action of trespass against several defendants, there cannot be a nonsuit as to one, and a verdict against the others. *Revett v. Brown*, 2 M. & P. 18; 5 Bing. 7.

If one of two defendants suffers judgment by default, and the other goes to trial, the plaintiff cannot be nonsuited as to him; but such defendant must have a verdict if the plaintiff fails to make out his case. *Hannay v. Smith*, 3 T. R. 663.

In a joint action of assumpsit against two defendants, one of whom suffers judgment by default, and the other goes to trial, the plaintiff may elect to be nonsuited as against the latter, if he finds that he cannot make out his case. *Murphy v. Tomlin*, 7 D. & R. 619; 5 B. & C. 178.

Where three partners were sued, and two suffered judgment to go by default:—Held, that the plaintiff could not be nonsuited, but the third partner, who defended, was entitled to a verdict. *Newmarch v. Clay*, 14 East, 239.

Cause of nonsuit.]—A nonsuit will not lie upon a wrong venue if there is no issue in the pleadings upon the locality. *Hitchings v. Hollingsworth*, 7 Moore P. C. C. 228.

A plaintiff may be nonsuited, although an objection appears upon the record, if it is of such a nature that the action clearly cannot be maintained. *Sadler v. Robins*, 1 Camp. 256—Ellenborough.

A plaintiff having been nonsuited for not producing a document on the trial, the court set aside the nonsuit on payment of costs, upon an affidavit only of his attorney, that he, the attorney, "as soon as he found that the action was likely to come on," commenced inquiries to ascertain in whose hand the document was, and, upon discovering this, immediately (through a person who promised to procure it) made efforts to obtain it, but obtained it too late for the trial, and had it at the time of making the application. *Atkins v. Owen*, 4 A. & E. 819; 2 H. & W. 59; 6 N. & M. 229.

Setting aside.]—When a judge nonsuits the plaintiff from mistake, it may be set aside. *Sadler v. Evans*, 4 Burr. 1984.

But the court will not set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff. *Kindred v. Bagg*, 1 Taunt. 10.

Where the plaintiff's counsel, after a judge has begun to sum up, proposes to be nonsuited, he cannot move to set aside the nonsuit, notwithstanding the judge may have expressed a strong opinion as to the effect of the evidence. *Simpson v. Clayton*, 2 Bing. N. C. 467; 2 Scott, 691.

By submitting to a nonsuit, not spontaneously, but in deference to an opinion expressed by the judge that the action is not maintainable, a plaintiff is not precluded from moving to set that nonsuit aside. *Scott v. Lee*, 3 M. & G. 452; 4 Scott, N. R. 77; 5 Jur. 1184.

Submitting to a nonsuit, in deference to the opinion of the judge at the trial, which opinion is incorrect, does not estop the plaintiff from moving to set aside such nonsuit. *Alexander v. Barker*, 2 C. & J. 133; 3 Tr. 140.

If a plaintiff elects to be nonsuited instead of allowing his case to go to the jury, he cannot afterwards move to set aside the nonsuit. *Barnes v. Whiteman*, 1 W. P. C. 17; 9 D. P. C. 181.

Where a plaintiff was nonsuited through the neglect of the attorney's clerk to attend in court, the court refused to set aside the nonsuit, except upon the terms of the attorney paying the costs occasioned by the defendant's attending to try. *White v. Sandell*, 3 D. P. C. 798.

Action on a bond. Plea, setting out the condition, and averring performance. Replication, assigning breaches. Rejoinder, tendering issue thereon. At the trial, the issue as one of the breaches only was found for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit:—Held, that the breach being found as alleged, the defendant could not be entitled to have a nonsuit entered. *Chapman v. Beckington*, 3 G. & D. 83; 7 Jur. 62.

A plaintiff, being indebted to the defendant, gave him a bill of exchange for 170*l.* for discounting or return on demand. The defendant transmitted the bill to a broker, directing him, if he was satisfied with the respectability of the acceptor, to put the bill to his account. In trover for the bill, the defendant pleaded not guilty, and not possessed. At the trial, it was proved that the defendant had authority to apply the proceeds of the bill to his own use; but that if he could not get it discounted, he might return it to the plaintiff. The judge directed the jury to decide whether the defendant had wrongfully converted the proceeds of the bill to his own use. The plaintiff objected to this direction, and elected to be nonsuited:—Held, that the direction was not inconsistent with the state of the record, for that it was within the issue to inquire whether the defendant had acted within the scope of the authority given to him by the plaintiff; and that, as the plaintiff had elected to be nonsuited, under the circumstances, the court would not set aside the nonsuit. *William*

v. *Whalley*, 1 D. & L. 9; 5 M. & G. 590; 6 Scott, N. R. 631; 12 L. J., C. P. 270.

A rule having been obtained to set aside a nonsuit, upon the ground that the defendant had, as it was alleged, prevented two or three co-plaintiffs from giving evidence, by bribery, it was not made to appear that the co-plaintiffs said to have been kept away could have given any material evidence, or that any steps had been taken to procure their attendance, and the rule was discharged. *Beale v. Martin*, 12 W. R. 135—B. C.—Crompton.

On the argument of a rule to set aside a nonsuit on the ground that upon certain findings of the jury the verdict should have been entered for the plaintiff, the defendant may show that the verdict, if so entered, would be against the weight of evidence, although he may not have informed the court within the first four days of the term succeeding the trial of his intention to raise such an objection. *Walker v. Cory*, 4 L. R., Exch. 152; 38 L. J., Exch. 128; 20 L. T., N. S. 453.

## II. UPON RESERVATION OF LEAVE TO ENTER.

**Necessity of leave, and its effect.**—The court will not permit a nonsuit to be entered upon a valid legal objection taken at the trial, but not reserved by the judge. *Matthews v. Smith*, 2 Y. & J. 426.

A motion for entering a nonsuit cannot be made unless leave has been reserved for that purpose. *Ricketts v. Burman*, 4 D. P. C. 578. S. P., *Tippets v. Heane*, 4 Tyr. 772.

Where two issues were joined for the plaintiff and two for the defendant, and the jury was discharged as to the fifth, and the verdict was entered accordingly, but leave was given to the defendant to move to enter a nonsuit:—Held, that the court might direct the nonsuit to be entered, although the defendant had a verdict on the same issue. *Shepherd v. Chester (Bishop)*, 4 M. & P. 130; 6 Bing. 485.

Where a legal objection is taken at the trial, and overruled by the judge, without reserving the point, and the court is afterwards of opinion that the objection was a good ground of nonsuit, the court will grant a new trial only, and will not permit a nonsuit to be entered. *Minchin v. Clement*, 1 B. & A. 252.

A nonsuit which is omitted to be taken by mistake at nisi prius cannot afterwards be recorded in bar. *Gardener v. Davis*, 1 Wils. 800.

When leave is reserved to move to enter a nonsuit upon one point only, the court, when it has the facts before it upon the judge's notes, will take the whole of these facts into its consideration, and will come to such a decision as these facts require. *Dos d. Pritchard v. Dodd*, 2 N. & M. 838.

If leave is reserved to enter a nonsuit, the court will, notwithstanding the leave reserved being thus restricted in point of form order

a verdict to be entered for the defendant on one issue without disturbing the verdict found for the plaintiff on another, if that course seems most consistent with doing justice between the parties. *Winterbottom v. Derby*, 2 L. R., Exch. 316; 36 L. J., Exch. 194.

**Motion to enter.**—No motion to enter a nonsuit shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term, or after the expiration of the first four days of the ensuing term, when the cause is tried out of term, unless entered in a list of postponed motions by leave of the court. Reg. Gen., Q. B., C. P., and Exch., H. T. 16 Vict. r. 50; 1 EL. & BL., App. xii.

**Rule.**—[By 17 & 18 Vict. c. 125, s. 83, in every rule nisi to enter a nonsuit, the grounds upon which such rule shall have been granted shall be shortly stated therein.]

A rule nisi for a new trial on affidavits stating that the rule was granted "on the grounds set forth in the affidavits annexed" is insufficient. *Drayson v. Andrews*, 10 Exch. 472; 18 Jur. 1057; 24 L. J., Exch. 22.

But the court has power to order the rule to be amended on showing cause against it. *Id.*

**Appeal on rule.**—[By 17 & 18 Vict. c. 125, Common Law Procedure Act, 1854, s. 84, in all cases of rules to enter a verdict or nonsuit upon a point reserved at the trial, if the rule to show cause be refused or granted and then discharged or made absolute, the party decided against may appeal.]

By s. 87, no appeal shall be allowed unless notice thereof be given in writing to the opposite party or his attorney, and to one of the masters of the court, within four days after the decision complained of, or such further time as may be allowed by the court or a judge.]

An appeal lay against the decision of the court on a rule to enter a verdict or a nonsuit upon a point reserved at the trial of a cause before an under-sheriff under the Writ of Trial Act. *Levy v. Green*, 1 EL. & EL. 969; 5 Jur., N. S. 1245; 28 L. J., Q. B. 319—Exch. Cham.

Upon the trial of an action the plaintiff obtained the verdict, but leave was reserved to the defendant to move for a nonsuit, or to enter a verdict for him. He moved accordingly, and the court was about to make a rule absolute for entering a verdict, when the plaintiff requested that a nonsuit should be entered instead of a verdict. A nonsuit was entered accordingly:—Held, that the plaintiff was a party decided against, and that he might appeal. *Gether v. Copper*, 2 Jur., N. S. 789—Exch. Cham.

But where a verdict was found for the plaintiff, leave being reserved for the defendant on a point taken at the trial to move to enter a verdict or for a nonsuit, and he obtained a rule nisi to enter a verdict, or for a

nonsuit, or for a new trial on the ground of misdirection, and the court made absolute the rule for a new trial:—Held, that no appeal lay. *Abbott v. Feary*, 6 Jur., N. S. 1099; 29 L. J., Exch. 475; 8 W. R. 617; 6 H. & N. 113—Exch. Cham.

Where a party has through inadvertence allowed the time for giving notice of appeal to elapse, the court may in its discretion allow an appeal, but will be guided in the exercise of that discretion by the particular circumstances of each case. *Kelner v. Baxter*, 2 L. R., C. P. 174.

### III. Costs.

**Right of defendant to costs.**—[The 23 Hen. 8, c. 5, 8 Eliz. c. 2, s. 2, and 4 Jac. 1, c. 3, give costs to the defendant where the plaintiff is nonsuited.]

Where a plaintiff is nonsuited, the defendant is entitled to costs. *Cameron v. Reynolds*, Cowp. 407.

Where a qui tam informer in an action on 21 Hen. 8, c. 13, is nonsuited, the defendant is entitled to costs. *Wilkinson q. t. v. Allot*, Cowp. 366.

When a nonsuit is set aside upon payment of costs, such payment is made a condition precedent to setting aside the nonsuit; and without it the plaintiff cannot proceed to another trial. *Nichols v. Bozon*, 13 East, 185.

Where a plaintiff was nonsuited, and a rule nisi was afterwards granted to set aside the nonsuit on payment of costs, and then the parties entered into an arrangement, without the intervention of the defendant's attorney, to settle the action, by the defendant's giving a bill of sale and warrant of attorney to the plaintiff for his debt and costs, but without providing for the costs due by the defendant to his attorney, and the attorney thereupon got the rule discharged for setting aside the nonsuit:—Held, that he was justified in so doing. *Young v. Redhead*, 2 D. P. C. 119.

A plaintiff having mistaken what the judge had said the day previously as to what causes would be taken on the day following, was not present on that day when his cause was called on. The defendant was present, and the judge directed a nonsuit to be entered, after which the defendant left the assize town. The plaintiff shortly after appeared in court, and discovered that the jury had not been sworn, upon which the judge, after waiting for the defendant to return, and the defendant not returning, directed, instead of a nonsuit, the cause to be struck out. The defendant, having obtained a rule nisi for the costs of the day, the court thinking that it was his own fault in not having the jury sworn, that he did not obtain a nonsuit under the circumstances of the case, discharged the rule, the costs of the day and of the rule to be costs in the cause. *Warne v. Hill*, 6 Jur., N. S. 959; 29 L. J., C. P. 201.

## Notary.

### I. ADMISSION AND APPOINTMENT, 2510. II. PROTESTS, CERTIFICATES AND OTHER NOTARIAL ACTS, 2511.

1. *General Requisites, and Effect*, 2511.
2. *Admissibility and Effect in Evidence*. See EVIDENCE.
3. *Protest for Non-Payment of Bills, Notes, &c.* See BILLS OF EXCHANGE AND PROMISSORY NOTES.

### I. ADMISSION AND APPOINTMENT.

**Statutes.**—[41 Geo. 3, c. 79, 3 & 4 Will. 4, c. 70, and 6 & 7 Vict. c. 90, regulate the qualifications, service, admission, and appointment of public notaries to practice in England.

By 18 & 19 Vict. c. 42, ambassadors and British diplomatic and consular agents in foreign countries and places are enabled to do abroad all such notarial acts as public notaries may do in the United Kingdom of Great Britain and Ireland.

As to stamp duty on admission to act, and annual certificate,—see 33 & 34 Vict. c. 97, Schedule.]

**Apprenticeship and articles.**—A party bound apprentice for the term of seven years, who, during the whole of that term, acted as a banker's clerk daily till five o'clock in the evening, and after that hour went to the notary and presented bills of exchange, and prepared protests, was not actually employed by the public notary during the whole period of seven years, within 41 Geo. 3, c. 79, s. 7, and consequently he was not entitled to act as a notary; and the court refused a mandamus to the Scriveners' Company to admit such a party to the freedom of the company, in order that he might be admitted to practice as a notary. *Re v. Scriveners' Company*, 10 B. & C. 511.

Before 6 & 7 Vict. c. 90, s. 1, which entitles an apprentice to a notary, after the regular term of service under 41 Geo. 3, c. 79, to be admitted a notary, although such apprentice, during the time, is also articulated clerk to the same master as an attorney, an apprentice to a notary, being also articulated clerk to the same master as an attorney, could not serve, so as to be entitled to become a notary. *Scriveners' Company v. Reg.* (in error), 3 G. & D. 273; 3 Q. B. 939; 12 L. J., Q. B. 493—Exch. Cham.

**Appointment.**—The Master of the Faculties, in exercising the discretion given to him by 3 & 4 Will. 4, c. 70, s. 2, in the appointment of notaries public, will, while paying due regard to vested interests, above all things, consider the convenience and accommodation of the merchants, shipowners and bankers carrying on business in the town where it is proposed to appoint additional notaries. Increase of population alone, unless accompanied by an increase of shipping and

mercantile business, is no sufficient ground for the appointment of additional notaries. *Graham v. Smart*, 9 Jur., N. S. 387—Court of Faculties.

## II. PROTESTS, CERTIFICATES AND OTHER NOTARIAL ACTS.

### 1. General Requisites, and Effect.

**Stamping.**—The former duties on protests and other notarial instruments (see 24 & 25 Vict. c. 91, and 21 & 22 Vict. c. 76), were abolished by 33 & 34 Vict. c. 97; by which (see Schedule), the following duties are imposed:

*On the protest of any bill of exchange or promissory note—*

*Where the duty on the bill or note does not exceed 1s., the same duty as the bill or note.*

*In any other case, 1s.*

*And a notarial act of any kind whatever, 1s.*

By s. 116, the duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be canceled by the notary.]

A notarial instrument in the form of Schedule H, given by 21 & 22 Vict. c. 76, s. 12, is correctly stamped with a one-shilling stamp. *Eglington (Trustees) v. Inland Revenue Commissioners*, 11 Jur., N. S. 670; 34 L. J., Exch. 225; 3 H. & C. 871; 13 W. R. 902; 12 L. T., N. S. 707.

**Initialing documents.**—A notarial deed was written on several pieces of paper:—Held, that each paper did not require the initials of the notary. *Hamel v. Panet*, 46 L. J., P. C. 5; 3 L. R., App. Cas. 121; 35 L. T., N. S. 741.

**Effect of protests.**—A notarial protest under seal is no evidence that a foreign bill of exchange has been presented for payment in England. *Chester v. Noyes*, 4 Camp. 122—Ellenborough.

A protest is of itself evidence only to contradict the captain's evidence, and not to show a variance between it and the condemnation. *Christian v. Coombe*, 2 Esp. 490—Kenyon.

**Proof and effect of certificates.**—The court will judicially notice the seal on a notarial certificate, verifying an affidavit sworn before a magistrate abroad. *Cole v. Sherard*, 11 Exch. 482.

Where it is necessary to produce a notarial certificate, a court of equity will dispense with an affidavit verifying the notary's handwriting. *Hayward v. Stephens*, 15 L. T., N. S. 173; 30 L. J., Chanc. 185.

When a power of attorney has been executed before a notary public in a British colony, an affidavit verifying the notarial signature is not necessary under 15 & 16 Vict. c. 86, s. 22. *Goff, In re*, 12 Jur., N. S. 595; 14 L. T., N. S. 727.

In an action brought to recover a piece of land in Lower Canada, the pleadings challenged a strict proof of the title. The land had been devised to Mary, the wife of "James" L. The plaintiff claimed the land under a power of attorney executed by "Alexander" L. and Mary his wife; and on the face of the power of attorney it was stated that this Alexander L. was the same person who in the will was called James, but no other evidence of their identity was produced. To the power of attorney there were two attesting witnesses, one of whom was a notary public of Upper Canada. Neither of these witnesses was produced, but a certificate that the notary public had been duly appointed was put in:—Held, that the plaintiff had failed to make out his title; first, because the identity was not made out between the devisee and the husband of the devisee, and the persons professing to execute the power of attorney; and, secondly, because the notarial certificate was not sufficient proof of the execution of the power of attorney. *Nye v. Macdonald*, 23 L. T., N. S. 220; 18 W. R. 1075; 8 L. R., P. C. 331.

A notary public of Upper Canada, a province regulated by English law, has no power to certify to the execution of a deed, so as to make his certificate evidence, without more, that the deed was executed; and the circumstance that by French law a French notary public has a greater power, and his certificate a greater validity, does not give a power to the act of the English notary upon English soil, so that this act when brought into question upon French soil, should have the effect given to it there which is given by the law of France to the act of a French notary public. *Ib.*

## Note.

- I. BANK NOTES. See BANKER AND BANKING COMPANY.
- II. PROMISSORY NOTES. See BILLS OF EXCHANGE AND PROMISSORY NOTES.
- III. BOUGHT AND SOLD NOTES. See SALE.

## Not Guilty.

- I. IN ACTIONS. See PLEADING.
- II. ON INDICTMENTS. See CRIMINAL LAW.

## Notice.

- I. GENERAL PRINCIPLES, 9513.
- II. OF INCUMBRANCES. See MORTGAGE.
- III. TO QUIT. See LANDLORD AND TENANT.

- IV. OF LIMITATION OF CARRIER'S LIABILITY. See CARRIER.
- V. OF ACT OF BANKRUPTCY. See INSOLVENCY AND BANKRUPTCY.
- VI. OF DISHONOR AND PROTEST OF BILLS AND NOTES. See BILLS OF EXCHANGE AND PROMISSORY NOTES.
- VII. TO TREAT FOR PURCHASE OF LANDS BY COMPANIES. See PUBLIC COMPANY.
- VIII. OF ACTIONS. See ACTION AND SUIT.
- IX. OF BAIL. See BAIL.
- X. TO PLEAD. See PLEADING.
- XI. OF MOTION. See PRACTICE.
- XII. OF TRIAL. See PRACTICE.
- XIII. TO PRODUCE DOCUMENTS. See EVIDENCE.
- XIV. OF INQUIRY. See INQUIRY.
- XV. OF OTHER FACTS OR PROCEEDINGS. See THEIR SEVERAL TITLES.

#### I. GENERAL PRINCIPLES.

**What sufficient to affect.**—The means of knowledge by which a party is to be affected with notice must be understood to be means of knowledge which are practically within reach, and of which a prudent man might have been expected to avail himself. *Broadbent v. Darlow*, 7 Jur., N. S. 479; 30 L. J., Chanc. 569; 4 L. T., N. S. 193; 8 De G., F. & J. 570.

A declaration stated, that the defendant covenanted that he would at any time or times appear at an office or offices for the insurance of lives within London or the bills of mortality and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and would not afterwards do, or permit to be done, any act whereby such insurance should be avoided or prejudiced; and it then alleged that the defendant, in part performance of his covenant, did, at the plaintiff's request, appear at the office of the Rock Life Insurance Company, and did answer certain questions asked of him, and that the plaintiff insured the defendant's life with that company by a policy containing a proviso, that if he went beyond the limits of Europe, the policy should be null and void. Breach, that the defendant went beyond the limits of Europe, to wit, to the province of Canada, in North America:—Held, that the declaration was bad for not averring that the defendant had notice that the policy was effected. *Vyse v. Wakefield*, 6 M. & W. 442; 8 D. P. C. 377; affirmed in error, 7 M. & W. 126; 8 D. P. C. 611.

**General obligation to give notice.**—When a duty to be performed at uncertain intervals has been created by statute, the person liable to fulfil it must have notice of the necessity to perform it before he can be held responsible for its non-fulfilment by the person for whose benefit it exists, if the latter is aware of the circumstances requiring its fulfilment, and is in possession of the thing as to which it is to

be discharged. *London and South Western Railway Company v. Flower*, 45 L. J., C. P. Div. 54; 33 L. T., N. S. 687.

The 18 & 19 Vict. c. 120, empowers a district board to alter or demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation:—Held, that this does not empower them to demolish the building, without first giving the party guilty of the omission an opportunity of being heard; and that s. 211, which gives an appeal to the Metropolitan Board of Works, does not prevent the builder or owner of the premises from suing them for so doing. *Cooper v. Wandsworth Board of Works*, 14 C. B., N. S. 180; 9 Jur., N. S. 1153; 8 L. T., N. S. 278.

Mandamus to a vicar to restore a parish clerk to his office. The return was that the clerk had on several occasions misconducted himself by designedly irreverent and ridiculous behavior in the performance of his duty, by appearing in the church drunk, so as to be incapable of performing it, and by indecently disturbing the congregation during the administration of the sacrament, and that these acts were done in the view and presence of the vicar, and after repeated reproof, whereupon he removed him from his office. Plea, that he had not been summoned to answer for his conduct before his removal:—Held, that the return was bad for not showing such summons. *Reg. v. Smith*, 5 Q. B. 614; D. & M. 564; 13 L. J., Q. B. 168.

As to necessity of notice or demand before action, generally,—see ACTION AND SUIT; in particular forms of action and for particular causes of action,—see their respective titles.

## Novation.

See DEBTOR AND CREDITOR.

## Nudum Pactum.

See CONTRACT OR AGREEMENT.

## Nuisance.

### I. WHAT CONSTITUTES, 9515.

1. In General, 9515.
2. Noxious or Offensive Trades and Works; Smoke, Vapors, Noise and Vibration, &c., 9518.
3. Spring Guns, Traps, Fire Arms and Fire Works, 9524.
4. Under Nuisances Removal Acts and Sanitary Acts. See THIS TITLE, III., 2.



5. *Nuisances Indictable at Common Law.* See CRIMINAL LAW.

6. *Offenses against Sanitary Acts and Similar Statutes.* See CRIMINAL LAW.

7. *Obstruction of Highways and other Ways.* See WAY; CRIMINAL LAW.

8. *Obstruction of Navigation of Rivers or Canals.* See NAVIGATION.

9. *Obstruction, Diversion or Pollution of Rivers and other Watercourses.* See WATER AND WATERCOURSE.

## II. PARTIES LIABLE FOR CREATING OR CONTINUING, 9528.

1. *To Action*, 9528.

2. *To Proceedings for Removal.* See THIS TITLE, III., 2.

3. *To Indictment.* See CRIMINAL LAW.

4. *For Negligent Acts or Omissions, in General.* See NEGLIGENCE.

## III. ABATEMENT AND REMOVAL, 9532.

1. *At Common Law*, 9532.

2. *Under Nuisances Removal Acts and Sanitary Acts*, 9533.

## IV. ACTIONS, 9543.

1. *At Common Law*, 9543.

2. *Under The Judicature Acts*, 9544.

### 1. WHAT CONSTITUTES.

#### 1. In General.

**Extent of injury.]**—In order to constitute a nuisance, there must be, not merely a nominal, but such a sensible and real damage as a sensible person, if subjected to it, would find injurious, regard being had to the situation and mode of occupation of the property injured. *Scott v. Firth*, 10 L. T., N. S. 240; 4 F. & F. 349—Blackburn.

The judge, on the trial of an indictment for obstructing the navigation of the Menai Straits by erecting a wall, asked the jury whether they thought the erection proved a material nuisance, in which case they were to find a verdict of guilty; but told them that if they thought the nuisance was so slight, rare, and uncertain, that the defendant ought not to be made criminally liable for it, they were to acquit him; and on the jury saying that they considered the erection, "although a nuisance, was not sufficiently so as to render the defendant criminally liable," he directed an acquittal:—Held, that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance, and that the jury must be understood as finding that the obstruction in question was so insignificant, and that therefore there was no misdirection warranting a new trial. *Reg. v. Russell*, 3 El. & Bl. 942; 18 Jur. 1022; 23 L. J., M. C. 173.

Indictment for a nuisance by erecting and continuing piles and planking in a harbor, and thereby obstructing it and rendering it

insecure. A special verdict found, that by the defendant's works the harbor was in some extreme cases rendered less secure:—Held, that the defendant was not responsible criminally for consequences so slight, uncertain and rare, and that a verdict of not guilty must be entered. *Rex v. Tindull*, 6 A. & E. 148; 1 N. & P. 719.

The amount of annoyance which will induce a court of equity to interfere between the owners of adjoining buildings, discussed and defined, and the nature and value of evidence in such cases considered. *Gaunt v. Fynney*, 8 L. R., Ch. 8; 42 L. J., Chanc. 123.

When a trifling trespass or an interference with an ancient right has been submitted to for six years, the court will not exercise its jurisdiction, but will leave the plaintiffs to their rights at law. *Id.*

Noise caused by machinery having been acquiesced in for more than five years, the court refused to grant an injunction on the ground of increase, evidenced only by the sense of hearing, it being proved on the other side that no new machinery or change in the manner of working had been introduced. *Id.*

A party seeking to interfere on the ground of nuisance with a work carried on in a normal manner must, in order to sustain his suit, show that he has incurred actual and substantial or visible damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to establish the fact of the damage, but only to explain the causes of it. *Salvin v. North Brancepeth Coal Company*, 44 L. J., Chanc. 149; 9 L. R., Ch. 705.

#### Exercise of powers conferred by statutes.]

—When statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impracticable without causing one, the persons so exercising them are liable to an indictment. *Reg. v. Bradford Navigation Company*, 6 B. & S. 631; 11 Jur., N. S. 769; 34 L. J., Q. B. 191; 13 W. R. 892.

**Public and private injury.]**—Where the legislature declares an act to be a public nuisance, the person doing the act is indictable. *Reg. v. Crshaw*, Bell C. C. 308; 30 L. J., M. C. 58; 8 L. T., N. S. 510; 9 W. R. 38.

An action will lie at the suit of a private individual, who actually sustains an injury by reason of a public nuisance, which may possibly affect the public, and for which the person committing the nuisance would be indictable. *Ross v. Groves*, 5 M. & G. 618; 6 Scott, N. R. 645; 1 D. & L. 61; 7 Jur. 951; 12 L. J., C. P. 251.

A private individual cannot justify damaging the property of another on the ground that it is a nuisance to a public right, unless it does him a special or particular injury. *Dimes v. Petley*, 15 Q. B. 276; 14 Jur. 1132;

19 L. J., Q. B. 449. S. P., *Colchester (Mayor, &c.) v. Brooks*, 7 Q. B. 389.

To entitle a private person to maintain an action for a matter which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial. *Benjamin v. Storr*, 9 L. R., C. P. 400; 48 L. J., C. P. 162; 22 W. R. 631; 30 L. T., N. S. 862.

The plaintiff kept a coffee-house in a narrow street near Covent Garden. The defendants carried on an extensive business as auctioneers in the same neighborhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from vans. The vans intercepted the light from the coffee-shop to such an extent, that he was obliged to burn gas nearly all day, and access to the shop was obstructed by the horses standing in front of the door, and the stench arising from their frequent staling there rendered the plaintiff's dwelling incommodious and uncomfortable:—Held, that the evidence disclosed such a direct and substantial private and particular damage to the plaintiff beyond that suffered by the rest of the public, as to entitle him to maintain an action. *Id.*

The declaration alleged that, in consequence of the nuisance complained of, the plaintiff's premises had been rendered "unhealthy and incommodious" as well as a house of business as also as a dwelling-house:—Held, that evidence that the premises were rendered uncomfortable by reason of the offensive smells arising from the staling of the horses which were kept constantly standing opposite to them, was properly admitted. *Id.*

As to what private injury is sufficient to create a right to enter and abate a nuisance,—see this title, III., 1.

In the metropolis.][3 & 8 Vict. c. 47, ss. 54, 60, prohibit the commission of a variety of nuisances by persons in any thoroughfare or public place within the limits of the Metropolitan Police District, under a penalty of forty shillings.

The extent of such district is defined by s. 2, to be fifteen miles in a straight line from Charing Cross.]

Under Nuisances Removal Acts.][S. 9 of the 18 & 19 Vict. c. 121, which consolidates and amends the Nuisances Removal and Diseases Prevention Acts, 1844 and 1849, defines what shall be deemed nuisances within the provisions of that act. It is amended by 23 & 24 Vict. c. 77; 26 & 27 Vict. c. 108; and 29 & 30 Vict. c. 90.]

For instances of nuisances held to be within the statutes above referred to and similar acts,—see this title, III., 2.

As to obstruction of highways, private ways, &c.,—see WAY; of canal and river navigation,—see NAVIGATION; of rivers and

watercourses,—see WATER AND WATER-COURSE.

As to negligent acts and omissions of similar nature to, but not constituting nuisances,—see NEGLIGENCE.

As to nuisances indictable at common law or under various statutes,—see CRIMINAL LAW.

## 2. Noxious or Offensive Trades and Works; Smoke, Vapors, Noise and Vibration, &c.

**Distinction between injury to property and personal discomfort.**—There is a distinction between an action for a nuisance in respect of an act producing a material injury to property and one brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around. As to the former, the same rule would not apply. *St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 642; 35 L. J., Q. B. 66; 11 Jur., N. S. 785; 13 W. R. 1083; 12 L. T., N. S. 776; affirming judgments of Queen's Bench and Exchequer Chamber, 4 B. & S. 608.

**Brick-making.**—Brick-making is not necessarily such a noxious or an offensive business, trade, or manufacture as is contemplated by the Public Health Act (11 & 13 Vict. c. 63, s. 64). *Wanslead Local Board of Health v. Hill*, 13 C. B., N. S. 479; 9 Jur., N. S. 972; 32 L. J., M. C. 185.

But burning bricks on a man's own ground, so as to be offensive to a neighbor, is a nuisance, and will be restrained by injunction by a court of equity. *Walter v. Selfe*, 4 De G. & S. 815; 15 Jur. 416; 30 L. J., Chanc. 433.

A. contracted to supply bricks for the erection of the fortifications at Portsdown Hill, and he obtained a lease of land, containing brick clay, upon which he erected brick kilns within 840 yards of a mansion, and close to the boundary of the property of the owner, and he proceeded with the burning of bricks, which was an annoyance to her, and it destroyed her property. The court granted an injunction to restrain the nuisance, and directed that he should not burn any bricks within a distance of 653 yards from the house. *Beardmore v. Tredwell*, 3 Giff. 683; 9 Jur., N. S. 272; 31 L. J., Chanc. 892.

**Emission of smoke from chimneys, furnaces, steam vessels, &c.**—[1 & 2 Geo. 4, c. 41, first provided for the abatement of nuisances arising from smoke, and from steam engines, and 16 & 17 Vict. c. 128, those from furnaces in the metropolis, and from steamboats above London Bridge.

By 19 & 20 Vict. c. 107, s. 1, furnaces in glass works and pottery works existing within the metropolis, and all steam vessels plying to and fro between London Bridge and any place on the river Thames to the westward of the Nore

*Light, shall be subject to the provisions of the 16 & 17 Vict. c. 128, relating to steam vessels above London Bridge.*

By s. 2, every furnace employed in any public baths and washhouses in the metropolis, although the same shall not be used for the purposes of trade or manufacture, are included in and made liable to all the provisions of the 16 & 17 Vict. c. 128.

By s. 8, no proceeding shall be taken under 16 & 17 Vict. c. 128, against other nuisances besides smoke, unless it shall at any time appear to the secretary of state that the local authorities fail to proceed actively and impartially in noticing and suppressing such nuisances.]

A., the owner of a house, with a fire-place and a chimney, demised it to a tenant from week to week. The tenant lighted fires, and from the position of the chimney, the emission of the smoke was a nuisance to B., the occupier of the adjoining house. More than one week elapsed during which this nuisance continued, and A. did not determine the tenancy. B. brought an action against A. for causing and continuing this nuisance, to which A. pleaded not guilty and not possessed:—Held, that, on both issues, A. was entitled to the verdict. *Rich v. Dasterfield*, 4 C. B. 783; 11 Jur. 696; 16 L. J., C. P. 273; 2 C. & K. 257. But see *Harris v. James*, 35 L. T., N. S. 240, 241.

The entering of smoke discharged from the defendant's chimneys into the plaintiff's house amounted, in contemplation of law, to a nuisance; but the fact of all buildings erected in the locality on which the defendant's were, being declared common nuisances by statute, was not, per se, sufficient to entitle the plaintiff to a verdict in an action in which the nuisance complained of arose from the smoke. *Id.*

Making fires and causing smoke to issue from a chimney, the erection of the chimney itself not being a nuisance, but only the use made of it, is not a ground for an action by a reversioner of adjoining premises, although his tenants have given notice to quit in consequence, and the premises would sell for less if the nuisance was continued. *Simpson v. Savage*, 1 C. B., N. S. 847; 3 Jur., N. S. 161; 26 L. J., C. P. 50.

A steam vessel not carrying passengers, but employed in towing ships for hire to and from the various docks on the Thames, for the most part between London-bridge and the Nore Light, but occasionally going eastward of the Nore Light as far as the Downs, is within 19 & 20 Vict. c. 107, s. 1, when towing a ship from Limehouse to Blackwall. *Walker v. Beane*, 6 Jur., N. S. 71; 29 L. J., M. C. 22; 2 El. & El. 356.

The Towns Improvement Clauses Act, 10 & 11 Vict. c. 84, s. 108, imposes a penalty of 40*l.* upon any one so negligently using a furnace as not to consume the smoke. The Birmingham Improvement Act, 1851, incorporated this section, with a proviso that the magistrate may remit the penalty if he is of opinion that the person summoned has consumed the smoke as far as possible:—Held,

that the words "as far as possible" are not to be understood absolutely, but are to be construed as far as possible consistently with the carrying on of the ordinary trade for which the furnace is used. *Cooper v. Wooley*, 15 W. R. 450; 15 L. T., N. S. 539; 36 L. J., M. C. 27; 2 L. R., Exch. 88.

— from railway engines. — [By 8 & 9 Vict. c. 20, s. 114, every locomotive steam-engine to be used on the railway shall, if it use coal or other similar fuel, emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke, and if any engine be not so constructed the company or party using such engine shall forfeit 5*l.* for every day during which such engine shall be used on the railway.]

By 31 & 32 Vict. c. 119, s. 10, where proceedings are taken against a company using a locomotive steam-engine on a railway on account of the same not consuming its own smoke, then if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint, through the default of the company, or of any servant in the employment of the company, such company shall be deemed guilty of an offense under the Railways Clauses Act, 1845, s. 114.]

Under 8 & 9 Vict. c. 20, s. 114, justices convicted a company, on the ground that one of their engines did not in fact consume its own smoke. The court remitted the case to the justices, with their opinion, that if the engine was constructed on the principle required by the act, and the not consuming its own smoke was occasioned by the negligence of the servants of the company, the company was not liable. *Manchester, Sheffield and Lincolnshire Railway Company v. Wood*, 6 Jur., N. S. 70; 29 L. J., M. C. 29; 2 El. & El. 844.

The plaintiff, the owner and occupier of a mansion house and grounds adjoining a railway and sidings on which was a shed used for cleaning the engines, complained of the smoke and noxious vapor from a large number of engines stabled at the sidings and shed, arising during the process of lighting the engine fires. As the nuisance complained of was not abated, the plaintiff brought an action for an injunction to restrain the railway company from causing or permitting smoke or vapor to issue from their shed and premises so as to occasion a nuisance to the plaintiff. The company contended that the statute authorized them to commit even a nuisance, provided they worked their line properly, and used due precautions, and that the use of the shed and sidings for cleaning their engines and relighting the fires was a necessary and legitimate one, and incidental to the reasonable enjoyment of their statutory powers, and that the plaintiff had no rights as against them:—Held, that the statute had not deprived the plaintiff of his ordinary rights, and

did not authorize the nuisance complained of; that the emission of smoke and noxious vapor during the operations of cleaning the engines and relighting the engine fires was not a necessary evil incident to the proper working of the line, or a reasonable user of the land for the purposes of the railway within the scope and meaning of the Railways Clauses Act, 1845, and that the plaintiff was entitled to the relief claimed, with costs. *Smith v. Midland Railway Company and Lancashire and Yorkshire Railway Company*, 87 L. T., N. S. 324; 25 W. R. 861—V. C. B.

**Noise, vibration, &c.]—**A circus, the performances in which were to be carried on for eight weeks, was erected near a dwelling-house, and the performances, which took place every evening, lasted from about half-past seven till half-past ten. It was proved that the noise of the music and shouting in the circus could be distinctly heard all over the plaintiff's house, and was so loud that it could be heard above the conversation in the dining-room though the windows and shutters were closed, and several persons were talking in the room:—Held, that this was such a nuisance as a court of equity would restrain by injunction. *Inchbald v. Robinson*, 4 L. R., Ch. 388; 17 W. R. 459; 20 L. T., N. S. 250.

The plaintiffs, a firm of solicitors, were the owners and occupiers of offices adjoining the defendants' steam printing works, which had been working from 1848 to May, 1875, without any complaint by the plaintiffs of nuisance occasioned by the noise and vibration of the machinery, though a slight noise and vibration could at times be heard and felt. In May, 1875, the defendants made alterations in their machinery, which, the plaintiffs contended, increased the noise and vibration, and they accordingly commenced an action for an injunction to restrain the defendants from working their machinery so as to occasion a nuisance to the plaintiffs:—Held, that they were entitled to an injunction restraining the defendants from working their machinery so as to occasion a nuisance or an injury by vibration to any greater degree than had previously been occasioned up to May, 1875. *Heather v. Pardon*, 87 L. T., N. S. 893—V. C. B.

Seem, that the fact that noise and vibration from machinery have never been complained of for more than twenty years, does not deprive a neighbor of his right to prevent any increased noise, even though such increase is slight. *Id.*

**When justified by nature of business, character of locality, user, prescription, &c.]—**Carrying on a lawful trade in the ordinary and obvious manner is not necessarily carrying it on in a proper manner. *Stockport Waterworks Company v. Potter*, 7 H. & N. 160; 7 Jur., N. S. 880; 31 L. J., Exch. 9.

A defendant erected a rolling-mill with steam hammers near some houses of the plaintiff, the vibration and noise of which injured the building and caused the tenants to

quit. To an action for the nuisance thereby occasioned, he pleaded that the grievances complained of were caused by the reasonable and proper exercise of a trade reasonably and properly carried on:—Held, not to be a reasonable and proper exercise of a trade. *Scott v. Firth*, 10 L. T., N. S. 240; 4 F. & F. 349—Blackburn.

A declaration stated that the plaintiff was possessed of a term of years in a messuage, and that he was disturbed in its enjoyment by a nuisance. The defendants pleaded that they were possessed of their workshops and manufactory (the nuisance complained of) for ten years before the plaintiff became possessed of his term. The plaintiff replied that the term, of which he held the residue, was created four years before they were possessed of their workshops and manufactory:—Held, that the plea was bad; the defendants should have alleged a user for twenty years. *Elliotson v. Peetham*, 2 Scott, 174; 2 Bing. N. C. 134; 1 Hodges, 259.

In an action for a nuisance in carrying on the business of a tallow-chandler, in a messuage adjoining the messuage of the plaintiff, it is no plea that the defendant was possessed of his messuage, and the business was carried on there three years before the plaintiff became possessed of and occupied the adjoining messuage. *Bliss v. Hall*, 4 Bing. N. C. 183; 5 Scott, 500; 6 D. P. C. 442; 1 Arn. 19; 2 Jur. 110.

To a declaration for causing offensive stenches to come over the plaintiff's land, a plea that the defendant occupied premises adjoining those of the plaintiff, and for twenty years next before the commencement of the suit enjoyed of right, and without interruption, the benefit of using a mixen on his own premises, near to premises of the plaintiff, that thereby stenches necessarily arose, is a bad plea, as he does not state that the stenches had for twenty years passed over the plaintiff's land. *Flight v. Thomas*, 2 P. & D. 531; 10 A. & E. 590; 7 D. P. C. 741; 3 Jur. 822.

A nuisance cannot be justified by the existence of other nuisances of a similar character, if it can be shown that the inconvenience is increased by the nuisance complained of. *Crossley v. Lightowler*, 36 L. J., Chanc. 584; 2 L. R., Chanc. 478.

Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighboring tenement, as to amount prima facie to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. *Bamford v. Turnley*, 31 L. J., Q. B. 286; 3 B. & S. 62; 9 Jur., N. S. 377 (overruling *Hole v. Barlow*, 4 C. B., N. S. 334; 27 L. J., C. P. 207; 4 Jur., N. S. 1019)—Exch. Chanc. S. C., at Nisi Prius, 2 F. & F. 231. 8 P., *Cavey v. Lodbetter*, 13 C. B., N. S. 479; 33 L. J., C. P. 104; 10 W. R. 808; 6 L. T., N. S. 721.

The fitness of the locality does not prevent

carrying on of an offensive, though lawful trade, from being an actionable nuisance; and whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the nuisance complained of, the annoyance is sufficiently great to amount to a nuisance, an action will lie, whatever the locality may be. *Id.*

When no right by prescription exists to carry on a particular trade, the fact that the locality where it is carried on is a locality generally employed for the purpose of that and similar trades, will not exempt the person carrying it on from liability to an action for damages in respect of injury created by it to property in the neighborhood. *St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 423; 11 Jur., N. S. 785; 85 L. J., Q. B. 66; 12 L. T., N. S. 770; 13 W. R. 1083; affirming *S. C.*, 4 B. & S. 608.

A place where the works of one person are carried on, which occasion an actionable injury to the property of another, is not within the meaning of the law a convenient place. *Id.*

A. bought an estate in a neighborhood where many manufacturing works were carried on. Among others, there were the works of a copper smelting company. It was not proved whether these works were in actual operation when the estate was bought. The vapors from these works when they were in operation were proved to be injurious to the trees on the estate. At the trial the judge told the jury that (unless by a prescriptive right) every man must so use his own property as not to injure that of his neighbor, but that the law did not regard trifling inconveniences; everything must be looked at from a reasonable point of view, and therefore, in the case of an alleged injury to property, as from noxious vapors from a manufactory, the injury, to be actionable, must be such as visibly to diminish the value of the property; that locality and all other circumstances must be taken into consideration; and that in counties where great works have been and were carried on, parties must not stand on extreme rights:—Held, that the direction was right. *Id.*

An occupier of a house in a street in London had, many years ago, converted the ground floor into a stable. In 1871, a new occupier altered the stable so that the noise of the horses was an annoyance to the next-door neighbor, and prevented him from letting his house as lodgings:—Held, that the fact of horses having been previously kept in the stable, but so as not to be an annoyance, did not deprive the neighbor of his right to have the nuisance restrained. *Ball v. Hay*, 8 L. R., Ch. 467; 28 L. T., N. S. 346.

Annoyance caused by the unusual use of a house may be a nuisance where like annoyance from the ordinary use of it would not be. *Id.*

As to covenants and stipulations against noxious and offensive trades, &c.,—see COVENANT; CONTRACT OR AGREEMENT.

### 3. Spring Guns, Traps, Fire Arms and Fire Works.

**Statute.**—[By 24 & 25 Vict. c. 100, s. 31, whosoever shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of five years (27 & 28 Vict. c. 47), or to be imprisoned for any term not exceeding two years, with or without hard labor;

And whosoever shall knowingly and willfully permit any such spring gun, man trap, or other engine, which may have been set or placed in any place then being in, or afterwards coming into, his possession or occupation, by some other person, to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid:

Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap, such as may have been or may be usually set or placed with the intent of destroying vermin:

Provided also, that nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof. (Former provision, 7 & 8 Geo. 4, c. 18, ss. 1, 2, 3, 4.)]

**When action is maintainable for resulting injury.**—Before this statute a trespasser, having knowledge that there were spring-guns in a wood, although he might be ignorant of the particular spots where they were placed, could not maintain an action for an injury received in consequence of his accidentally treading on a latent wire communicating with a gun, and thereby letting it off. *Ilott v. Wilkes*, 3 B. & A. 804.

Where a defendant, for the protection of his property, some of which had been stolen, set a spring gun, without notice, in a garden completely walled round, and at a distance from his house, and the plaintiff, who had climbed over the wall in pursuit of a strayed fowl, was shot:—Held, that an action was maintainable, and the defendant was liable in damages. *Bird v. Holbrook*, 4 Bing. 628; 1 M. & P. 607. *S. P.*, *Jay v. Whitfield*, 3 B. & A. 808, c.; 4 Bing. 644, c.

The plaintiff entered the defendant's garden at night and without his permission to search for a stray fowl, and, while looking closely into some bushes, he came in contact with a wire which caused something to explode with a loud noise, knocking him down, and slightly injuring his face and eyes:—Held, that the defendant was not liable for this injury at common law, nor, in the absence of evidence

that it was caused by a spring-gun or other engine calculated to inflict grievous bodily harm, under 7 & 8 Geo. 4, c. 18, s. 1. *Wootton v. Dawkins*, 2 C. B., N. S. 412.

The law requires of persons having in their custody instruments of danger, that they should keep them with the utmost care; therefore, where a defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off:—Held, that the defendant was liable to damages in an action upon the case. *Dixon v. Bell*, 5 M. & S. 198; 1 Stark. 287.

To a declaration alleging that the defendant, with intent to frighten away grouse from the plaintiff's land, fired and exploded rockets and fire-works so as to be a nuisance, a plea that he committed the grievance in order to prevent the plaintiff from shooting and killing grouse which had been enticed by the plaintiff from land of the defendant, and also in order to prevent the plaintiff from enticing other grouse which might be enticed by him from the defendant's land, is no answer to the action. *Ibbotson v. Peat*, 24 L. J., Exch. 118; 3 H. & C. 644.

If a man places dangerous traps baited with flesh in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, must probably be attracted by their instinct into the trap, and in consequence of such act his neighbor's dogs are so attracted and thereby injured, an action on the case lies. *Townsend v. Wathen*, 9 East, 277.

Quære, whether a person is authorized in fixing dog-spears in his woods, or whether he is answerable in an action for an injury done to a dog? *Deane v. Clayton*, 2 Marsh. 577; 1 Moore, 203; 7 Taunt. 489. And see *Sears v. Lyon*, 2 Stark. 817.

A declaration alleged, that the defendant wrongfully and unlawfully set and concealed a dog-spear, being an engine calculated to do grievous bodily harm as well to the subjects of the Queen as to their dogs happening to run upon the same, among the bushes, near a public footway running through a close of the defendant's, by means whereof a dog of the plaintiff's, with which he was going on foot along the footway, and which, by reason of a rabbit having crossed the footway in his view, had, against the will of and unavoidably by the plaintiff, began to pursue, and was in pursuit of the rabbit, ran upon the dog-spear and was wounded. A plea, that the defendant set and concealed the engine for the purpose of preserving his game, and of disabling and killing dogs that might come upon his close, lest they should pursue and destroy the game, whereof the plaintiff had notice, is a good answer, even without the allegation of notice. *Jordin v. Crump*, 8 M. & W. 782; 5 Jur. 1113.

## II. PARTIES LIABLE FOR CREATING OR CONTINUING.

### 1. To Action.

#### Parties to employment or other contract.]

—If A. employs another to do a lawful act, and he, in doing it, commits a public nuisance, A. is not responsible. *Peachey v. Bealand*, 18 C. B. 182; 17 Jur. 764; 23 L. J., C. P. 81. S. P., *Ellis v. Sheffield Gas Consumer Company*, 2 El. & Bl. 767.

Aliter, if the act to be done necessarily involves the commission of a public nuisance. *Id.*

The plaintiff complained that the defendant E., the commanding officer at the Curragh camp, caused to be placed on a piece or parcel of ground next the plaintiff's premises certain filthy ordure or excrement, from which foul and pestilential vapors and exhalations arose, which rendered the house and premises of the plaintiff unfit for human habitation; the defendant denied doing the acts complained of. On the trial, it appeared that the other defendant, B., a contractor, had contracted with the comptroller (who had the power of employing and of dismissing him) to deodorize the filth, and to remove it from the camp when required by E. so to do; and it further appeared that E. had not ordered the commission of the nuisance B. removed, but did not deodorize the filth. The jury found for the plaintiff, damages 10*l.*:—Held, that, inasmuch as E. had not ordered the commission of the nuisance, and inasmuch also as he had neither contracted with, nor had the power of dismissing the contractor, he was not responsible for the commission of the grievances complained of, and that the verdict must, therefore, be entered for him. *Igos v. Booleigh*, 4 Ir. R. C. L. 238—Q. B.

As to liability for acts or for negligence of servants, generally,—see MASTER AND SERVANT; for negligence of contractors or workmen,—see NEGLIGENCE.

**Owner and occupier of premises; landlord and tenant.]**—A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape, however careful he may have been, and whatever precautions he may have taken to prevent the damage. *Fletcher v. Rylands*, 4 H. & C. 263; 1 L. R., Exch. 265; 12 Jur., N. S. 608; 35 L. J., Exch. 154; 14 W. R. 799—Exch. Chanc., and Dom. Proc., 37 L. J., Exch. 161; 19 L. T., N. S. 220; 3 L. R., H. L. Cas. 830. But see *Wilson v. Newberry*, 7 L. R., Q. B. 81, 82; 41 L. J., Q. B. 31, 32.

Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability



aches only upon parties in actual possession. *Rich v. Basterfield*, 4 C. B. 783; 11 Jur. 6; 16 L. J., C. P. 273; 2 C. & F. 257. *Harris v. James*, 35 L. T., N. S. 240, 241; L. J., Q. B. Div. 545.

The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession. *Id.*

If the owner of land demises it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; so, if he is a party to the creation of a nuisance after the demise; but he is not responsible for a nuisance so created, though such nuisance is a probable consequence of the use of the land as demised. *Id.*

An omission on the part of the owner of land to determine the tenancy after the creation by the tenant of a continuing nuisance thereon, is not equivalent to a fresh demise of the premises, so as to make him responsible for such nuisance. *Id.*

A declaration stated that the defendant, being possessed of a messuage adjoining a garden of the plaintiff, erected a cornice upon his messuage, projecting over the garden, by means whereof rain-water flowed from the cornice into the garden and damaged the same, and the plaintiff was incommoded in the possession and enjoyment of his garden:—Held, that the erection of the cornice was a nuisance from which the law would infer injury to the plaintiff; and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice and the commencement of the action. *Fay v. Prentice*, 1 C. B. 823; 9 Jur. 877; 14 L. J., C. P. 298.

A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance. *Rez v. Pedley*, 3 N. & M. 627; 1 A. & E. 822.

But a landlord is not liable in respect of a new nuisance created by his tenant during the term. *Id.*

Where a landlord lets premises, the natural consequence of the regular use of which is, that they will become a nuisance unless properly attended to, he is liable if they afterwards become a nuisance by such regular use. *Id.*

Action for continuing a nuisance to the plaintiff's market by building, which excluded the public from a part of the space on which the market was lawfully held. The building was erected in 1838, under the superintendence and directions of the defendants, not on their own lands but on that of a corporation, of which corporation they were members. L. was the owner of the market in 1838, and in 1839 he demised it to the plaintiff; and the market being afterwards obstructed by the buildings an action was brought:—Held, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was, therefore,

maintainable. *Thompson v. Gibson*, 7 M. & W. 456; 9 D. P. C. 717.

An owner of a messuage and premises, attached to which was an area, let the same to a tenant from year to year, and died; having devised the property, with an iron grating over the area improperly constructed, and out of repair so as to amount to a nuisance, to the defendant. The defendant having no notice of the nuisance, suffered the tenant to remain in the occupation of the premises upon the same terms as before, receiving rent. The wife of A. having sustained damage by reason of the dangerous condition of the grating:—Held, that the defendant, as reversioner, was liable to an action for the damage thereby occasioned. *Gandy v. Jubber*, 5 B. & S. 78; 12 W. R. 526; 10 Jur., N. S. 652; 33 L. J., Q. B. 151; 12 W. R. 526; 9 L. T., N. S. 800. But on appeal the decision was questioned without the point being determined. *S. C.*, 5 B. & S. 485; 13 W. R. 1022—Exch. Cham.; and see *S. C.*, 9 B. & S. 15. See also *Hayes v. Fitegibbon*, 4 Ir. R., C. L. 500, 506, 507.

An action lies against an owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them so to remain, until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. *Todd v. Flight*, 9 C. B., N. S. 877; 30 L. J., C. P. 21; 9 W. R. 145; 3 L. T., N. S. 825.

An owner of premises, including a stack of chimneys which were ruinous, and impended over A.'s premises in a dangerous manner, demised the first-mentioned premises, knowing the real state of the case; the condition of the chimneys continued to be so dangerous until they actually fell and damaged A.'s premises, without any default of the tenant, but owing to the effect of gravitation:—Held, that the owner was liable to A. for the injury. *Id.*

But a landlord who lets a house in a dangerous state is not liable to the tenants, customers, or guests for accidents happening in consequence during the term. *Robbins v. Jones*, 15 C. B., N. S. 221.

In an action for a nuisance, occasioned by drains on the premises belonging to the defendant, and adjoining the premises of the plaintiff, the declaration alleged that the defendant was the owner and proprietor of the drains, and that he ought to have kept them cleansed, and have prevented the accumulation of filth from running into the dwelling-house of the plaintiff, but neglected to do so:—Held, that the declaration was bad, as it did not show that the defendant was the occupier of the drains, and the nuisance was not shown to be of a permanent or a continuing character. *Russell v. Shenton*, 2 G. & D. 573; 3 Q. B. 449; 6 Jur. 1059.

A defendant had more than twenty years before action constructed a sewer or a water-course through property of his own, then occupied by him. In 1845, the defendant let a house, shop, and cellar to the plaintiff, which the defendant down to that time also occu-

pied with the property. In 1851, the sewer or watercourse burst, and thereby the plaintiff's cellar and goods were damaged, and he thereupon brought an action against the defendant for negligently and improperly making and constructing the sewer, and keeping and continuing the same negligently and improperly made and constructed, and so causing the damage. The jury found that the sewer was not originally constructed with proper care, and it was proved that it had been continued in the same state:—Held, that upon the letting of the premises to the plaintiff, a duty arose on the part of the defendant to take care that that which was rightful did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff, and that upon this ground, as also upon the principle *sic utere tuo ut alienum non laedas*, the action was maintainable. *Alston v. Grant*, 3 El. & Bl. 128; 2 C. L. R. 933; 18 Jur. 332; 23 L. J., Q. B. 168.

The defendants were owners of the soil of a stream which supplied water to two print-works. A., while occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff, becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from the defendants, and against their will, replaced the weir:—Held, that they were not responsible for the act of A., or for the continuance of the nuisance. *Saxby v. Manchester and Sheffield Railway Company*, 4 L. R., C. P. 198; 38 L. J., C. P. 153; 17 W. R. 293; 19 L. T., N. S. 640.

A. was the lessee for twenty-one years, at a rack rent, of a house and shop; he occupied the shop himself and underlet the upper part of the house to B. as a yearly tenant. The upper part was shut off from the shop, and A. had no access to it. There was a privy in the upper part of the house, which the nuisance authority took proceedings to abate, as a nuisance arising from a defective construction of a structural convenience; and they proceeded against C., who received the rent from A. as agent for A.'s landlord:—Held, that C. was not owner within the 18 & 19 Vict. c. 131, s. 2, incorporated with the 29 & 30 Vict. c. 90, s. 21, as he did not receive the rent from B., who was the occupier of the premises. *Cook v. Montagu*, 7 L. R., Q. B. 418; 41 L. J., M. C. 149; 26 L. T., N. S. 471.

By 29 & 30 Vict. c. 90, s. 10, the word "nuisances" under the Nuisance Removal Acts shall include any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance:—Held, that in the event of such a nuisance existing, the occupier of the premises is liable to be charged and to have an order made upon him for the abatement of the nuisance, although it may have arisen or have been continued by the act of a

servant employed by him upon the premises. *Barnes v. Akroyd*, 41 L. J., M. C. 110; 7 L. R., Q. B. 474; 26 L. T., N. S. 692; 20 W. R. 671.

When premises are let to a tenant, the landlord cannot be made liable for a nuisance existing on them, unless it is shown that he could have removed it, but yet continued the nuisance. *Pretty v. Bickmore*, 21 W. R. 733; 8 L. R., C. P. 401; 28 L. T., N. S. 704.

The owner or lessee of houses let or sub-let to weekly tenants cannot maintain a suit to restrain a temporary nuisance, such as the noise of machinery in adjacent premises. *Jones v. Chappell*, 20 L. R., Eq. 539; 44 L. J., Chanc. 658—R.

Semble, that such a suit could be maintained by a weekly tenant if the nuisance was of such a nature as to be injurious to his health or comfort. *Id.*

If the lessee of property, proceeding by the license of the lessor, performs acts which amount to a nuisance, and for which he would have no defense in an action, the lessor will be liable, for he is bound to see that his property is so managed that other persons are not injured. *White v. Jameson*, 22 W. R. 761—R.

The lessor of demised premises adjoining the highway is not liable for a nuisance to the highway, existing on such premises at the time of the demise, if the lessee occupies under an obligation to repair. *Guinnell v. Eamer*, 32 L. T., N. S. 835; 10 L. R., C. P. 658.

A landlord, in 1873, demised a house abutting upon a public street to W., the lease containing a covenant whereby he bound himself to "repair and keep in repair" the demised premises. At the time of the demise there was upon the premises a grating opening into the street, which grating was, unknown to the landlord, in a defective state of repair and dangerous. In 1874 the grating gave way, causing damage to the plaintiff while lawfully using the highway. The jury found that the landlord could not have known of the defective condition of the grating by the exercise of ordinary care:—Held, that he was not liable. *Id.*

A landlord who lets premises for a fixed and definite purpose is liable for any nuisance that arises naturally and of necessity from the use of such premises as contemplated by the demise. *Harris v. James*, 35 L. T., N. S. 240; 45 L. J., Q. B. Div. 545.

A. let to B. a field for the purpose of its being worked as a lime quarry. The ordinary way of getting the limestone was by blasting, and A. authorized the quarrying of the stone and the erection of lime-kilns in the field. A nuisance was caused to the adjoining occupier by the blasting and by the smoke from the kilns, and he brought an action against both A. and B.:—Held, that A., the landlord, was liable, although the nuisance was actually created by the act of his tenant, because the terms of the demise were an authority from him to B. to create the nuisance, which was

therefore the necessary consequence of the mode of occupation contemplated in the demise. *Ib.*

It is the absolute duty of an occupier of premises, having a lamp overhanging the footway, to prevent its becoming dangerous to the public; and if, in fact, it becomes dangerous it is a nuisance, and for any injury caused by such nuisance he is liable; and he cannot shift the liability arising from such a duty from himself, by having employed a competent person to repair it. *Tarry v. Ashton*, 45 L. J., Q. B. Div. 260; 1 L. R., Q. B. Div. 314; 24 W. R. 581; 34 L. T., N. S. 97.

A. occupied a house abutting on a street. Projecting from the front wall, about fifteen feet over the pavement, was a lamp which he had employed a contractor to repair, along with his other lamps. The contractor did his work badly. Another contractor being afterwards employed by A. to examine the lamp, placed the ladder against the bracket which joined it to the wall. The weight of the ladder and the rotten state of the bracket caused the lamp to fall and injure a passer-by in the street:—Held, that A. was responsible to him for the injury so caused. *Ib.*

The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes a nuisance to a neighbor, even though it has been put there before he took possession. *Broder v. Saillard*, 2 L. R., Ch. Div. 692; 24 W. R. 1011; 45 L. J., Chanc. Div. 414—R.

The plaintiff and the defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's house, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being decayed, the sewage escaped, and, flowing into the plaintiff's cellar, did damage. The defendant was unaware of the existence of this return drain, and consequently of its want of repair:—Held, that the defendant was liable for the damage done to the plaintiff; for that defendant's duty was to keep the sewage which he himself was bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that this duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain. *Humphries v. Cousins*, 2 L. R., C. P. Div. 289; 46 L. J., C. P. Div. 438; 25 W. R. 371.

A landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or when he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition: in all other cases he is exempt from responsibility for accidents happening to strangers dur-

ing the tenancy. *Nelson v. Liverpool Brewery Company*, 2 L. R., C. P. Div. 311; 46 L. J., C. P. Div. 675; 25 W. R. 877.

The defendants let to F. a house by an agreement in writing, by which F. agreed "to do all necessary repairs to the premises except main walls, roof, and main timbers." There was no agreement by the defendants to repair, and the house was in good condition at the time of letting it. Owing to the defendants' negligence in not repairing a part of the main walls, a chimney-pot, during the tenancy of F., fell upon the plaintiff, who was a servant of F., and injured him:—Held, that the plaintiff was not entitled to recover compensation from the defendants for the injury sustained by him. *Ib.*

As to liability of owners or occupiers, landlords or tenants, for negligent acts or omissions not necessarily causing nuisances,—see NEGLIGENCE.

As to parties liable to indictment for nuisances or offenses against sanitary acts,—see CRIMINAL LAW.

### III. ABATEMENT AND REMOVAL.

#### 1. At Common Law.

##### Right of private individuals, generally.]

—An individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. *Colchester (Mayor, &c.) v. Brooke*, 7 Q. B. 339.

A private individual cannot justify damaging the property of another on the ground that it is a nuisance to a public right, unless it does him a special or particular injury. *Dimes v. Petley*, 15 Q. B. 270; 14 Jur. 1132; 19 L. J., Q. B. 449.

##### Extent of right to enter and abate nuisance.]

—If a man, in his own soil, does anything which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. *Raikes v. Townsend*, 2 Smith, 9.

A person, in abating a nuisance to his property, may justify an interference with the property of the wrong-doer, but only so far as is necessary to abate the nuisance. *Roberts v. Rose*, 4 H. & C. 103; 12 Jur., N. S. 78; 35 L. J., Exch. 62; 13 L. T., N. S. 471; 12 W. R. 181—Exch. Cham.

It is the duty of a person who enters upon the land of another to abate a nuisance to do it in the way least injurious to the owner of the land entered. *Ib.*

Where there is an alternate way of abating a nuisance which involves an interference with the property of an innocent person or a wrong-doer, the interference must be with the property of the wrong-doer. *Ib.*

Notice.]—An entry on the land of another

in order to remove a nuisance of filth, by a party injured, is justifiable, without previous notice, where the owner of the land is himself the original wrong-doer by placing it there; so possibly where the nuisance arises from a default in the performance of some obligation incumbent on him. *Jones v. Williams*, 11 M. & W. 170; 12 L. J., Exch. 249.

But where such nuisance is created by another, and the owner succeeds to the locus in quo, he is entitled to notice before an injured party can enter and remove it. *Id.*

## 2. Under Nuisances Removal Acts and Sanitary Acts.

**Statutes.**—[18 & 19 Vict. c. 121, repealed the 11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111, and consolidated the Nuisances Removal Acts; it was amended by 23 & 24 Vict. c. 77, and by 26 & 27 Vict. c. 108, with respect to the seizure of diseased and unwholesome meat.

29 & 30 Vict. c. 90, Sanitary Act, 1866, amends the Nuisances Removal Act, 1853, 18 & 19 Vict. c. 121, and 26 & 27 Vict. c. 117, amends the same act as to the seizure of diseased and unwholesome meat.]

### Jurisdiction and powers of local authority.]

—Under 18 & 19 Vict. c. 121, s. 12, the power of a local authority to prefer, and the jurisdiction of justices to determine, a complaint in respect of a nuisance existing within the area of that local authority, arises only where the cause of such nuisance is also within that area. *Reg. v. Cotton*, 1 El. & El. 203; 5 Jur., N. S. 811; 23 L. J., M. C. 22; 7 W. R. 62.

By 18 & 19 Vict. c. 121, s. 6, extra-parochial places, having a population of less than 200 persons, shall, for the purpose of the act, be attached to and form part of the adjacent place, having the largest common boundary with the extra-parochial place; and notice of vestry meetings for the election of a local authority, under and for the purposes of the act, shall be given in such extra-parochial places, and the householders within such places may attend such vestry meetings and vote on such elections:—Held, that, where the seashore forms the boundary of a parish, the portion of the shore below the high-water mark of medium tides is an extra-parochial place within this enactment. *Reg. v. Gee*, 1 El. & El. 1068; 5 Jur., N. S. 1348; 28 L. J., Q. B. 298; 7 W. R. 528.

By 18 & 19 Vict. c. 121, s. 23, the local authority of a district is required to lay down a sewer in such district when necessary, and keep the same in good and serviceable repair:—Held, that the expression repair does not mean the reconstruction of a sewer which has been originally defectively made; but the keeping the original sewer in proper repair. *Reg. v. Epsom Union*, 11 W. R. 593; 8 L. T., N. S. 383—Q. B.

By 18 & 19 Vict. c. 121, s. 22, where a watercourse, used or partly used for the conveyance of sewage, is a nuisance within the

meaning of the act, and cannot, in the opinion of the local authority, be rendered innocuous without the laying down of a sewer along the same, or part thereof, or instead thereof, the local authority shall lay down such sewer, and may have the same powers as to entering lands as are given to the surveyor of highways by the Highway Act 5 & 6 Will. 4, c. 56, s. 67. Those powers are to make and lay trunks, tunnels, &c., in and through lands or grounds adjoining or lying near to any highway, upon paying the owner for the damages sustained by him:—Held, that the local authority, in laying down a new sewer under this section, is not bound to follow the course of the old watercourse, but may, in the exercise of an honest discretion, carry the new sewer across inclosed land adjoining the old watercourse. *Derby v. Bury Improvement Commissioners*, 38 L. J., Exch. 100; 4 L. R., Exch. 222; 17 W. R. 772; 20 L. T., N. S. 927—Exch. Cham.

**What are nuisances within the statutes.**—By 18 & 19 Vict. c. 121, s. 8, the word "nuisances" shall include any premises in such a state as to be a nuisance or injurious to health. A railway company was the owner of a railway bridge over a highway. The rain-water collected on the bridge, and, running through the planks, dripped on to the highway and on persons using the highway. The company was summoned, under s. 12, for allowing a nuisance to exist on its premises, and the justices ordered its abatement:—Held, that the act, being a sanitary act, applied only to such nuisances as were injurious to health; and that as the nuisance complained of was not injurious to health, the justices were wrong in ordering its abatement. *Great Western Railway Company v. Bishop*, 7 L. R., Q. B. 550; 41 L. J., M. C. 120; 20 W. R. 969; 26 L. T., N. S. 905.

N. had a manufactory for bichrome, and heated his furnaces with coal, the smoke from which constituted a nuisance. The bichrome as an article of commerce could be produced of equal quality by the use of coke and wood as a combustible, but at a much greater expense. He had adopted a smoke-consuming apparatus, but it had proved insufficient to prevent the nuisance. The justices in petty sessions made an order on him under 18 & 19 Vict. c. 121, ss. 12 and 19, to abate the nuisance:—Held, by Blackburn and Mellor, JJ., Lush, dissentiente, that the manufacture of bichrome as involving the smelting of ores or minerals was excepted from the operations of the Sanitary and Nuisances Removal Acts, 29 & 30 Vict. c. 90, and 18 & 19 Vict. c. 121, by s. 44 of the latter statute, and that the order was therefore wrongly made. *Reg. v. Yorkshire (Justices), Norris v. Barnes*, 7 L. R., Q. B. 537; 41 L. J., M. C. 154; 20 W. R. 703; 26 L. T., N. S. 622.

It is not necessary, in an information under the Sanitary Act, 1866 s. 19, to show that black smoke sent forth from a chimney is injurious to health as well as a nuisance. *Gaskell v. Bayley*, 30 L. T., N. S. 516—Q. B.

An overcrowded house, occupied by one family, is a nuisance within 18 & 19 Vict. c. 121, and part 2 of 20 & 30 Vict. c. 90, which by s. 14 are to be construed together, and justices have power in such a case to make an order under 18 & 19 Vict. c. 121, s. 12, notwithstanding that s. 29, giving them power to deal with overcrowded dwellings, is limited to cases where the inhabitants consist of more than one family. *Eye Union (Guardians) v. Paine*, 82 L. T., N. S. 757; 23 W. R. 692; 44 L. J., M. C. 148—Q. B.

By 18 & 19 Vict. c. 121, s. 12, where a nuisance is ascertained by a local authority to exist, "the person by whose act, default, permission or sufferance the nuisance arises or continues," may be summoned before justices, who may make an order on such person for the abatement or discontinuance and prohibition of the nuisance. By s. 8, the word "nuisance" shall include any watercourse, drain, &c., so foul as to be a nuisance or injurious to health. By a local act, all public sewers were vested in the corporation of the borough, which was to maintain, cleanse and flush the same, and provide them with proper traps and means of ventilation. A company was possessed of chemical works connected by drains with a public sewer passing under a street of a borough, and poured down these drains liquids which while separate in the drains were innocuous, but which met in the sewer, and when in combination there generated a gas injurious to health, which escaped into the street, and was a nuisance to inhabitants passing along the street. The corporation had not properly trapped the sewer so as to prevent the escape of gas from it:—Held, that the public sewer was a drain or watercourse within 18 & 19 Vict. c. 121, s. 8, and that the nuisance arose from the act, default, permission or sufferance of the company, notwithstanding that the corporation by its negligence might have contributed to it; and that the company was rightly convicted. *St. Helen's Chemical Works Company v. St. Helen's (Mayor, &c.)*, 45 L. J., M. C. 150; 1 L. R., Exch. Div. 196; 34 L. T., N. S. 397—D. C. A.

As to what offenses against sanitary acts are indictable,—see CRIMINAL LAW.

**Diseased and unwholesome meat and other provisions.**—A butcher carried on business at his shop in a town, but resided at and occupied a house and some land at the outskirts, and nearly a mile distant from his shop. A quantity of diseased meat, loaded in carts, was carried into the yard belonging to the shop, and there seized by the police. Within this yard there was a slaughter-house:—Held, first, that the yard was a place within the meaning of 26 & 27 Vict. c. 117, s. 2. *Young v. Gattridge*, 88 L. J., M. C. 67; 4 L. R., Q. B. 166.

Held, secondly, that assuming the word "place" was used in the same sense in s. 2 as in s. 3, the word "place" in s. 3 is not to be limited to places ejusdem generis with any

slaughter-house, shop, building or market. *Id.*

Diseased meat placed on a cart, when passing along the streets of the city of Dublin from a slaughter-house to a place for the manufacture of preserved meats, in the city, was seized by the inspector of nuisances:—Held, that the meat was, when placed upon the cart, exposed for sale and intended for the food of man, within the meaning of the 26 & 27 Vict. c. 117, s. 2. *Daly v. Webb*, 4 Ir. R., C. L. 809; 18 W. R. 631—Q. B.

A butcher at his residence half a mile from his shop, on a Sunday afternoon was requested to go himself, or send some one with the key, to admit the inspector of nuisances to his shop, in order that some meat there might be examined. He refused, and was convicted under 26 & 27 Vict. c. 117, s. 8, of preventing, obstructing, or impeding the inspector when duly engaged in carrying the provisions of that act into execution:—Held, that although Sunday afternoon might, under some circumstances, be a reasonable time for the examination of meat under s. 2, the butcher had committed no offense under s. 3. *Smull v. Bickley*, 82 L. T., N. S. 726—Q. B.

The council of a borough, under the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, s. 90, empowering them to make by-laws for the suppression of all such nuisances as are not already punishable in a summary manner, made a by-law imposing a penalty on any butcher or other person who should have in his possession, with intent to sell or expose for sale, any unsound, putrid or unwholesome meat or other victuals or provisions unfit for the food of man, or which would be deleterious to the health of persons who might feed thereon. S. was charged under this by-law with having in his possession, with intent to sell, some cheese unfit for the food of man:—Held, that the by-law was properly made, was still in force, and that the having in possession with intent to sell, or exposing for sale, cheese, which was in fact unfit for human food, was a nuisance at common law, and so within the scope of the Municipal Corporations Act, s. 90, and that S. was within the by-law. *Skillico v. Thompson*, 45 L. J., M. C. 18; 1 L. R., Q. B. Div. 12.

**Notice to remove.**—When a nuisance has been ascertained by the local authority to exist on private premises, and a notice has been served under 26 & 30 Vict. c. 90, s. 21, it is not necessary, in order to found proceedings before justices for the abatement, under 18 & 19 Vict. c. 121, s. 12, that a notice should have been served under s. 11, and Schedule Form C of the latter act. *Amyes v. Creed*, 4 L. R., Q. B. 122.

When proceedings are taken by an inhabitant under 23 & 24 Vict. c. 77, for the abatement of a nuisance, he is not required, under 29 & 30 Vict. c. 90, s. 21, before taking such proceedings, to serve a notice on the person by whose act the nuisance arises, requiring him to abate the same. *Cooker, v.*

*Cardwell*, 18 W. R. 212; 5 L. R., Q. B. 15; 10 B. & S. 797; 89 L. J., M. C. 28; 21 L. T., N. S. 457.

**When and against whom order for abatement or removal may be made.**—An owner of a market allowed sheep to be penned there, and he found the hurdles for the pens, and derived a profit in addition to the toll on the sheep. The sheep droppings created a nuisance on the part where they were penned:—Held, that the owner of the market was liable to an order for the removal of the nuisance, under 18 & 19 Vict. c. 121, s. 12, as being the person within the meaning of that section "by whose act, default, permission, or sufferance," the nuisance arose. *Draper v. Sperring*, 10 C. B., N. S. 118; 80 L. J., M. C. 225; 9 W. R. 656; 4 L. T., N. S. 865.

An order may be made under 18 & 19 Vict. c. 121, s. 12, upon a person who causes a nuisance, though it arises at a distance from his premises. *Brown v. Russell*, 9 B. & S. 1.

When several persons drain into one place, an order under s. 12 may be made upon one whose drainage by itself causes a nuisance. *Ib.*

But not if, though the aggregate drainage is a nuisance, the drainage of each is not by itself enough to cause a nuisance. *Ib.*

An order under s. 12 may be made upon a person who claims an easement to drain through land of A. into a watercourse on land of B. *Ib.*

The owner of six houses, let to yearly tenants, made a drain from them by leave of the owner of adjoining land through his land into a watercourse on another person's land, where the drainage became a nuisance:—Held, that an order under s. 12 was rightly made on the owner. *Ib.*

An information was filed at the relation of persons dwelling on a river, complaining of a nuisance caused by the sewage of the neighboring town. The nuisance to the relators was proved, but it was in evidence that if the nuisance was stopped, the health of the inhabitants of the town, whose number greatly exceeded the sufferers by the nuisance, would be endangered:—Held, that the court could not interfere with the attorney-general's discretion, or consider the balance of inconvenience. *Att. Gen. v. Leeds (Mayor, &c.)*, 39 L. J., Chanc. 254; 18 W. R. 517; 23 L. T., N. S. 330—V. C. J.

An urban sanitary authority deposited in a field ashes and refuse, in order that the same might be removed by certain farmers, with whom they had contracted for its purchase; the appellants were not the owners or tenants of the field, and they exercised no control over the ashes and refuse after the same were deposited; the deposit formed a nuisance. An order was made under the Public Health Act, 1875, s. 96, by justices, against the appellants, for the abatement of the existing nuisance and for the prohibition of its recurrence:—Held, that so much of the order as directed an abatement was bad, for it prescribed an act, the execution of which

might involve the committal of a trespass; but that so much of the order as prohibited a recurrence was good, for it was the appellants' act which created the nuisance. *Scarborough (Mayor) v. Scarborough Rural Sanitary Authority*, 1 L. R., Exch. Div. 344; 54 L. T., N. S. 768.

**Enforcing orders for abatement and removal.**—Under 18 & 19 Vict. c. 121, the sanitary inspector for the local authority of a district obtained an order of justices for the abatement of a nuisance. The local authority was requested by the party aggrieved by the nuisance to take steps for enforcing the order, but did not do so. The court refused an application by the party aggrieved for a mandamus to compel the local authority to enforce the order. *Bassett, Ex parte*, 7 El. & Bl. 280; 3 Jur., N. S. 186; 26 L. J., M. C. 64.

Under 18 & 19 Vict. c. 121, justices ordered a party against whom complaint was made by the Nuisances Removal Committee, for causing a nuisance, "to abate and discontinue the nuisance and to do such works and acts as are necessary to abate the nuisance, so that the same shall no longer be a nuisance;" and if the order was not complied with, the committee was authorized to enter upon the premises, and to do all such works, matters or things as might be necessary for carrying the order into execution:—Held, that this was not an order for the execution of structural works, so as to be subject to appeal, and that therefore a penalty might be imposed for disobedience of the order, notwithstanding the entry of an appeal against such order, and that the orders could not be brought up by certiorari. *Liverpool (Mayor, &c.), Ex parte*, 8 El. & Bl. 537; 4 Jur., N. S. 333; 27 L. J., M. C. 89.

A penalty, under 18 & 19 Vict. c. 121, s. 14, for disobedience of an order to abate a nuisance, cannot be enforced without a previous summons of the persons on whom it is imposed. *Reg. v. Jenkins*, 3 B. & S. 116; 9 Jur., N. S. 570; 32 L. J., M. C. 1; 11 W. R. 20; 7 L. T., N. S. 272.

An order to abate a nuisance by removing offensive privies was directed to the "owner, or to the nuisance removal committee," the owner being directed to remove the same within seven days, and if such order was not complied with, the committee was authorized and required to enter and remove it. The seven days elapsed, and neither the owner nor the committee removed the nuisance:—Held, that the justices had power to fine the owner, under the 18 & 19 Vict. c. 121, s. 14, for disobedience of the order, notwithstanding that it was addressed as well to the nuisance committee as to the owner. *Tomlin v. Great Stanmore*, 12 L. T., N. S. 118—Q. B.

Upon an information against a party for a nuisance through a chimney sending forth black smoke, an order was made on the 20th July, 1868, that within two months he should make such alterations in the chimney, as to consume the smoke arising therefrom. He



whereupon made alterations, and the smoke ceased to issue until the 4th of the following February, when for a limited period on that day and following days it again issued. In the following July an information was laid or disobedience to the order. No evidence was given as to the cause of the issuing of the smoke, and the justices convicted him:—Held, first, that there was evidence justifying the conviction, and, secondly, that as the nuisance was a continuing one the 11 & 12 Vict. c. 43, s. 11, did not apply. *Higgins v. Northwich Union (Guardians)*, 23 L. T., N. S. 752—Mellor and Pigott.

An order having been made under the 29 & 30 Vict. c. 90, s. 19, requiring the owners of a chimney "within one calendar month from the service of the said order to cease to send forth black smoke from a certain chimney," they failed to comply with the order on nineteen separate days:—Held, that they were guilty of nineteen distinct offenses, and that the justices had power to order them to pay nineteen penalties of 10s. each, and the costs of nineteen separate summonses, under 18 & 19 Vict. c. 121, s. 13. *Reg. v. W. R. Yorkshire (Justices)*, 20 W. R. 712—B. C.

Justices acting in pursuance of the Nuisances Removal Act, 1855, and the Sanitary Act, 1866, ordered the occupiers of premises to cease to send forth black smoke from their chimney, so that the same should be no longer a nuisance. The order having been persistently disregarded, and the offenders summoned and a penalty imposed on them for their default, nineteen separate informations were eventually laid, and the same number of summonses simultaneously issued in respect of as many acts of disobedience, each committed on a different day, by sending forth black smoke. At the hearing of the summonses, the full penalty of 10s. was imposed for the offense alleged in each, and the offenders were ordered also to pay 15s. costs upon the first summons, and 10s. costs upon every other. They objected that their disobedience was but one default, and that the divers acts complained of should have been charged in a single summons, to which one set of costs only would have attached; and they obtained a rule calling on the justices to show cause why they should not state a case:—Held, that each daily emission of smoke was a separate act of disobedience, for which a separate summons might be lawfully issued, and that, under the circumstances, the justices had not so exercised their discretion in awarding costs as to render the interference of the court necessary. *Reg. v. Waterhouse*, 7 L. R., Q. B. 545; 41 L. J., M. C. 115; 26 L. T., N. S. 761.

Seemingly, that, had they done so, the proper remedy would not be by ruling them to state a case. *Id.*

By 38 & 39 Vict. c. 55, s. 343, which came into force on the 11th of August, 1875, 18 & 19 Vict. c. 121, and 29 & 30 Vict. c. 90, are repealed, with a proviso that "this repeal shall not affect any right or liability acquired,

accrued, or incurred under any enactment hereby repealed." An order under 18 & 19 Vict. c. 121, and 29 & 30 Vict. c. 90, to discontinue the sending forth of black smoke from a certain chimney in such quantity as to be a nuisance was made by justices and served on the owner on the 24th of May, 1875. On the 12th of August, 1875, black smoke was emitted from the chimney in such quantity as to be a nuisance. The owner having been summoned before justices for a disobedience of the order, they dismissed the summons upon the ground that the statutes under which the order was made had been repealed on the 11th of August:—Held, that the order was a "liability" within the proviso in 38 & 39 Vict. c. 55, s. 343, that it continued in force, notwithstanding the repeal of the statutes under which it was made, and that the decision of the justices was erroneous. *Barnes v. Edleston*, 1 L. R., Exch. Div. 102; 45 L. J., M. C. 162; 34 L. T., N. S. 822—D. C. A.

Black smoke having issued from a chimney in such quantities as to be a nuisance, an order of abatement was made under the Nuisances Removal Act, 1855, and the Sanitary Act, 1866; subsequently, black smoke having again issued from the chimney, an order was made upon the complaint of the respondent, under 23 & 24 Vict. c. 77, s. 13, prohibiting the recurrence of the nuisance. Two informations having been laid, one in respect of each order, but both founded on the same act of emission of black smoke:—Held, that the act complained of being the same in each case, there could not be two convictions in respect of it. *Edleston v. Barnes*, 1 L. R., Exch. Div. 67; 34 L. T., N. S. 497.

**Appeal against order of removal and abatement.**—In computing the two days allowed by 18 & 19 Vict. c. 121, s. 40, to an appellant for entering into a recognizance after giving notice of appeal, Sunday is to be reckoned as one, though it falls on the last day. *Simpkin, Ex parte*, 6 Jur., N. S. 144; 29 L. J., M. C. 23; 2 El. & El. 392.

The drainage of a jail, which had been duly declared to be a borough jail, was carried by open drains through lands not belonging to the corporation. Upon the complaint of the nuisances removal committee the justices made an order, under the 18 & 19 Vict. c. 121, s. 12, upon the corporation to abate the nuisance, and do such works as were necessary to abate the same. The nuisance could only be removed by the construction of a covered drain through the lands:—Held, that the order was an order to abate the nuisance, and not an order for structural works, within s. 10, and therefore there was no appeal to the quarter sessions against it. *Liverpool (Mayor, &c.), Ex parte*, 4 Jur., N. S. 833; 27 L. J., M. C. 80; 8 El. & Bl. 537.

Parties having been convicted by justices for a nuisance, under 18 & 19 Vict. c. 121, they appealed to the quarter sessions, when

the conviction was affirmed, subject to a case; the order of quarter sessions directing that "the costs of the appeal should abide the result of the decision of the Queen's Bench." The case and order of sessions having been duly removed, the court quashed the order of quarter sessions generally:—Held, that the order being quashed generally, the court of quarter sessions had no power afterwards to deal with the costs. *Reg. v. Hampshire (Justices)*, 8 Jur., N. S. 1212; *S. U.*, nom. *Isle of Wight Ferry Company v. Ryde Commissioners*, 7 L. T., N. S. 391—B. C.—Crompton.

**Assessments and rates.**—By 18 & 19 Vict. c. 121, s. 22, the local authority is empowered to lay down a sewer along any ditch or watercourse used for the conveyance of sewage from any house, and to keep the same in good repair, and "to assess every house, building, or premises then or any time thereafter using for the purposes aforesaid the said ditch, watercourse or sewer, to such payment, either immediate or annual, or distributed over a term or years, as they shall think just and reasonable." Under this enactment a local authority assessed the houses then built and using a sewer in certain sums set opposite to their names in the assessment, and passed a resolution enabling the persons assessed to compound for the assessment:—Held, first, that the assessment was not bad, because it did not provide for houses which might thereafter be built and use the sewer. *Reg. v. Middlesex (Justices)*, 2 Jur., N. S. 1045—Q. B.

Held, secondly, that the resolution enabling the persons to compound was no part of the assessment. *Id.*

By 18 & 19 Vict. c. 121, s. 22, the local authority is in certain cases required to make a sewer, and is empowered to assess every house using it, and after fourteen days' notice left on the premises assessed to levy the sum assessed in the same manner as highway rates are leviable, with the same right of appeal against the assessment as shall be given by the law for the time being relating to highways. By the Highway Act, 5 & 6 Will. 4, c. 50, s. 103, notice of appeal is to be given within fourteen days after the rate has been made:—Held, that the fourteen days for appealing were to be reckoned from the notice of the assessment being left on the premises. *Reg. v. Middleton Nuisances Removal Committee*, 5 Jur., N. S. 622; 1 El. & El. 98; 28 L. J., M. C. 41; 7 W. R. 87.

By 18 & 19 Vict. c. 121, s. 22, it is provided that the assessment shall in no case exceed 1s. in the pound on the assessment to the highway rate:—Held, that the assessment might exceed 1s. in the pound on the ratable value as assessed to the highway rate, if distributed over a term of years, but must not exceed 1s. in the pound on such ratable value for the current year. *Id.*

Under 18 & 19 Vict. c. 121, the local authority in a district, which has rendered innocuous a drain passing through its district,

conveying away the filth of houses in a higher district, has no power to assess the owners of those houses for payment of the expenses, though those houses use this drain. *Reg. v. Tatham*, 8 El. & Bl. 915; *S. C.*, nom. *Reg. v. Warner*, 4 Jur., N. S. 609; 27 L. J., M. C. 144.

The power of assessment of a local authority is confined to property within the district for which they act. *Id.*

A parish, II., was divided into districts for the purpose of drainage works. In 1855 the local authority constructed a sewer at M. street, and assessed the houses using that sewer, and B. was charged with an annual payment, which was redeemed by him in pursuance of a resolution of the local authority. In 1856 the local authority constructed another sewer at M. hill. These sewers increased a nuisance which already existed in the village of H., which was a lower district. In 1859 the local authority laid down a sewer in the village, and it was resolved that the drainage of M. street, M. hill, and in the village should be considered as one system, and that the total cost of the works should be ascertained, and that all houses using the sewers so constructed should be assessed in such manner that each should pay an equal pound rate. The local authority assessed the houses in M. street at a rate, making, with what was paid by that district for the works done in 1855, an amount equaling the amount to be paid by the houses in the village. Among others B. was assessed:—Held, that the local authority had power to assess B., as his house used the sewer laid down in the village, within the meaning of the 18 & 19 Vict. c. 121, s. 22. *Reg. v. Bodkin*, 6 Jur., N. S. 1270; 30 L. J., M. C. 38; 3 El. & El. 271.

Where a local authority, being a nuisances removal committee, of which the surveyors of highways are ex officio members, have made a sewer, under 18 & 19 Vict. c. 121, s. 22, they must exercise their power under that section of assessing the houses using the sewer before the highway rates are applicable to the payment of the expenses; and an order of justices, made under s. 7, on the surveyors of highways, for payment of the expenses, is illegal, and may be removed by certiorari, notwithstanding that writ is taken away by s. 30. *Reg. v. Gosse*, 6 Jur., N. S. 1369; 30 L. J., M. C. 41; 3 L. T., N. S. 404—Q. B.

A nuisances removal committee, acting for any place under 18 & 19 Vict. c. 121, and entitled to be repaid their costs and charges in executing the act out of the poor-rates, may call on the overseers to pay them the amount of such costs and charges, without justifying the item to such overseers. *Reg. v. Ewell*, 9 W. R. 127—B. C.—Crompton.

As to assessments and rates for sewers, generally,—see SEWERS; in the metropolis,—see METROPOLIS.

**Recovery of expenses.**—A person to whom an owner of premises resident abroad sent a power of attorney, authorizing him to receive

the rents, is not thereby constituted owner, within 18 & 19 Vict. c. 121, s. 2, so as to render him personally liable for the costs and expenses of the abatement of a nuisance on the premises previously to the receipt of his authority. *Blything Union (Guardians) v. Warton*, 3 B. & S. 352; 9 Jur., N. S. 867; 12 L. J., M. C. 132; 11 W. R. 306; 7 L. T., N. S. 672.

The county court, or two justices, have exclusive jurisdiction to try an action for the recovery of money paid by parish authorities for the abatement of a nuisance, and the costs thereof, under 11 & 12 Vict. c. 123, s. 3, although the title to land may be in question. *Hertford Union (Guardians) v. Kimpton*, 11 Exch. 295; 25 L. J., M. C. 41.

The amount paid for carrying into force an order of two justices to abate a nuisance, under 11 & 12 Vict. c. 123, may, under s. 3, be recovered in a county court, from the owner of the premises where the nuisance existed, though title to land comes in question. *Reg. v. Hadden*, 2 El. & Bl. 180; 17 Jur. 804; 22 L. J., Q. B. 290.

#### IV. ACTIONS.

##### 1. At Common Law.

**Local in their nature.**—An action for a nuisance is local in its nature, and the nuisance must be proved to have been committed in the county where the venue is laid; if no place and county are alleged where the nuisance is committed, the county in the margin will be intended. *Warren v. Webb*, 1 Taunt. 379.

An action for damages arising from a public nuisance on real property, as on a public highway, is a local action; and if there is no local description in the body of the declaration, the county in the margin must be taken as repeated in the declaration, and it is a material allegation; and on a plea traversing the existence of the highway, proof that the highway is in another county is a fatal variance and a ground of nonsuit. *Richardson v. Locklin*, 11 Jur., N. S. 951; 34 L. J., Q. B. 225; 6 B. & S. 777.

**Pleading.**—In declaring for a nuisance, the immediate cause of the injury must be stated; and under an averment of the remote cause, and an allegation that by means of the premises the noxious matter annoyed the plaintiff's house, it is not competent to give evidence of the intermediate causes. *Fitzsimons v. Inglis*, 5 Taunt. 534.

**Evidence.**—In an action for a nuisance, where the defendant pleads not guilty, the plaintiff must not only prove the existence of the nuisance, but that the defendant was the person who caused it. *Dawson v. Moore*, 7 C. & P. 25—Abinger.

Notice to remove a nuisance, left at the premises, is evidence against a subsequent occupier. *Johnson v. Bensley, R. & M.* 189—Abbott.

On the trial of an issue, whether (during a certain period) there arose from the works of the defendants noisome, offensive, noxious or unwholesome smoke, and other vapors, to the nuisance of the plaintiff, whereby the produce of his garden was deteriorated, evidence was adduced for the plaintiff to show that the smoke and other vapours from defendants' works had injured the produce of other grounds in the neighborhood; and also for the defendants to show that their works did not injure the produce of any other ground; and one of the defendants' witnesses having, on his examination in chief, described several gardens in the neighborhood of the works as in the utmost health, was asked on cross-examination by the plaintiff's counsel, if he knew Glasgow-field (grounds in the neighborhood); and having answered that he "knew Glasgow-field, and never knew of any damage done there," he was then asked "whether he had known of any sum having been paid by the defendants to the proprietors of Glasgow-field for alleged damage there occasioned by their works?"—Held, that the question was inadmissible, as leading to a new collateral inquiry, which, answered either way, could not affect the issue or test the credit of the witness. If he answered that money had been paid, the payment would not be proof of damage done, as it might have been paid to buy peace. *Tennant v. Hamilton*, 7 C. & P. 122.

In an action by a reversioner for damage done to the reversion, by cutting off the eaves of a building belonging to him, and by erecting a wall with a drip over his premises:—Held, that as there might be repeated actions for continuing the nuisance, evidence tendered at the trial of the first action for the purpose of showing the diminution in the salable value of the premises, was properly rejected. *Battishill or Bathishill v. Reed*, 18 C. B. 690; 25 L. J., C. P. 200.

##### 2. Under The Judicature Acts.

**Parties to actions to restrain; and when such actions are maintainable.**—The defendant was tenant and occupier of a newly-erected stable, adjoining and all but touching the flank wall of a house in the suburbs of London, and which stable was erected on a mound of made earth at a higher level than the basement of the plaintiff's house, and the result was that water, mixed with stable drainage and sewage, leaking from a broken soil pipe in the stable yard, oozed through the wall of the plaintiff's house, so as to be a nuisance. On a bill by the owners of the house, for an injunction to restrain the nuisance occasioned by the damp, and also by the noise of the horses kept in the stable:—Held, that the occupier of the house should be a party to the suit, inasmuch as the alleged nuisances were of a temporary nature. *Broder v. Saillard*, 45 L. J., Chanc. Div. 414; 2 L. R., Ch. Div. 692; 24 W. R. 1011—R.

The bill having been amended by the

addition of the occupier as a co-plaintiff, it appeared that the damp was due to the circumstance of the stable being erected on made earth, placed there unknown to the defendant by some predecessor in title:—Held, nevertheless, that an injunction should be granted, for the reason that the possessor of land is responsible for nuisances arising on it, by whatever means occasioned. *Ib.*

A corporation, which became the sanitary authority in their town in 1873, suffered sewage to continue to run from a drain in the town into a canal, by a culvert running through the plaintiff's property, which created some nuisance and some damage to the plaintiff:—Held, that an information would lie, and that the corporation was liable to be restrained by injunction from continuing such nuisance and damage, though they derived no profits from the works causing the nuisance. *Att. Gen. v. Basingstoke (Mayor)*, 45 L. J., Chanc. Div. 720; 24 W. R. 817—V. C. II.

An action was brought to restrain a general in her Majesty's army, and the officers under his command, from causing or permitting rifle practice on a common (forming part of the land thus vested), in close proximity to a house, which as the owner alleged, was a serious nuisance and occasioned damage to his property. On motion for an injunction:—Held, that to such an action, if sustainable, the secretary of state for war was a necessary party. *Hawley v. Steele*, 6 L. R., Ch. Div. 521; 46 L. J., Chanc. Div. 782—I.

Held, also, that the allegations in the statement of claim being insufficient, no interlocutory injunction could be granted. *Ib.*

**Pleading.**—Payment into court, together with a denial of the right of action, was pleaded in an action for a nuisance:—Held, that in such an action such pleading ought not to be allowed, even if in other actions the case were otherwise. *Spurr v. Hall*, 46 L. J., Q. B. Div. 603; 2 L. R., Q. B. Div. 615.

In an action to restrain carrying on works as a nuisance, the reasonableness of the mode of working is not proper to be put in issue. *West v. White*, 46 L. J., Chanc. Div. 333—V. C. B.

**Award of damages instead of injunction.**—Injunction suit to restrain the defendants from causing a nuisance, by the working of their patent for making bricks and tiles under a covered area, to the plaintiff and her dwelling-house. The bill prayed an injunction, but did not ask any inquiry as to dam-

ages. The plaintiff at the hearing was willing to take damages instead of an injunction:—Held, that a nuisance was proved, and that the plaintiff was entitled to damages although she had not prayed for them by her bill. *Crawford v. Hornsea Steam Brick and Tile Company*, 34 L. T., N. S. 923; 45 L. J., Chanc. Div. 432—C. A.

A memorandum of a decree, giving damages instead of an injunction in respect of a nuisance, was directed to be indorsed on the plaintiff's title-deed. *Ib.*

## Nul Tiel Record.

See JUDGMENT.

## Nun.

**Rights of property.**—Quære, whether an assignment of property by a nun, in pursuance of a vow made on entering the convent, is valid? *Fulham v. MacCarty*, 1 H. L. Cas. 703; 12 Jur. 757.

A nun is not civiliter mortua, or incapable of holding property. *Metcalf, In re*, 1 Jur., N. S. 224; 33 L. J., Chanc. 308; affirmed on appeal, 2 De G., J. & S. 123.

As to effect of profession as monk or nun. —see MONK.

## Nuncupative Wills.

See WILL.

## Nunquam Indebitatus.

See PLEADING.

## Nuptial Contract.

See HUSBAND AND WIFE.

## O.

## Oaths.

- I. WHEN REQUIRED OR ALLOWED, AND FORM, IN GENERAL, 9547.
- II. PROFANE CURSING, 9550.
- III. ON AFFIDAVIT. See AFFIDAVIT AND DECLARATION.
- IV. OF WITNESSES. See EVIDENCE.
- V. FALSE SWEARING, VOLUNTARY, AND OTHER UNLAWFUL OATHS. See CRIMINAL LAW.
- VI. BLASPHEMOUS LIBELS. See CRIMINAL LAW.

# I. WHEN REQUIRED OR ALLOWED, AND FORM, IN GENERAL.

**Statutes.**—[By 1 & 2 Vict. c. 105, it is declared and enacted, that in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity, in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person in case of willful false swearing may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted.

By 17 & 18 Vict. c. 125, s. 20, if any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation in the words following; viz.:—

"I, A.B., do solemnly, sincerely and truly affirm  
 "and declare, that the taking of any oath  
 "is, according to my religious belief, un-  
 "lawful; and I do also solemnly, sincerely  
 "and truly affirm and declare," &c.

which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

16 & 17 Vict. c. 78, relates to the appointment of persons to administer oaths in chancery in lieu of masters extraordinary.

17 & 18 Vict. c. 78, appoints persons to administer oaths in the High Court of Admiralty.

22 Vict. c. 10; prescribes the form of affirmation to be taken by Quakers and other persons by law permitted to make a solemn affirmation or

declaration, instead of taking an oath prescribed by 21 & 22 Vict. c. 48.

By 24 & 25 Vict. c. 66, persons refusing, from conscientious motives, to be sworn in criminal proceedings, are permitted to make a solemn affirmation or declaration.

By 5 & 6 Will. 4, c. 62, s. 18, justices and other persons are prohibited from receiving any affidavit touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some statute: provided that it is not to extend to affidavits which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries.

By 31 & 32 Vict. c. 72, The Promissory Oaths Act, 1868, the forms of the oath of allegiance, clerical, official and judicial oaths, and for members of parliament on taking their seats, are prescribed, and a declaration in other cases substituted.

34 & 35 Vict. c. 48, The Promissory Oaths Act, 1871, repeals a variety of enactments relating to oaths and declarations which are not in force.

By s. 2, whereas by the Promissory Oaths Act, 1868, it is provided that the oaths of allegiance and judicial oath should be taken by each of certain officers therein mentioned, in manner in which the oaths required to be taken by such officer previously to the passing of that act would have been taken; and it is desirable, with a view to the revision of the statute law, to define the manner in which such oaths are to be taken: Be it enacted that each such officer shall take the said oaths before such persons as her Majesty may from time to time appoint; or, in England, before the Lord High Chancellor of Great Britain, or in the Court of Chancery, Queen's Bench, Common Pleas, or Exchequer, in open court before one or more of the judges of such court, or in open court at the general or quarter sessions of the peace for the county, borough or place in which the person taking the oaths acts as justice.

By 34 & 35 Vict. c. 83, the House of Commons may administer an oath to a witness at the bar of the house, and a committee of the house may also examine witnesses on oath; and by s. 2, the first section of the 21 & 22 Vict. c. 78, and the third section of the 34 & 35 Vict. c. 8, are repealed.]

A private estate act gave power to a tenant in tail to alien, provided he took, within six months after attaining eighteen, the oaths appointed to be taken, instead of the oaths of supremacy and allegiance, by 1 Will. & M. c. 8, and also subscribed the declaration in 30 Car. 2, stat. 2, s. 8; and by subsequent enactments, the imposition of these oaths and declaration, for the purposes of the acts, was abolished:—Held, that such tenant in tail was not, nor his issue, entitled to alien; and

the effect of the alteration was to nullify the power. *Shrewsbury v. Hope Scott*, 6 O. B., N. S. 1; 6 Jur., N. S. 452; 20 L. J., C. P. 84.

**Form and substance.**—The concluding paragraph in the form of oath of abjuration imposed by 6 Geo. 3, c. 53, "and I do make this recognition, acknowledgment, abjuration, renunciation, and promise heartily, willingly and truly, upon the true faith of a Christian," was an essential portion of the substance of the oath, and no part of it could be omitted or altered. *Salomons v. Miller* (in error), 8 Exch. 778; 17 Jur. 463; 22 L. J., Exch. 169—Exch. Cham.; affirming 7 Exch. 475; 16 Jur. 375; 21 L. J., Exch. 161.

By a private act, no person appointed to act as tithe valuer shall be capable of acting until he shall have taken and subscribed an oath in the words following: "I, A. B., do swear that I will faithfully, &c., execute, &c., So help me God." The oath had been subscribed with the omission of the words "So help me God."—Held, that the oath had nevertheless been properly administered according to the statute, for the words omitted were no part of the oath, but only an indication of the manner of administering it. *Lancaster and Carlisle Railway Company v. Heaton*, 8 El. & Bl. 952; 4 Jur. N. S. 707; 27 L. J., Q. B. 105.

An affirmation taken under 3 & 4 Will. 4, c. 82, stated that the affirmant was a member of a religious sect, called Separatists. It did not follow in terms the form of affirmation required by the statute, but it purported to be supplemental to another affirmation which did, and to have been made before an officer authorized to administer it:—Held, that it must be assumed to have been properly made. *Wolsely v. Worthington*, 18 Ir. Chanc. R. 341.

**Proof of taking.**—Trustees were created by an act for the purpose of building a bridge, and it was enacted that no person should be capable of acting as a trustee until he should have taken and subscribed the oath therein set forth, which oath so taken and subscribed by each trustee should be entered in the book of proceedings of the trustees. The book contained a blank form of oath, under which the names of the trustees were written by themselves, without any date; but there were entries from time to time in the proceedings, to the effect that they were appointed trustees, having qualified by taking and subscribing the oath prescribed:—Held, that it sufficiently appeared that the trustees were properly sworn, although there was no regular jurat or entry of the oath having been administered to the trustees. *Miles v. Bough*, 3 Railw. Cas. 608; 3 G. & D. 110; 3 Q. B. 845.

Held, also, that, in order to prove orders and directions of the trustees, it was necessary to give evidence of their having subscribed the oath. *Id.*

## II. PROFANE CURSING.

**Offense; and conviction.**—Under 19 Geo. 2, c. 21, s. 11, a conviction that "A. did, on the day of , profanely curse one profane curse," setting it out, "twenty several times repeated," and adjudging him to pay "for such his offense the penalty of 2*l.*," being a cumulative penalty at the rate of 2*s.* for each repetition, is good. *Reg. v. Scott*, 33 L. J., M. C. 15; 8 L. T., N. S. 662; 4 B. & S. 368.

Using several oaths on one and the same occasion, is one offense only; and 11 & 12 Vict. c. 43, s. 10, therefore, does not apply. *Id.*

As to blasphemous libels,—see CRIMINAL LAW.

As to voluntary and other unlawful oaths, and perjury and false swearing,—see CRIMINAL LAW.

## Obligor and Obligee.

See BOND.

## Obscenity.

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## Obstruction.

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- II. OF NAVIGATION. See NAVIGATION.
- III. OF WATERCOURSE. See WATER AND WATERCOURSE.
- IV. OF OFFICER OR PROCESS. See CRIMINAL LAW.

## Occupation.

- I. UNDER ADVERSE POSSESSION. See LIMITATION OF ACTIONS AND SUITS.
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### I. PUBLIC OFFICERS, GENERALLY.

#### 1. *Appointment, Qualification and Tenure; Removal and Suspension.*

**Appointment and acceptance; and nature of official tenure, generally.**—An appointment to an office for the life of the appointee is not invalid, upon the sole ground that the person making the appointment only holds his own office for life. *Rosslyn v. Aytoun*, 11 C. & F. 742.

The office of paymaster of exchequer bills was an office during pleasure only, and not during good behavior or for life, under 48 Geo. 3, c. 1. *Smyth v. Latham*, 9 Bing. 692; 3 M. & Scott, 251; 1 C. & M. 547; 3 Tyr. 509.

The subsequent appointment of a new paymaster in the place of a former one is a virtual revocation of the appointment of such former paymaster, even though the instrument under which the new appointment is made contains no express clause of revocation of the old one, and though it allege, contrary to the fact, that the former paymaster had resigned. *Id.*

A public officer cannot vacate his office by

accepting an incompatible office, unless the first office is one which he might have determined by his own act, or which he might have surrendered to the party appointing to the second office, or from which he might have been removed by, or with the concurrence of, such party. *Rees v. Patterson*, 1 N. & M. 612; 4 B. & Ad. 9.

An office, of which the salary is to be fixed, and the accounts audited by certain justices, cannot be held by one of such justices. *Id.*

The office of surgeon of the district prison of St. Catherine, in the island of Jamaica (created by the acts of the local legislation), is an office held during pleasure only, and not during good behavior. *Hill v. Reg.*, 8 Moore P. C. C. 138.

Where justices of the peace, having power to appoint a surgeon, appointed another in the place of one holding the office:—Held, first, that the office of surgeon of the district prison being a public office, held at pleasure, and not an ancient office, the choice of another to fill such office, by the justices, in exercise of the powers vested in them by the local acts, was a determination of the first appointment. *Id.*

Held, secondly, that the office being full a mandamus would not lie; and semble, the only remedy was by quo warranto against the occupant of the office. *Id.* See *Reg. v. St. Martin's-in-the-Fields (Guardians)*, 17 Q. B. 140.

The acceptance by the holder of one office of another incompatible office does not vacate the former, unless it is such as he could determine by his own act simply, or unless that authority concurred in the appointment which could accept the surrender of or remove from the old one. *Worth v. Newton*, 10 Exch. 247; 23 L. J., Exch. 338.

Where one of two, appointed under 9 & 10 Vict. c. 95, s. 25, to execute jointly the office of clerk to a county court, dies, the survivor continues to hold the office, though he cannot act till a successor to the deceased person is appointed. *Reg. v. Wake*, 8 El. & Bl. 384; 4 Jur., N. S. 68; 27 L. J., Q. B. 11.

Under 6 & 7 Will. 4, c. 86, s. 7, the clerk to the board of guardians of a union created under 4 & 5 Will. 4, c. 76, has no right to be superintendent registrar except in the case of the first appointment after 6 & 7 Will. 4, c. 86, coming into operation; and on any subsequent vacancy the power of appointment is in the board of guardians. *Reg. v. Acason*, 2 B. & S. 795; 31 L. J., Q. B. 227.

A., who was clerk to the board of guardians of a union, created under 4 & 5 Will. 4, c. 76, and was also superintendent registrar appointed by the registrar-general, under 7 Will. 4 & 1 Vict. c. 23, died on 4th January, 1861. On the 17th January, the defendant was appointed superintendent registrar by the board of guardians. On the 14th February, the relator was appointed clerk to the board of guardians. Upon information in the nature of quo warranto:—Held, that the defendant

was duly appointed superintendent registrar. *Id.*

One who gratuitously accepts the office of steward of a horse-race is not responsible for a loss resulting to one who enters a horse for the race, for his mere non-feasance in omitting to appoint a judge; at all events, unless it appears that he has actually entered upon the duties of the office. *Bilfo v. West*, 13 C. B. 460; 23 L. J., C. P. 175.

By a charter, Edw. I. granted to the burgesses of C., that the constable of his castle of C. for the time being should be mayor of that borough, "sworn as well to the king as to the burgesses, who, on oath for preserving the king's right being first taken, should swear to the burgesses, that he would preserve the liberties of the burgesses, granted by the king, and faithfully do those things which to the office of mayoralty belong in the borough." By letters patent, William IV. granted the office of the castle of C.:—Held, that until oath taken, according to the charter, the title of grantee was incomplete. *Raz v. Roberts*, 5 N. & M. 130; 3 A. & E. 771; 1 H. & W. 444.

Where a corporation has power by statute to appoint a weigh-master, and also at their discretion to remove him, the office is not a freehold office, and an appointment duly made by the corporation of a weigh-master during their pleasure is valid. *Delea v. Cork (Mayor, &c.)*, 5 Ir. R., C. L. 37; 19 W. R. 411—C. P.

**Qualification.**—By a private statute, tithes and dues were commuted for a specific corn rent, to be raised by assessment upon the land-owners; and the court of quarter sessions, once in every ten years, upon application to be made to them by the land-owners, was to nominate and appoint one or more fit and proper person or persons, not interested in the tithes or dues, and not being the steward or agent of any person so interested, to make a new valuation and assessment. In an action upon a distress for a sum for which the plaintiff had been assessed in pursuance of such a valuation, it was contended that the land was not liable, because the appointed tithe valuer, who was a shareholder in a railway passing through the township, was interested in the tithes and dues, that the sessions had consequently no jurisdiction to appoint him, and that therefore his acts were null and void:—Held, assuming him to be interested within the meaning of the statute, and that the order appointing him might have been brought up by certiorari and quashed, that as the sessions had jurisdiction to inquire and determine whether he was interested, and the appointment had not been set aside, he was de facto in the office of tithe valuer, and that consequently his acts done while so in office were not null and void, and could not be challenged. *Lancaster and Carlisle Railway Company v. Ilaton*, 8 El. & Bl. 952; 4 Jur., N. S. 707; 28 L. J., Q. B. 628.

The 88 Geo. 3, c. 5, s. 8, requires the assessors of land tax to be inhabitants of the

parish, township or place, residing within the parish for which they are to act:—Held, that the acts of a person duly appointed as assessor were valid, although he was not qualified by being an inhabitant. *Waterloo Bridge Company v. Cull*, 5 Jur., N. S. 464; 28 L. J., Q. B. 70; 1 El. & El. 218.

As to oaths of officers,—see OATHS.

**Proof of appointment.**—The fact, that a party did a particular act (assigning a land-tax assessment) in an official capacity, may be proved, not only by showing that he exercised the office before or at the period in question, but also by evidence (limited to a reasonable time) of his having exercised it afterwards. *Doe d. Hopley v. Young*, 8 Q. B. 63; 9 Jur. 941; 15 L. J., Q. B. 9. S. P., *Doe d. Bowley v. Baines*, 8 Q. B. 1037.

Proof that a person has acted as a public officer on one occasion, before the occasion in question, is evidence that he is such officer. *Reg. v. Murphy*, 8 C. & P. 397—Coleridge.

In proceedings against a party in a voluntary office, not cast on him by law, it is necessary to aver not only an appointment, but an acceptance by the person appointed. *Serra v. Wright*, 6 Taunt. 45; 1 Marsh. 441.

The office of weigh-master in a market town in Ireland is a freehold office. The appointment to it ought to be for life. *M'Mahon v. Lennard*, 6 H. L. Cas. 970.

It is not necessary, in an action by the weigh-master for disturbance in his office, to show a formal appointment to it by deed. His having acted in the office for several years is sufficient. *Id.*

An averment in an information for a libel, that Lord St. Vincent was, at the time when such libel was published, first lord of the admiralty, is supported by producing the patent of appointment, dated prior to the publication. *Raz v. Budd*, 5 Esp. 230.

**Stamp duties on appointment.**—[See 23 & 29 Vict. c. 96, s. 19; 33 & 34 Vict. c. 97; 35 & 36 Vict. c. 20; and 38 Vict. c. 23, s. 14.]

The appointment in writing of a treasurer to the guardians of the poor of Birmingham, under a local act, at a yearly salary, requires a stamp. *Reg. v. Welch*, 2 C. & K. 296; 1 Den. C. C. 100.

But if such appointment is not receivable for want of a stamp, a recital in a bond executed by him is sufficient evidence of his appointment, and his duties may be shown from the clauses of the local act of parliament under which he is appointed. *Id.*

Two persons, who had been appointed common-keepers in a manor, appointed their deputy, by the following writing signed by them: "We, the undersigned, having been appointed common-keepers, hereby nominate and appoint you our deputy for the lower common, and authorize you to act for us in that behalf in all things pertaining to the rights and privileges of the lord and the tenants of the manor, with the same powers and in the same manner as it would be our

uty to act." It then went on to state what were the rights of common, and in what manner the duties of common-keeper should be exercised:—Held, that this document did not require to be stamped, as being a "grant or appointment of or to an office or employment," within 55 Geo. 3, c. 184. *Roberts v. Elliott*, 11 M. & W. 527.

**Appointment of deputy.**—An under-sheriff could not appoint a deputy under 3 & 4 Will. 4, c. 42. *Jones v. Williams*, 2 D., N. S. 938; 7 Jur. 581; 12 L. J., Q. B. 295.

By a royal charter, establishing the Palace Court, it was granted that there should forever be an office of the prothonotary of the court, and officer called the prothonotary, to make out and enroll processes, pleadings and judgments, and to keep the rolls and records; and the king granted the office to B., to have and execute the same by himself, or by his sufficient deputy, during his natural life. On a vacancy, the marshal of the household was to appoint the new prothonotary, who should be admitted, and might have and exercise the office during his natural life by himself or by his sufficient deputy or deputies. The prothonotary revoked by deed the appointment of his deputy, and appointed another by deed. The judge of the court, deeming this person insufficiently qualified, rejected him, and himself appointed the party previously dismissed, who had not ceased to act and to receive the fees payable to the prothonotary. He had received these fees while in office under the prothonotary's appointment, and the practice had been that he retained part and paid over the rest, in stated portions, to the knight marshal, the steward and the prothonotary:—Held, that the offices of prothonotary and deputy prothonotary were not distinct, and that, in the absence of special contract, the deputy acted and received fees on behalf of the prothonotary. *Campbell v. Hewitt*, 10 Q. B. 258.

Held, secondly, that the retention of fees by the deputy on his account must be ascribed, not to any independent right, but to agreement between him and the prothonotary. *Ib.*

Held, thirdly, that the prothonotary's revocation of the appointment determined the agreement and the deputy's right to retain any part of the fees; though if he unavoidably continued to perform duties on behalf of the prothonotary, he might have a cross claim for remuneration. *Ib.*

Held fourthly, that the judge of the court might refuse an insufficient deputy nominated by the prothonotary, but could not, of his own authority, appoint another deputy. *Ib.*

Ordinarily, if it is an office requiring skill or discretion, a person cannot appoint a deputy; he cannot transfer, but is bound to do it himself. But where the office is merely ministerial, such as that of digging a grave or of pulling a bell, it is clear that a deputy may be appointed therein; in the case of the sexton falling ill the public might be inconvenienced if dead bodies could not be buried.

*Burial Board of St. Margaret's, Rochester v. Thompson*, 19 W. R. 892; 40 L. J., C. P. 218; 6 L. R., C. P. 445.

**Indictment for refusing office.**—An indictment alleging that the defendant was appointed overseer of the poor of a parish, "and that he afterwards refused to take the office of overseer of the parish to which he was so appointed," is good. *Ree v. Burder*, 4 T. R. 788; Nolan, 111.

In an indictment against a person for refusing to serve the office of overseer of the poor of a parish:—Held, that he was a substantial householder within 43 Eliz. c. 2, and liable to serve such office, although he occupied a house and paid the rent and taxes in the parish, by means of a clerk only, but slept in another parish. *Ree v. Poynder*, 2 D. & R. 258; 1 B. & C. 178.

The voluntary absence of a chief officer of a corporation, upon the charter day of election of his successor, is not an indictable offense under 11 Geo. 1, c. 4, s. 6, unless his presence as such chief officer was necessary, by the constitution of the corporation, to constitute a legal corporate assembly for such purpose. *Ree v. Corry*, 5 East, 372; 1 Smith, 538.

**Compelling service.**—Payment of a fine imposed by the by-laws of a corporation, for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled to do so by mandamus. *Ree v. Bowser*, 2 D. & R. 848; 1 B. & C. 585.

**Removal or suspension.**—It is the prerogative of the crown, by letters patent, to suspend a public officer, though the office is granted for life. After suspension the officer is entitled to receive the salary, but not to exercise the functions of the office. *Slingsby's case*, 3 Swans. 178.

Suspension does not create a vacancy in an office, it is only an impediment to the officer enjoying any benefit from it; but all acts required to be done by such officer must still be done by him to give them validity. *Phillips v. Bury*, 2 T. R. 351.

A person validly elected to an office and admitted to it, cannot be removed from it without notice. *Reg. v. Saddlers' Company*, 10 H. L. Cas. 404.

The Supreme Court of Calcutta has power by the Charter of Justice to remove or suspend officers of that court, on account of misconduct, and this power of removal is not limited to acts done by such officer in his judicial character, but includes transactions distinct from those of his office. *Grant, In re*, 7 Moore P. C. C. 141.

An officer of the court, being a shareholder and director of a bank at Calcutta, was a party to deceptive statements, contained in the half-yearly reports of the concern, as to the state of the affairs of the bank, and also availed himself of his character of director, to obtain credit to a considerable amount upon his personal security only, which, by the condition of the deed of copartnership

of the bank, amounted to a breach of trust. No charge or imputation, with respect to his judicial functions, was brought against him:—Held, that there were sufficient grounds for calling upon the court to protect the administration of justice by suspending such officer for so misconducting himself. *Id.*

The office of commissioner of crown lands in New South Wales, created by the act of the legislature of that colony, is not a patent office, though made under the great seal of the colony, within the meaning of the 23 Geo. 3, c. 75, but is an office held durante bene placito; and there is no right of appeal to the Queen in council, under that statute, from an order of amotion from such office by the governor-general and executive council. *Robertson, Ex parte*, 11 Moore P. C. C. 288.

The 23 Geo. 3, c. 75, applies only to offices held by patent, for life, or for a certain term. *Id.*

The poor law commissioners have a discretionary power of removing a relieving officer of a union whom they deem unfit for his office, without giving him notice of their intention to remove him, or hearing what he has to say in his defense. *Teather v. Poor Law Commissioners*, 19 L. J., M. C. 70—B. C.—Erie.

Though a corporation may have by statute a power to remove one of its officers holding a freehold office, the Court of Queen's Bench will see that that power is exercised in a lawful manner, and will interfere if it should not be so. But if exercised in a lawful manner that court will refuse to interfere, on the mere ground that the power has not been wisely or discreetly put in force in the particular case. *Osgood v. Nelson*, 5 L. R., H. L. Cas. 636; 41 L. J., Q. B. 320.

In the case of removal from office of an officer of the corporation, upon an accusation of inability or neglect of duty, if there has been such evidence given as in an ordinary trial would justify the judge in leaving it to a jury to say, as a matter of fact, whether the accusation was made out, the court will not interfere with the decision arrived at by the corporation. *Id.*

A corporate body having the power to dismiss one of its officers holding a freehold office, on complaint against him, referred to a committee of its own body the task of examining into the complaint, and receiving evidence upon it and reporting thereon. The committee performed this duty. The report and evidence were duly furnished to the inculpated officer, who was then called on for his defense. He was afforded the opportunity of being heard, and counsel was heard for him, but the corporate body itself did not rehear the evidence. He was ordered to be dismissed from his office:—Held, that this was not a case of delegation of lawful authority, but was a due exercise of that authority by the corporate body itself. *Id.*

As to officers of corporations, in general,—see CORPORATION; of companies,—see PUBLIC COMPANY.

## 2. Fees and other Remuneration; Assignment of Office or Profits; Compensation on Abolition of Office.

**Right to fees or salary in general.]**—The immemorial existence of fees of an office may be presumed from uninterrupted modern usage, unless there is some evidence given to the contrary. *Shepherd v. Payne*, 16 C. B., N. S. 132; 10 Jur., N. S. 540; 33 L. J., C. P. 158; 12 W. R. 581; 10 L. T., N. S. 193—Exch. Cham.

The modern usurpation of an excess does not affect the title to the original fees. *Id.*

The marshal of the city of Dublin is by virtue of his office registrar of the pawnbrokers of Ireland, and as marshal and registrar is entitled to receive considerable fees; and the defendant, in consideration of his being appointed to the office of marshal by the corporation of Dublin, entered into an agreement with them to accept, by way of fixed salary, a sum less than the fees, and to pay over the fees to the city treasurer:—Held, that the agreement was illegal, as being against public policy. *Dublin (Lord Mayor, &c.) v. Hays*, 10 Ir. R., C. L. 220—C. P.

As to exorbitant or illegal fees,—see this title, I., 3.

**Action for salary, or loss of salary.]**—An action will not lie by a deputy against his principal for an increase of salary, without an express agreement, where the latter has been appointed to a new office. *Bell v. Drummond, Peake*, 45—Kenyon.

The defendant, who had been illegally elected for the office of surgeon of a county infirmary in Ireland, entered into office, and, though cautioned, kept out the plaintiff, who had been legally elected:—Held, first, that the plaintiff was entitled to recover damages from the defendant for so excluding him from the office. *Lawlor v. Alton*, 8 Ir. R., C. L. 160—Q. B.

Held, secondly, that the plaintiff, as he had not actually discharged the duties of the office, though he had offered and was ready to do so, was not entitled to recover, as money had and received, the salary which the defendant had received under the grand jury presentment. *Id.*

**Assignment of office, or of salary and profits.]**—The office of warden of a forest was granted by James the First to Lord Oxford, his heirs and assigns, and was subsequently assigned by the holder upon various occasions; and, lastly, to A., without any objection on the part of the crown:—Held, that the office passed under the assignment to A., and that he was entitled to claim compensation upon the forest being disafforested. *Wellesley v. Mornington*, 23 L. J., Chanc. 48.

The office of wood-ward, or forester of the crown, is an office of trust, incapable of assignment without a license from the crown, founded on the return to a writ of *ad quod damnum*. *Att. Gen. v. Matthias*, 4 Kay &

579; 4 Jur., N. S. 638; 27 L. J., Chanc.

A. executed a deed in Scotland according to the form there, assigning his property to trustees, for the benefit of creditors. The operative part of the deed was in these words: "All and sundry superiorities, lands and heritages, debts heritable and movable, and whole goods, gear, sums of money, and effects; and in general my whole means and estate, heritable and movable, of whatever nature or denomination, or wherever situate, presently belonging to me."—Held, that these words did not pass the profits of a public office at that time filled by the grantor. *Till v. Paul*, 8 C. & F. 295.

An agreement between a municipal corporation and the clerk of the peace of the borough, on his appointment, that he shall accept a fixed salary in lieu of his fees, and that any surplus of fees above the salary shall be paid into the borough fund, is void, on two grounds of public policy: first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office. *Liverpool Corporation v. Wright*, 1 Johnson, 359; 5 Jur., N. S. 1156; 28 L. J., Chanc. 868.

An assignment by a retired military officer of his pension for valuable consideration is void under 47 Geo. 3, sess. 2, c. 25. *Lloyd v. Cheetham*, 8 Giff. 171; 9 W. R. 924; 4 L. T., N. S. 570; 30 L. J., Chanc. 640.

But the statute does not apply to the assignment of a pension granted by the East India Company. *Heald v. Hay*, 3 Giff. 467; 81 L. J., Chanc. 811. S. P., *Carew v. Cooper*, 33 L. J., Chanc. 290; 4 Giff. 619.

A compensation granted to a public civil officer on the reduction of officers in his department, under 4 & 5 Will. 4, c. 24, is not assignable by him. *Wells v. Foster*, 8 M. & W. 140; 5 Jur. 464.

**Superannuation allowances.**—[4 & 5 Will. 4, c. 24, and 22 Vict. c. 26, regulate superannuations to persons in the public service.

20 & 30 Vict. c. 68, amends the law relating to granting pensions and superannuation allowances to persons holding offices connected with the administration of justice in England.

20 & 30 Vict. c. 31 provides for superannuation allowances to officers of vestries and other boards within the area of the Metropolitan Management Act.

The law is further amended and extended by 36 Vict. c. 28; 38 Vict. c. 4; and 39 & 40 Vict. cc. 43, 53, 68.]

A superannuation allowance, granted by a resolution of the Board of Directors of the East India Company to a retired clerk, under the authority of 53 Geo. 3, c. 155, s. 93, is only a gratuity; and the grant, to be binding on the company, must be by deed. For both these reasons, the allowance is not a debt which can be attached on behalf of a judg-

ment creditor of the grantee under 17 & 18 Vict. c. 125. *Jones v. East India Company*, 17 C. B. 351; 2 Jur., N. S. 180; 25 L. J., C. P. 154.

By the Lee River Navigation Improvement Act, 1850, 13 & 14 Vict. c. 109, s. 76, it is enacted, that "it shall be lawful for the trustees from time to time to pay and allow to any officer or servant of the trustees whose service may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, may, in the judgment of the trustees, be reasonable and proper," and to pay the same out of moneys in their hands by virtue of their special acts: under this section the trustees, by resolution not under seal, granted to their clerk, upon his resignation of his office, an annuity of 300*l.* a year:—Held, that the trustees were entitled afterwards to reduce the amount of the annuity. *Marchant v. Lee Conservancy Board*, 9 L. R., Exch. 60; 43 L. J., Exch. 44; 30 L. T., N. S. 867—Exch. Chm.; reversing S. C., 8 L. R., Exch. 200; 43 L. J., Exch. 141.

**Compensation on abolition of offices.**—[See 5 & 6 Will. 4, c. 76, s. 66, and 5 & 6 Vict. c. 111, s. 2.]

On the 21st August, 1835, the town-clerk of Lyme Regis died, and, on the 31st of the same month, Lee was appointed his successor. On the 8th September, 1835, the 5 & 6 Will. 4, c. 76, passed:—Held, that he was entitled to nominal compensation only for the loss of his office as town-clerk, since he must have known, when he was appointed, that his appointment would soon cease. *Lee, Ex parte*, 2 N. & P. 63; 7 A. & E. 139.

By the usage of a borough, the office of clerk to the justices was appurtenant to the office of common clerk. After the 5 & 6 Will. 4, c. 76, a separate commission of the peace was granted to the borough; and the person who had been common clerk, which office was then abolished, was in lieu thereof appointed town-clerk and clerk of the peace, but not, as formerly, clerk to the justices also; such office being, by s. 102, incompatible with that of clerk of the peace:—Held, that the lords of the treasury had jurisdiction to make an order on the town council to compensate him for the loss of such office. *Ree v. Bridgewater (Mayor)*, 1 N. & P. 466; 6 A. & E. 339.

The steward of a borough demanded compensation as for an office held for life. The town council allowed compensation as for an annual office only. The lords of the treasury, after hearing the parties, awarded compensation on the former principle. On motion for a mandamus to the corporation to execute a compensation-bond, there appeared evidence, on the one hand, that the office was not legally holden for life; and, on the other, that it had usually been so holden, and that the appointment was accepted on that understanding:—Held, that the lords of the treas-

ury were not bound to consider only the legal tenure, but might, referring to the circumstances of the case, award compensation as for an office held for life. *Reg. v. Norwich (Mayor, &c.)*, 8 A. & E. 633.

The lords of the treasury had no jurisdiction to decide whether an officer of a borough had been properly removed from office on the ground of misconduct. *Reg. v. Warwick (Corporation)*, 3 P. & D. 429; 10 A. & E. 396.

Where the lords of the treasury awarded compensation to an officer in a borough, on his being removed from office by the town council, if the office was not a borough office, or the removal was not made under 5 & 6 Will. 4, c. 76, the lords of the treasury had no jurisdiction. *Reg. v. Poole (Mayor, &c.)*, 8 N. & P. 119; 7 A. & E. 730.

In 1704, a corporation appointed A. assistant-chamberlain of the city, for a year, at a yearly salary. In 1804 the salary of A. was raised. In 1810 B. was appointed assistant-chamberlain by the chamberlain, and he continued to hold this office till the passing of the 5 & 6 Will. 4, c. 76. In 1827 the corporation had again raised the salary. On the passing of the 5 & 6 Will. 4, c. 76, the office of B. was abolished, and a claim having been made by him for compensation, the lords of the treasury awarded, that his office was not the subject of compensation, and the court confirmed the decision. *Harvey, Ex parte*, 3 N. & P. 159; 7 A. & E. 739.

The council of a borough removed a town clerk, who had been elected to hold during good behavior, but had not made the declaration prescribed by 9 Geo. 4, c. 17, s. 2:—Held, that, having been an officer de facto, he was entitled to compensation. *Reg. v. Cambridge (Mayor, &c.)*, 12 A. & E. 702; 4 P. & D. 294.

The town council has jurisdiction to determine the whole claim to compensation of a borough officer who has been removed from office; and may pronounce not only on the amount to which he is entitled, but whether his office or the tenure of it was such as to entitle him to anything. *Reg. v. Sandwich (Mayor, &c.)*, 2 G. & D. 28; 2 Q. B. 895; 6 Jur. 684.

The lords of the treasury have no jurisdiction to determine the right of a borough officer to compensation, whether he has been removed for alleged misconduct or otherwise. They have jurisdiction as to nothing but the amount of compensation. *Ib.* 8 P., *Reg. v. Harwich (Mayor, &c.)*, 2 Q. B. 909; *Reg. v. Newbury (Mayor, &c.)*, 1 Q. B. 751; 2 G. & D. 109; 6 Jur. 821.

An agreement by a corporation with one of their officers, for an increase of the salary of an office retained by him, as a compensation for the loss of an office of which he was deprived, though upon an executed consideration, is not binding, if the contract is not under the common seal of the corporation. *Reg. v. Stamford (Mayor, &c.)*, 6 Q. B. 433; 8 Jur. 909.

An attorney cannot, under 5 & 6 Will. 4, c.

76, s. 63, or 5 & 6 Vict. c. 111, s. 2, claim compensation for fees and emolument which he derived from being employed by the justices of a division to prosecute offenders committed by them for trial, where the prosecutor did not employ another attorney. *Reg. v. Manchester (Mayor, &c.)*, 5 Q. B. 402; 8 Jur. 421.

It is no evidence of voluntary resignation, by a corporate officer, of the offices held by him, so as to exclude him from compensation, that he omitted to declare his wish to be re-elected, and allowed another person, without opposition, to be elected in his place. *Att. Gen. v. Poole (Corporation)*, 8 Beav. 73; 9 Jur. 818; 14 L. J., Chanc. 101.

Where no formal resignation or surrender of the offices held by a corporate officer was made by him, and another person was, without opposition by him, appointed in his place:—Held, that such corporate officer was removed from his offices within the meaning of the act. *Ib.*

After the 5 & 6 Vict. c. 111, a corporate borough was created by charter, not containing a non-intermittent clause. Its area was a part of a county. A grant of a court of quarter sessions was made, and the council appointed a clerk of the peace for the borough:—Held, that the clerk of the peace of the county was not entitled to compensation under the 5 & 6 Will. 4, c. 76, s. 66, he not having been removed nor his office abolished, although the profits were diminished. *Reg. v. Brighton Council*, 7 El. & Bl. 249; 3 Jur. N. S. 585; 26 L. J., Q. B. 153.

A treasury order for compensation to an officer of a corporation, dismissed after the passing of 5 & 6 Will. 4, c. 76, is not necessarily bad because it directs the compensation to be calculated from a bygone time. But such order is bad, and a nullity, if on the face of it, or by comparison with the treasury minute directing the order to issue, it appears that the compensation is partly given for a period during which the party still held the office. *Reg. v. Lichfield (Mayor, &c.)*, 16 Q. B. 781; 15 Jur. 812; 20 L. J., Q. B. 333—Exch. Cham.

Before and at the time of granting a charter of incorporation and a separate court of quarter sessions to the borough of Manchester, there was a division of the county of Lancaster, called "the division of Manchester," consisting of forty-three townships, and the business of the division was done at the New Bailey, in Salford; and M. acted as clerk to the justices who attended there. Some of the justices of the division met at Worsley, and others at Heaton Norris, both being townships within the division, and did petty sessions business there; and such justices employed different clerks on such occasions. By virtue of 53 Geo. 3, c. 78, a stipendiary magistrate was appointed for a district, including Salford and other townships in the division of Manchester, who appointed M. as his clerk:—Held, first, that M. was not clerk to the justices for the Manchester division of



the county of Lancaster, but only to such of them as attended at Salford. *Reg. v. Manchester (Borough)*, 9 Q. B. 458; 11 Jur. 222; 3 L. J., Q. B. 27.

Held, secondly, that the clerk to the stipendiary magistrate was not an officer of the borough, county or division of the county within 5 & 6 Vict. c. 111, s. 2; and therefore, that M. was not, on either ground, entitled to compensation. *Ib.*

A town clerk had transacted the legal business of the corporation as charity trustees. He and his predecessors in office had usually transacted such business as incidental to their office. On the passing of 5 & 6 Will. 4, c. 76, he was removed from the office of town clerk, and subsequently the new charity trustees also removed him from their employment. The town council having awarded him compensation for the loss of his office of town clerk, but having refused compensation for the loss of his employment by the trustees, he appealed to the lords of the treasury, who awarded him compensation for such employment also:—Held, that they had jurisdiction to award such compensation, because the transaction of the charity business formed part of the incidental profits of the office of town clerk, and they therefore had entertained a question of amount only, and not a question whether the loss of any distinct office was a proper subject of compensation. *Reg. v. Norwich (Mayor, &c.)*, 2 G. & D. 605; 3 Q. B. 285.

The four attorneys of the sheriff's court of York having a monopoly of the office of attorney in that court, were not, on other attorneys being admitted to practice in the court, by the operation of 5 & 6 Will. 4, c. 76, entitled to compensation; because, although their office was an office of profit within 5 & 6 Will. 4, c. 76, s. 66, there had been no abolition of it, or removal from it. *Reg. v. York (Mayor, &c.)*, 2 G. & D. 580; 3 Q. B. 530; 6 Jur. 1082.

Where a town council, in obedience to a mandamus, assessed compensation for the loss of certain offices of profit, and the lords of the treasury, on appeal, assessed a larger amount of compensation:—Held, that the assessment under the mandamus estopped the town council from denying the right to compensation. *Sandwich (Mayor, &c.) (in error) v. Reg.*, 10 Q. B. 563; 10 L. J., Q. B. 432.

If a corporation refuses compensation to a removed officer, on the ground that they had removed him for cause sufficient, the lords of the treasury have no jurisdiction to try the question of the sufficiency; and though, after entertaining that question, and determining it in favor of the claimant, they also adjudicate upon the proper amount of compensation, the court will not enforce by mandamus the payment of such compensation, nor try, upon the return to a mandamus, the sufficiency of the cause, the claimant being bound in the first instance to proceed against the corporation by mandamus, to compel them to restore him, or give him compensation for

removal. *Reg. v. Newbury (Mayor, &c.)*, 1 Q. B. 751; 1 G. & D. 389; 6 Jur. 305.

The 7 & 8 Vict. c. 92, s. 4, empowers the Queen, with the advice of her privy council, to order that any county shall be divided into so many districts as shall seem expedient, for the purposes of the act; and by s. 6, whenever any county has been customarily divided into districts, for the purpose of holding inquests, during seven years before the passing of the act, and it shall seem expedient that the same division of the county be made under this act, each of such districts shall be assigned to the coroner usually acting in and for the same district before the passing of this act; but if it shall appear expedient that a different division of such county be made, and any coroner shall present a petition praying for compensation for the loss of his emoluments arising out of such change, the lords of the treasury are to assess the amount of compensation to be paid out of the county rate:—Held, that the coroner was entitled to compensation only where a county had been customarily divided into districts for seven years before the passing of the act, and where a different division was ordered under the act. *Reg. v. Lechmere*, 16 Q. B. 284; 15 Jur. 558; 20 L. J., Q. B. 169.

Certain trustees having the management of the relief of the poor of a metropolitan parish, appointed a solicitor for the arrangement of legal matters, with an annual salary. After the passing of the Metropolitan Poor Act, 1867, 30 Vict. c. 6, the poor law board refused to allow the board of guardians elected under that act to continue him in the appointment which he had received from the trustees:—Held, that he was entitled to an award of compensation from the poor law board, under s. 76. *Reg. v. Local Government Board*, 43 L. J., Q. B. 49; 9 L. R., Q. B. 148; 22 W. R. 815; 20 L. T., N. S. 769.

### 3. Offences by Officers.

**Misconduct in office, generally.**—It is a high misprision in an officer to alter an enrollment without the sanction of the Court of Chancery. *Garrick v. Williams*, 3 Taunt. 540.

A public officer is indictable for misbehavior in his office. *Reg. v. Bembridge*, 3 Dougl. 327.

The 42 Geo. 3, c. 85, giving jurisdiction for trying and punishing in England, persons holding public offices or employments, for offenses committed abroad, does not extend to felonies. *Reg. v. Shawe*, 5 M. & S. 403.

**Extortion; receiving exorbitant or illegal fees.**—One who was appointed collector of certain duties by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties, by color and pretense of being collect-

or of such duties, though the money was fraudulently collected and misapplied by him, because he was in fact appointed collector, and in that character received the money. *Rea v. Dobson*, 7 East, 218.

A collector of post-horse duty demanded of A. a sum of money, alleging that A. had let out horses for hire without payment of the duty. A. denied that he had done so, and gave the collector a promissory note for 5*l.*, the amount of which, after it became due, was paid by A. to the collector, who handed it over to his principal, the farmer of the post-horse duties:—Held, that this was extortion in the collector, and that his having paid the money over to his principal made no difference. *Rea v. Higgins*, 4 C. & P. 247—Vaughan.

An indictment does not lie against a turnpike-keeper to try the question of exemption from toll, unless the ground of exemption was specified at the time the toll was taken. *Rea v. Hamlyn*, 4 Camp. 379—Ellenborough.

If exorbitant fees were taken by a custom-house officer from the master of a vessel, upon his taking out a cocket and bond pursuant to 13 & 14 Car. 2, c. 11, s. 7; though the statute imposed the duty on the master personally, the owners might recover the excess as money had and received. *Stevenson v. Mortimer*, Cowp. 805.

**Receiving bribes.**—By 33 Geo. 3, c. 52, s. 62, the demanding or receiving any sum of money or other valuable thing as a gift or present, or under color thereof, whether for the use of the party receiving the same, or for, or pretended to be for, the use of the company, or of any other person whatsoever, by any British subject holding any office in the East Indies, shall be extortion and a misdemeanor, and shall be proceeded against and punishable as such. An information under this section charged the defendant with receiving from R., in the East Indies, a sum of money, to wit, 8,000 rupees, being of the value of 800*l.* of lawful money of Great Britain, as a gift or present. The jury found him guilty, and that the sum of money was 8,000 rupees, and that the sum of 8,000 rupees, at the time of the receipt, was of the value of 766*l.* 13*s.* 4*d.* money of Great Britain, being at the rate of 1*s.* 11*d.* for each rupee:—Held, first, that the meaning of the statute was to prevent a person holding office in the East Indies from receiving any gift absolutely, whatever the reason for the gift might be; and that, if the meaning of the statute was to prohibit gifts being received only where they were received extorsively or under color of office, the indictment would be good by virtue of 7 Geo. 4, c. 64, which applied as well to indictments preferred for offenses abroad as for offenses in England. *Douglas v. Reg. (in error)*, 13 Q. B. 74; 12 Jur. 974; 17 L. J., M. C. 176—Exch. Cham.

Held, secondly, that it was not necessary to state for whose use the money was received. *Ib.*

Held, thirdly, that it was not necessary to state whose the money was. *Ib.*

**Indictment or information; evidence; trial.**—In an indictment against a public officer for breach of duty, it is sufficient to state generally that he is such officer, without showing his appointment. *Rea v. Ireland*, 5 T. R. 607.

Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as of omission. *Ib.*

In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. *Ib.*

Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them. *Ib.*

A charge, in an indictment against an officer, of a breach of orders in not prosecuting a war "with all possible vigor and decision," is too uncertain, even though the charge is made in the very words of the order given to him. *Ib.*

The 49 Geo. 3, c. 126, s. 3, makes it a misdemeanor in any person who shall by any way or means contract or agree to receive, or have any money, fee or profit, for any office or employment specified in that act, or for any appointment thereto:—Held, that a count in an indictment alleging the offense to be that the defendants did unlawfully and corruptly contract and agree with D. N. to procure the appointment to a certain office and employment, was bad for not stating the offense within that section. *Samo alias Day v. Reg.*, 2 Cox C. C. 178—Exch. Cham.

On the trial of an indictment for a fraud against an agent of government, under the control of the treasury, a letter of instructions addressed to him by the lords of the treasury may be read without proving the commission by which they were appointed. *Rea v. Jona*, 2 Camp. 131—Ellenborough.

## II. OFFICERS OF COURTS OF JUSTICE.

**Appointment.**—See 15 & 16 Vict. c. 73, *Nisi Prius Officers' Act.*

**Fees.**—[By 28 & 29 Vict. c. 45, and 29 & 30 Vict. c. 101, fees in the common law courts and offices are directed to be collected by means of stamps.]

The clerk of the papers of the Queen's Prison, appointed under 5 & 6 Vict. c. 23, by the secretary of state, at a fixed salary, held in effect the same office as the clerk of the papers of the Queen's Bench prison, appointed under the 27 Geo. 2, c. 17, by the marshal of the Marshalsea, and that office was one belonging to the Queen's Bench, and consequently within the 11 Geo. 4 & 1 Will. 4, c. 58, and 1 & 2 Will. 4, c. 35:—Held, therefore, that the

clerk of the papers of the Queen's prison was entitled to insist on payment to him of the fees sanctioned by the commissioners under the 1 & 2 Will. 4, c. 35, in order that he might account for them to the treasury. *Markwell v. Dyson*, 14 Q. B. 820; 14 Jur. 809; 19 L. J., Q. B. 193.

**Protection of officer acting in obedience to mandate of court.**—The plaintiff, having obtained judgment against F. in an action of assault and false imprisonment, sued out a ca. sa., whereon F. was taken and committed to the Queen's Prison, of which the defendant was the keeper. F. afterwards petitioned the Court of Bankruptcy for his discharge, under 5 & 6 Vict. c. 110, and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape:—Held, that, whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially, in a matter over which he had jurisdiction. *Thomas v. Hudson*, 14 M. & W. 353; 2 D. & L. 873; 9 Jur. 627; 14 L. J., Exch. 283.

As to sheriffs,—see **SHERIFF**.

As to judges of superior courts,—see **JUDGE**;  
of county courts,—see **COUNTY COURTS**.

## Official Referee.

See **ARBITRATION AND AWARD**.

## Old Metals.

**Statutes.**—[24 & 25 Vict. c. 110, regulates the business of dealers in old metals.

By 32 & 33 Vict. c. 99, s. 17, any dealer in old metals, as defined in the *Old Metals Dealers Act*, 1861, 24 & 25 Vict. c. 110, who shall either personally or by any servant or agent purchase, receive or bargain for lead, whether new or old, in any quantity at one time of less weight than 112 lbs., or who shall personally or by any servant or agent purchase, receive or bargain for copper, whether new or old, in any quantity at one time of less weight than 56 lbs., shall be liable to a penalty of 5l., to be recovered in the same manner as penalties incurred under the said recited act are therein directed to be recovered.

34 & 35 Vict. c. 112, s. 13, imposes a penalty not exceeding 5l. on a dealer in old metals purchasing quantities less than stated in the schedule annexed to the act.]

## Omnium.

See **STOCK**.

## Orders.

- I. OF AFFILIATION. See **BASTARD**.
- II. OF JUDGE. See **PRACTICE**.
- III. OF REFERENCE. See **ARBITRATION AND AWARD**.
- IV. OF JUSTICES. See **JUSTICE OF THE PEACE**.
- V. OF REMOVAL. See **POOR LAW**.
- VI. OF SESSIONS. See **SESSIONS**.
- VII. OF PRIVY COUNCIL.
  1. *Validity and Obligation*. See **PRIVY COUNCIL**.
  2. *Operation on Contracts*. See **CONTRACT OR AGREEMENT**.
- VIII. FOR PAYMENT OF MONEY. See **BILLS OF EXCHANGE AND PROMISSORY NOTES; BANKER AND BANKING COMPANY**.
- IX. FORGING. See **CRIMINAL LAW**.

## Ordinance.

See **FOREIGN LAW AND FOREIGNER**.

## Ordinary.

See **ECCLESIASTICAL LAW**.

## Outlawry.

- I. PROCEEDINGS, 9568.
- II. REVERSAL, 9572.
- III. EFFECT; AND HOW PLEADED, 9578.

### I. PROCEEDINGS.

**Process in actions.**—[By 1 & 2 Vict. c. 110, s. 2, all personal actions in the superior courts of law at Westminster are to be commenced by writ of summons. The writ of *capias* is no longer the commencement of an action.

The writ of *distringas* to compel an appearance and proceedings to outlawry on mesne process, under 2 Will. 4, c. 39, ss. 3, 5, were abolished by 15 & 16 Vict. c. 76, s. 24.

By 2 Will. 4, c. 39, s. 6, after judgment given in any action commenced by writ of summons, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may be now lawfully done after judgment in an action commenced by original writ: provided

always, that every outlawry or waiver had under the authority of the statute shall and may be vacated or set aside by writ of error or motion in like manner as outlawry or waiver founded on an original writ may be vacated or set aside.]

Writs of *capias* and *satisfaciendum* for the purpose of outlawry on final process must be made returnable on a day certain in term, and may be so returnable on any day in term, and it shall be sufficient that there be eight days between the teste and return. *Reg. Gen., Q. B., C. P. and Exch., 11. T., 10 Vict. r. 74; 1 El. & Bl., App. xv.*

Proceedings to outlawry on final process cannot be grounded on a *ca. sa.* made returnable immediately after execution, under 3 & 4 Will. 4, c. 67, s. 2, although returned non est inventus, because such writ can only be executed by arresting the defendant. *Leavis v. Holmes, 10 Q. B. 896; 11 Jur. 945; 10 L. J., Q. B. 430. S. P., Leay v. Hamer, 5 Exch. 518; 1 L. M. & P. 477; 19 L. J., Exch. 304.*

A *ca. sa.* to proceed to outlawry on final process cannot be tested in vacation. *Braham v. Hunter, 6 D. & L. 129—B. C.—Coleridge.*

**Who may be outlawed.]—**In an action against a member of parliament, it is incompetent for the plaintiff, upon final process, to issue out writs for the purpose of proceeding to outlawry, although he may have no present intention of putting them in execution. *Cassidy v. Stenart, 2 Scott, N. R. 432; 9 D. P. C. 369; 5 Jur. 25; 2 M. & G. 437.*

**Exigi facias and proclamations.]—**[31 Eliz. c. 3, regulates the mode and practice of proclamations of outlawries in civil actions.

By 4 & 5 Will. & M. c. 22, the proclamations for outlawries in criminal cases are assimilated.

By 7 Will. 4 & 1 Vict. c. 45, s. 2, proclamations for outlawry heretofore made or given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof, either in writing or in print, or partly in writing and partly in print, shall preciously to the commencement of divine service on the several days on which such proclamations have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches and chapels within such parish or place, and when so affixed, shall be in lieu of and as a substitution for the several proclamations heretofore given, and shall be good, valid and effectual, to all intents and purposes.]

In process of outlawry, the third proclamation must be made in the parish in which the defendant is dwelling at the time the writ of proclamation issues; if made otherwise it is a nullity. *Rayer v. Cooke, 5 D. & R. 302; 3 B. & C. 529.*

Where one month had not elapsed between the third proclamation and the quinto exactus, pursuant to 31 Eliz. c. 3, s. 1, the court set aside the outlawry as a nullity; but in pursuance of the discretion given by 9 Hen. 8, c. 4, they reversed it, on condition of the de-

fendant's putting in special bail to the original action, supposing the want of due proclamation within 31 Eliz. c. 3, to be an irregularity only. *Taylor v. Waters, 3 D. & R. 575; 2 B. & C. 353.*

The writ of exigent upon an outlawry must be in the hands of the sheriff at the time the defendant is demanded. *Valet v. Waters, 3 D. & R. 55.*

The sheriff must state, in his return to the writ of exigent, the day and year of each exaction. *Rez v. Atmon, 5 T. R. 202.*

The writ of exigent directed the proclamations to be made at the parish church of the parish in which the defendant resided:—Held, that it was sufficient, it not appearing from any affidavit that there was any nearer church or chapel; and that, at all events, it was not necessary to mention that in the exigent. *Leavis v. Davison, 1 C., M. & R. 655; 3 D. P. C. 272; 5 Tyr. 128.*

A writ of proclamation requiring the sheriff to proclaim the parties in open court in the sheriff's county (not saying county court), is good. *Rez v. Vandell, 4 T. R. 521.*

The sheriff need not allege in his return to the writ that "the persons proclaimed did not appear and render themselves," though he must in his return to the exigent. *Id.*

It need not be stated in express terms, on a record of a judgment of outlawry, that a writ of *capias* issued against the defendant; it is sufficient if it appears "that the sheriff was commanded to take the defendant." *Rez v. Perry, 6 T. R. 573.*

To an allocatur exigent the sheriff returned, that, at his county court, held at, &c., A. was the fifth time demanded and did not appear; and that, "because her Majesty's coroners of the county were, and each of them was, absent, on the fifth demand so made as aforesaid, judgment of outlawry against A. could not be pronounced," &c.:—Held, that the return was bad. *McTaggart v. Waddellburn, 2 D. & L. 576—B. C.—Patteson.*

Where the writ of proclamations commanded the sheriff to proclaim the defendant on three several days, "according to the form of the statutes for such purpose made in the thirty-first year of the reign of Elizabeth, and the first and second years of the reign of her Majesty Queen Victoria, one of such proclamations to be made at or near the most usual church door of the parish," &c., and the sheriff returned that he had proclaimed the defendant "at the most usual door of the church of the parish of," &c.:—Held, that the court would not set aside these proceedings for irregularity, where the defendant had obtained a previous rule for the same purpose, which had been discharged, although the objections taken were different, but left him to his writ of error. *Stultz v. Wynt, 3 D. & L. 560; 9 Jur. 131; 14 L. J., Q. B. 5.*

In proceeding to outlawry after final judgment, the writ of allocatur exigent is properly tested on the day of the return of the *exigi facias*, and need not bear teste upon the quarto die post. *Cox v. Boatan, 8 C. B. 335;*

**D. & L. 264; 18 Jur. 1057; 19 L. J., C. P. 3.**

**Judgment of outlawry and capias utlagatum.]**—In a record of outlawry, it appeared by the writ of proclamation and the return to it, that the prisoners were required to render themselves to the sheriff, so that he might have their bodies before the justices, &c., at the return of the writ:—Held good. *Res v. Yandell*, 4 T. R. 521.

If one exigent is awarded against the principal and accessory together, it is error only as to the accessory. *Ib.*

If it appears on the record that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though not so expressly alleged. *Ib.*

The names of the coroners need not be subscribed to the judgment of outlawry; if it appears on the record that the judgment of outlawry was given by them, it is sufficient. *Ib.*

It need not appear, on a record of outlawry, that the capias and exigent were sealed by the justices of oyer and terminer. *Ib.*

The writ of capias utlagatum, and the sheriff's return to it, ought to be filed with the clerk of the exigents. *Reynolds v. Adams*, 3 T. R. 578.

Rule granted to amend the return to a writ of capias utlagatum. *Res v. Garogan, W., W. & D. 393.*

Where a sheriff returned, that he had seized and taken into his possession property, found by inquisition to be the property of a party taken under a special capias utlagatum, the court refused, on affidavit of the falsity of that return, to call on the sheriff to show cause why he should not enter and take possession. *Reg. v. Mills*, 4 Jur. 407—Exch.

The sheriff's return upon a writ of exigent, that, by the judgment of the coroner, the defendant was outlawed, is not, until entered on the roll, a sufficient record of the outlawry. *Att. Gen. v. Rickards*, 8 Beav. 380: 9 Jur. 634; 14 L. J., Chanc. 863.

W., being indicted in the Queen's Bench for a conspiracy, pleaded guilty; whereupon it was adjudged that he be convicted, and a day was given him, by cur. adv. vult, to hear judgment; and he was afterwards outlawed for non-appearance. He afterwards came into court in custody, and brought error, assigning error in the record, process and publication of outlawry, and in pronouncing the judgment of conviction, and praying that the outlawry and conviction might be reversed, and that he might be restored to all he had lost by the outlawry. The coroner for the crown joined in error, pleading that neither in the record and process, nor in the publication of the outlawry, nor in pronouncing the judgment of conviction, was there error; and praying that the outlawry might be confirmed. It was admitted that the process of outlawry was erroneous:—Held, that it was sufficient to give judgment merely, reversing the outlawry, without noticing the judgment of conviction. *Wright v. Reg. (in error)*, 14 Q.

B. 148; 14 Jur. 305—Exch. Cham.; in Queen's Bench, 11 Jur. 103; 10 L. J., Q. B. 10.

The following points were decided by the Exchequer Chamber:—W. not having appeared on the day given him to hear judgment, a capias issued, which was followed by process of outlawry. Afterwards the outlawry was reversed, and judgment passed on the conviction:—Held, that no objection could be taken to want of continuances from the time of the non-appearance to that of the reversal of outlawry, which had been reversed; and that no continuances were necessary, during the proceedings to, or existence of, the outlawry. *Ib.*

The record of the Queen's Bench (into which court the indictment had been removed by certiorari) commenced "Pleas before," &c., of the term of St. Michael, in the 4th year of Will. 4, being the term of the appearance of the defendant in Queen's Bench. Then followed regular continuances down to the non-appearance; the outlawry; and, after an interval of several terms, an entry, "Hilary Term, in the 9th year of the reign Queen Victoria," being the term in which the defendant was brought into court after the outlawry; an entry, "and now, that is to say, on the 26th January in the same term," recording the bringing in of the defendant:—Held, that this was a sufficient commencement of the proceeding subsequent to the outlawry, without fresh placita. *Ib.*

Held, also, that it was sufficient for the record to state "that the defendant, being a prisoner in custody, by virtue of a warrant issued on the judgment of conviction of outlawry, is brought in custody into court," without further describing the process under which he was taken. *Ib.*

The return to a capias utlagatum was quashed in the first instance as being insufficient, on the application of the sheriff and the judgment creditor. *Engler v. Annasley*, 1 D., N. S. 186.—C. P.

## II. REVERSAL.

**Where outlaw beyond seas.]**—Error assigned, that the outlaw was beyond the seas when the writ of exigent issued, and thence continually until the outlawry pronounced:—Held, that it was sufficient to prove that the outlaw was in parts beyond the seas at the time of the writ of exigent issued. *Richardson v. Robinson or Robertson*, 5 Taunt. 309; 1 Marsh. 58. S. P., *Serocold v. Humphrey*, 12 East, 625, n.

Fraudulently and covinously departing the realm before the awarding of the exigent facias, in order to defeat a plaintiff of the means of recovering a just debt, and to avoid outlawry, does not preclude the defendant (on error) from reversing the outlawry, if he was, in fact, beyond sea at the time of the exigent, and thence until the time of the outlawry. *Bryan v. Wagstaff*, 8 D. & L. 208; 5 B. & C. 314; R. & M. 329; 2 C. & P. 125.

Error in fact, assigned to reverse an out-

lawry, that the defendant was beyond seas, is not answered by showing that he went beyond seas to avoid the plaintiff's process. *Hesse v. Wood*, 4 Taunt. 691.

A defendant need not appear before he moves to reverse an outlawry; and where he did not go or continue abroad for the purpose of avoiding process, the court will reverse the outlawry, and order the recognizance to be taken in the alternative, and not for the payment of the condemnation money absolutely. *Graham v. Henry*, 1 B. & A. 131.

An attorney (plaintiff in person) outlawed a defendant, although he knew that a person received an annuity for the defendant, under a power of attorney, during his absence abroad, and also knew several persons with whom the defendant was acquainted, without applying to the receiver or to these persons:—Held, that this knowledge was no ground for reversing the outlawry, without costs. *Hunter v. Whitfield*, 3 Bing. N. C. 878; 6 D. P. C. 70; 3 Hodges, 210.

In error to reverse an outlawry, the error assigned being, that at the time of issuing the *exigi facias*, the plaintiff in error was beyond the seas; the defendant pleaded that the plaintiff left the realm before the awarding the *exigi facias*, and voluntarily remained absent, and that he had notice that he was about to be demanded at the county courts, and might have returned before they were holden:—Held, a non-issuable plea. *Deauclerk v. Hook*, 20 L. J., Q. B. 485.

A plaintiff in error *coram nobis* assigned, as error, that he was beyond seas when the exigent was issued, and the defendant in error pleaded in *nullo est erratum* to the writ:—Held, that the ground assigned as error not being disputed, the plaintiff in error was entitled, as of right, to judgment of reversal of the outlawry; and he having appeared in person by the writ, the court, on the prayer of counsel on his behalf, pronounced judgment, reversing the outlawry, and refused to suspend it until he should have satisfied the original judgment debt. *Smith v. Bromley*, 2 El. & Bl. 581; 6 Jur., N. S. 400; 29 L. J., Q. B. 91; 8 W. R. 186.

**Reversal for other reasons.**—An affidavit, stating that the defendant died on such a day, and that the deponent had seen him in his coffin, is sufficient for the purpose of reversing an outlawry, where the defendant dies abroad; and the ordinary rule that there must be a certificate from the minister of the parish where the party died or was buried, does not apply. *Re v. Buchanan*, 1 C. & M. 125; 2 Tyr. 220.

A plaintiff having obtained judgment, proceeded to outlawry against the defendant, who was arrested upon a *capias utlagatum*. The plaintiff then died, leaving two infant children, but no personal representative. An application for the discharge of the defendant, upon the ground of the plaintiff's death, was opposed by the late plaintiff's attorney, who

had advanced money upon the security of the judgment, and who intended to take out administration:—Held, that he was not entitled to be discharged. *Cox v. Pritchard*, 3 L. M. & P. 298; 15 Jur. 427—B. C.—Coleridge.

Where a plaintiff had proceeded to outlaw a female, and obtained judgment of waiver, the court set it aside, where it appeared that she was in prison during the time the several processes were sued out, and that the plaintiff was aware of that fact, and knew where to find her. *James v. Jenkins*, 9 Moore, 539.

A defendant in a suit in equity having been taken under an attachment out of Chancery, a *capias utlagatum* was lodged with the sheriff against him while in custody, at the suit of the same plaintiff; and the attachment having been afterwards set aside for irregularity:—Held, that the detainer under the *capias utlagatum* was irregular, and that the defendant was entitled to his discharge; and that it must be considered, for this purpose, to be the process of the party and not of the crown. *Hall v. Hawkins*, 4 M. & W. 590; 7 D. P. C. 200.

Judgment of outlawry for not appearing to answer an indictment for high treason was reversed, after the lapse of a hundred and sixteen years, on writ of error sued out by a co-heir out of the outlaw, because it did not appear by the record that proclamations had been made, or a writ of proclamation issued. *Tynte v. Reg. (in error)*, 7 Q. B. 216.

An outlawry in felony reversed, because it appeared on the writ of proclamation and the return to it, that the person indicted had a day in court, after he was outlawed. *Barrington v. Rex (in error)*, 3 T. R. 499.

A party outlawed on civil process after judgment, and on his petition subsequently made to the Insolvent Debtors' Court, adjudged to be discharged, was not entitled to a reversal of the outlawry, though the debt on which the outlaw was founded was included in his schedule. *Dickson v. Baker*, 1 A. & E. 853; 8 N. & M. 775; 2 D. P. C. 517.

In a proceeding to reverse an outlawry after final judgment entered up on a warrant of attorney, the plaintiff in error appeared by attorney, and assigned error in fact. The defendant in error demurred, but afterwards pleaded a release of errors executed subsequently to the demurrer, under a power to release errors contained in the warrant of attorney. The plaintiff in error replied, setting out the warrant of attorney and the release. The warrant authorized a release "of all and all manner of error and errors in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning any writ, warrant, process, declaration, plea, entry, or other proceedings whatsoever of or any way concerning the same:"—Held, first, that the power in the warrant of attorney was confined to the giving a release of any error affecting the judgment itself, and did not extend to any proceeding or process by way of execution on outlawry after the judg-



ent; and therefore the release of errors as not authorized by the power, and the error was bad. *Graham v. Solomon (in error)*, 1 Jur., N. S. 1070; 24 L. J., Q. B. 332; 5 Bl. & L. 309.

Held, secondly, that payment or satisfaction of the debt was matter of practice; and therefore the defendant in error was not entitled to judgment, on the ground that the record did not show that the debt had been satisfied, or that the plaintiff in error had not acknowledged satisfaction on the record. *Id.*

Held, thirdly, that the appearance of the plaintiff in error by attorney was not matter of demurrer or error, but matter of practice; and that at any rate it could not be objected that error was not properly brought, after the defendant in error had pleaded to the errors assigned, and demurred to the replication. *Id.*

**Bail, upon coming in to reverse.**—An outlaw, in an action for a debt exceeding 20*l.*, appeared by attorney, and brought a writ of error to reverse the outlawry, on the ground that he was abroad at the time of the exigent. Judgment of reversal was signed thereon:—Held, that he was bound to put in special bail on signing the judgment of reversal; and as he had not done so, it was set aside as irregular. *Commerell v. Beauclerk*, 1 B. C. C. 1; 16 Jur. 65; 21 L. J., Q. B. 137—*Erle*.

Special bail must be put in, upon appearing to an outlawry, where special bail was originally required. *Campbell v. Daley*, 3 Burr. 1920. S. P., *Cracroft v. Gledose*, 3 Burr. 1482.

Upon reversing an outlawry, on the ground that the defendant was abroad at the time the proceedings were had against him, the court will not require him to give bail. *Porter v. O'Meara*, 7 Scott, 837; 5 Bing. N. C. 626; 7 D. P. C. 657. S. P., *Gill v. Tynte*, 7 Scott, 840.

Upon a defendant coming in to reverse an outlawry in a civil case, upon 4 & 5 Will. & M. c. 18, the usual form for taking the recognizance of bail is to pay the condemnation money, and not in the alternative, to pay it, or render the defendant. *Matthews v. Gibson*, 8 East, 527. S. P., *Graham v. Grill*, 1 M. & S. 409.

Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money or render the principal; and not absolutely to pay the condemnation money, as in case of reversals of outlawry upon 31 Eliz. c. 3, for want of proclamations, or upon 4 & 5 Will. & M. c. 18, s. 3, on appearance by attorney and by motion. *Havelock v. Galdes*, 12 East, 622.

The court will only set aside the outlawry on the terms of the defendant putting in bail to pay the condemnation money, unless it appears that the process of the court has been

abused, or the proclamation has been made in a different parish, in order to prevent the defendant having knowledge of the proceeding. *Rayer v. Cooke*, 5 D. & R. 302; 3 B. & C. 529.

**Proceedings to reverse; by motion.**—A defendant need not appear personally to reverse an outlawry, except in treason and felony. *Anon.*, Loft, 872, 520.

The court will reverse an outlawry upon motion, on error in fact sworn to. *Beauchamp v. Tomkins*, 3 Taunt. 141.

Though an outlawry is illegal and voidable, it cannot be set aside by a third person in a collateral action. *Symonds v. Parminter*, 1 W. Bl. 20.

An attorney making an affidavit in support of an application to reverse an outlawry against a defendant who does not appear personally, must show in express terms that he is duly authorized by the outlaw to make the application. *Plunkett v. Buchanan*, 5 D. & R. 625; 3 B. & C. 736.

A rule for setting aside the proceedings will be discharged with costs, unless it appears that the application is made by an attorney authorized by the defendant. *Houlditch v. Swinfin*, 2 Bing. N. C. 712; 3 Scott, 160; 5 D. P. C. 80.

A rule to set aside an outlawry for irregularity was discharged with costs, on the ground that the affidavit did not purport to be made by an attorney authorized by the defendant. The irregularity being admitted, the defendant, although he had not paid the costs, was allowed to make a second application for the same purpose, but only on payment of the costs of the second rule. *Skinner v. Carter*, 16 C. B. 543.

After motion to reverse an outlawry has been discharged, the court will not reverse it on a new motion founded upon affidavits not stating any fact subsequent to the first application, but will put the defendant to his writ of error. *Stule v. Wyatt*, 6 Q. B. 666.

— **by writ of error.**—Writs of error to reverse outlawries are not abolished by the 15 & 16 Vict. c. 76, s. 148; and therefore to reverse an outlawry, a writ of error must be sued out as before the act. *Arding v. Holmer or Bonner*, 1 H. & N. 85; 2 Jur., N. S. 763; 25 L. J., Exch. 261. S. P., *Solomon v. Graham*, 2 Jur., N. S. 859—*Q. B.*

In the Exchequer, the consent of the attorney-general is not necessary to enable a party to sue out such a writ. *Id.*

A motion for judgment of reversal of outlawry for error, on the default of a defendant to plead to the assignment of error, may be a rule absolute in the first instance. *Arding v. Holmer or Bonner*, 1 H. & N. 278; 2 Jur., N. S. 700; 26 L. J., Exch. 72.

A party may appear by attorney to reverse an outlawry for error in fact. *Craig v. Levy*, 1 Exch. 570.

But it must be shown that he is authorized by the outlaw. *Skinner v. Carter*, 15 C. B. 472.

A rule for judgment of reversal of outlawry, upon a verdict finding error in fact, was obtained on the 28. h of May:—Held, that an application to set it aside for irregularity, on the 10th June, was not too late. *Commerell v. Beaunclerk*, 1 B. C. C. 1; 16 Jur. 65; 21 L. J., Q. B. 137—Erie.

A rule for judgment to reverse an outlawry, where the defendant has not pleaded to the assignment of errors within the proper time, is a rule nisi; but the court will make the rule absolute without imposing any terms upon the plaintiff in error, if the defendant in error, on showing cause, has no answer to the facts alleged. *Howard v. Kershaw*, 6 Exch. 541; 2 L. M. & P. 360; 20 L. J., Exch. 237.

Upon error coram nobis to reverse an outlawry, a verdict having been found for the plaintiff in error upon the assignment of errors, and the time for moving for a new trial having passed, he is entitled to a rule absolute to reverse the outlawry, upon production of the record and postea. *Beavan v. Cor*, 9 C. B. 579; 19 L. J., C. P. 304.

In a writ of error brought to reverse a judgment of waiver against a woman, the judgment was called a judgment of outlawry:—Held, upon plea of nul tiel record, a fatal variance, and that the defendant in error was entitled to judgment. *Burnett v. Phillips*, 2 L. M. & P. 444; 20 L. J., Exch. 337.

It is sufficient for a plaintiff, in a writ of error coram nobis, to reverse outlawry upon final process, to appear in person by the writ to assign error; it is not necessary that he should appear in person at the subsequent stages of the proceedings. *Smith v. Bromley*, 2 El. & El. 581; 6 Jur., N. S. 400; 20 L. J., Q. B. 91; 8 W. R. 186.

The defendant in error having pleaded a joinder in error to such a writ, by which the plaintiff in error purported to appear in person:—Held, that the defendant had thereby precluded himself from afterwards applying to set aside the proceedings, on the ground that the plaintiff in error had not in fact appeared in person to the writ. *Id.*

An assignment of error by attorney for reversing a judgment of outlawry is a matter of practice, which is not waived by the defendant in error demurring, and pleading to the errors assigned. *Graham v. Solomon (in error)*, 1 Jur., N. S. 1089; 24 L. J., Q. B. 332; 5 El. & Bl. 309.

**Terms on reversal.**—Where a debtor, outlawed upon final process, had obtained his discharge as an insolvent under 1 & 2 Vict. c. 110, the court reversed the outlawry upon his making an assignment of his goods, which were affected by the outlawry, to the provisional assignee, for the benefit of his creditors, and paying the costs of the judgment of outlawry and the costs of the application. *Barkerville v. Spry*, 6 El. & Bl. 376; 2 Jur., N. S. 589; 25 L. J., Q. B. 334.

On making a rule absolute for setting aside an outlawry on payment of costs, the court will not limit the period within which those

costs shall be paid. *Bennett v. Gardener*, 2 D., N. S. 50; 7 Jur. 129—B. C.—Wightman.

On a motion to reverse an outlawry after final judgment, the court will not impose, as one of the terms upon which they will grant the motion, that the defendant should pay interest from the time of signing final judgment to the period of reversal. *Ibbotson v. Fenton*, 1 N. & P. 779; 6 A. & E. 772; W., W. & D. 292; 1 Jur. 397.

The court has no power to order the sheriff to restore money levied under a *capias* writ, on the reversal of the outlawry; the application should be for an *amoveas manus* in the Court of Exchequer. *Croft v. Percival*, 7 Scott, 847.

Where a defendant was beyond the seas at the time of the *exigi facias* issuing, the court reversed the outlawry on payment of costs, and putting in bail in the alternative. *Lee v. Claggett*, 1 M. & W. 547; 5 D. P. C. 322; 3 Gale, 152.

### III. EFFECT; AND HOW PLEADED.

**Personal disqualifications.**—An outlaw may claim the protection of the court to set aside irregular proceedings taken against him, although he cannot put the law in motion for his benefit without first reversing his outlawry. *Davis v. Trevanion*, 3 D. & L. 743; 9 Jur. 492; 14 L. J., Q. B. 138—B. C.—Wightman.

An outlaw, seeking to originate a legal right of his own, cannot be heard in support of such right; but he may be heard when he comes to the court in matters purely defensive. *Walker v. Thellusson*, 1 D., N. S. 578; 6 Jur. 345—B. C.

An outlawry in progress only, but not perfected, cannot prevent a party from being heard in a proceeding actually instituted. He may apply to the court to set aside an attachment which has been irregularly issued against him. *Hawkins v. Hall*, 1 Beav. 73; *Byrne v. Manning*, 2 D., N. S. 403; 7 Jur. 83; 12 L. J., Q. B. 4—B. C.—Patteson.

The court will not entertain an application, on the part of an outlaw, to compel the delivery of an attorney's bill, or to refer to taxation a bill of costs already delivered. *Ford, In re*, 1 B. C. Rep. 88; 10 Jur. 757—Wightman. S. P., *Munder, In re*, 6 Q. B. 867.

Seemle, that an outlaw brought before a judge by summons is entitled to be heard without reversing his outlawry. *Pyne, In re*, 5 C. B. 407.

An outlaw cannot enforce payment of damages recovered in an action for a libel by *scire facias* on the recognizance to the crown under 60 Geo. 3, c. 9, s. 6, and 11 Geo. 4 & 1 Will. 4, c. 73, s. 3. *Reg. v. Lowe*, 8 Exch. 637; 23 L. J., Exch. 262.

A party outlawed can appear in court only for the purpose of reversing his outlawry. *Loukes v. Holbeck*, 1 M. & P. 126; 8 D., nom. *Loukes v. Holbach*, 4 Bing. 419. S. P., *Alldridge v. Buller*, 2 M. & W. 412; 5 D. P. C. 733; M. & H. 94; 1 Jur. 385.

Where a defendant had been outlawed, but had been discharged, by the Insolvent Debtors' Court, from the judgment in respect of which the outlawry took place, the court allowed him to be heard in opposition to a motion made by the plaintiff to charge him in execution on the same judgment. *Adcock or Abthorpe v. Fiske*, 6 Bing. N. C. 17; 8 Scott, 138; 8 D. P. C. 60.

A sentence of outlawry, upon flight from a charge of felony, does not incapacitate the outlaw from directing, according to the terms of a previously-executed trust deed, the trustees as to the mode of carrying the trust into effect. *Macrae v. Wyndham*, 6 C. & F. 212.

An outlaw cannot join in a *fi. fa.* to enforce costs jointly due to himself and another before outlawry. But the court has a discretion, and will not set aside the writ where the right to costs has been assigned by the outlaw to his attorney before the outlawry. *Turgand, Ex parte*, 1 Eq. R. 64—Wood, V. C.

If a judgment of outlawry stands in the way of a claim to a barony in abeyance, although clearly erroneous, the committee of privileges cannot overlook it or reverse it, but the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the committee. *Wharton Peerage*, 12 C. & F. 295.

Quære, whether a trader against whom judgment of outlawry is in force can file a petition for adjudication of bankruptcy against himself? *Adams, Ex parte*, 4 Jur., N. S. 1089; 27 L. J., Bank. 37.

**Effect upon rights of property.**—The personal property becomes forfeited and vested in the king (for the use of the plaintiff) immediately upon outlawry at the suit of the party as well as at the suit of the king. *Res v. Cooke*, M'Clel. & Y. 196.

To a special *capias utlagatum* the sheriff returned an inquisition finding that the defendant had benefices, but no lay fee; the court awarded a writ of sequestration, on reading the transcript of the outlawry and inquisition. *Res v. Hind*, 1 D. P. C. 286; 1 C. & J. 389; 1 Tyr. 347.

The king's warrant and the attorney-general's consent for the payment of money in the hands of the sheriff, under a *capias utlagatum*, do not amount to an appropriation of that money, where they are granted in ignorance of the death of the defendant; and the court, on a plea by his representatives suggesting the death, will stay the making of an order for the payment, until the fact of the death is determined on an issue taken on the plea. *Res v. Buchanan*, 1 C. & M. 195; 8 Tyr. 229.

The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit. *St. John's College (Oxford) v. Muroott*, 7 T. R. 259.

A debt upon a promissory note is forfeited to the crown by the outlawry of the payee upon an indictment for misdemeanor.

*McDowell v. Bergin*, 12 Ir. C. L. R. 391—Exch.

A sentence of outlawry operates only as a forfeiture of such life-rent interest as the outlaw may have in the heritable estate and of his movable effects; it will not destroy his power of dealing with the fee, except so far as he may require the interference of a court to enable him to do. *Macrae v. Macrae*, 8 Jur. 571; 6 C. & F. 212; 1 Rob. 571.

**Plea of outlawry.**—A single plea of three outlawries was allowed. *Fox v. Yates*, 24 Beav. 271.

The outlawry of a plaintiff, when matter of plea in abatement and not of plea in bar, is after verdict no ground for setting aside the judgment; nor, when matter of plea in bar. *Sowerby v. Wadsworth*, 2 H. & C. 701; 10 Jur., N. S. 79; 33 L. J., Exch. 57; 12 W. R. 210; 9 L. T., N. S. 416.

A plaintiff in an action of trespass *quare clausum fregit* was an outlaw on civil process. The defendant, on learning it just before trial, applied for leave to add a plea of outlawry, which was refused. The court, after verdict, refused to set aside the judgment which had been signed by the plaintiff. *Id.*

Where a plaintiff was an outlaw at the time of bringing his action, but the defendant did not know of it till after plea granted and notice of trial given, the court, after verdict, granted a rule to stay the proceedings, which was afterwards discharged on the reversal of the outlawry, after granting the rule. *Somers v. Holt*, 8 D. P. C. 506.

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## Outstanding Terms.

See EJECTMENT.

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## Overseer.

See POOR LAW.

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## Oxford.

See UNIVERSITY.

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## Oper and Terminer.

See CRIMINAL LAW.

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## Oysters.

See FISH AND FISHERY.

## P.

**Packer.**

**Lien.**—A packer is entitled to a general lien on the goods of his customer which are in his hands. *Witt, in re, Shubbrook, Ex parte*, 2 L. R., Ch. Div. 489; 45 L. J., Chanc. Div. 1112—C. A.

**Palace.**

- I. EXECUTING WRITS WITHIN. See EXECUTION.  
 II. DISTRAINING FOR RATES WITHIN. See POOR LAW; SEWERS.

**Palatine Counties.**

**Statutes.**—[18 & 19 Vict. c. 45, assimilates the practice in the county of Lancaster in regard to the trial of issues from the superior courts to that of other counties.

18 & 19 Vict. c. 15, extends 1 & 2 Vict. c. 110, 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82, for registering judgments, orders or decrees, to those of the equity and common law courts of the counties of Lancaster and Durham.

By 19 & 20 Vict. c. 118, s. 1, all the duties which under 18 & 19 Vict. c. 126, should be performed by the clerks of assize as clerks of the crown, are, in the counties palatine of Lancaster and Durham, to be performed by the clerks of the crown of those counties palatine who are not clerks of assize, and abolishes all fees and emoluments payable to them for the performance of their duties as clerks of the crown; and they are to be paid by salaries in lieu of fees.

21 & 22 Vict. c. 45, amends 6 Will. 4, c. 19, for separating the palatine jurisdiction of the palatine of Durham from the bishopric of Durham, and makes provision with respect to the jura regalia of that county.

32 & 33 Vict. c. 37, authorizes the appointment of district prothonotaries of the Lancaster Court of Common Pleas.

32 & 33 Vict. c. 84, abolishes the office of curitor of the Court of Chancery in the Palatine of Durham.]

As to effect of The Judicature Acts,—see SUPREME COURT OF JUDICATURE.

**Panel.**

See JURY.

**Paper Books.**

See PRACTICE.

**Parceners.**

- I. TITLE, 9582.  
 II. EJECTMENT BY. See EJECTMENT.  
 III. PRESENTATION TO LIVING. See ECCLESIASTICAL LAW.  
 IV. PARTITION. See ESTATE.

## I. TITLE.

**Right to proportion of rents.**—One coparcener cannot sue separately for his portion of rents accruing to him and his fellows. *Decharme v. Horwood*, 4 M. & Scott, 400; 10 Bing. 526.

An action will not lie by one of three coparceners to recover his proportion of rents of the estate received by an agent, where the agent claims the rents under a devise to himself. *Id.*

**Pardon.**

See CRIMINAL LAW.

**Parent and Child.**

See INFANT.

**Parish.**

- I. APPRENTICES. See POOR LAW.  
 II. BOOKS. See EVIDENCE.  
 III. BOUNDARIES. See POOR LAW.  
 IV. CLERK. See ECCLESIASTICAL LAW.  
 V. OFFICER. See POOR LAW.  
 VI. PROPERTY. See POOR LAW.  
 VII. RATES. See POOR LAW.

**Parks.**

**Regulation of royal parks.**—[35 & 36 Vict. c. 15, regulates the royal parks and gardens in England; and 35 & 36 Vict. c. 6, amends the

**Public Parks (Ireland) Act, 1869, 32 & 33 Vict. c. 28.]**

By the Parks Regulation Act, 1872, 35 & 36 Vict. c. 15, s. 9, any rule made in pursuance of the first schedule to this act shall be forthwith laid before both houses of parliament, if parliament be sitting, or if not, then within three weeks after the beginning of the next ensuing session of parliament; and if any such rules shall be disapproved of by either house of parliament within one month after the same shall have been so laid before parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced:—Held, that rules made during the recess came into operation and remained in force until disapproved of by parliament; and a conviction for infringing such rules was valid. *Bailey v. Williamson*, 42 L. J., M. C. 49; 8 L. R., Q. B. 118; 21 W. R. 404; 28 L. T., N. S. 28.

Held, also, that there was no right in the public to hold meetings in the royal parks, and therefore there was no right interfered with within s. 11; and that the conviction was therefore right. *Id.*

## Parliament.

### I. LEGISLATIVE FUNCTIONS AND PROCEEDINGS, 9583.

#### II. APPELLATE JURISDICTION OF HOUSE OF LORDS; AND PROCEEDINGS, 9590.

1. *Before The Judicature Acts, 9590.*

2. *Under The Judicature Acts and The Appellate Jurisdiction Act, 1876, 9596.*

#### III. ELECTION OF MEMBERS. See ELECTION LAW.

#### IV. PEERS. See PEER AND PEERAGE.

### I. LEGISLATIVE FUNCTIONS AND PROCEEDINGS.

**Summoning, proroguing and dissolving parliament; qualifications of members.]**—[30 & 31 Vict. c. 81, *simplifies the forms of proroguing parliament during a recess.*

By 30 & 31 Vict. c. 102, s. 51, *the parliament in being at the demise of the crown shall not be determined or dissolved by such demise.*

By 15 & 16 Vict. c. 23, *so often as the Queen shall, by proclamation, appoint a time for the meeting of parliament, after a dissolution, the time so appointed may be at any time not less than thirty-five days after the date of the proclamation.*

21 & 22 Vict. c. 26, *abolishes the property qualification of members of parliament.*

By 30 & 31 Vict. c. 102, s. 52, *members holding offices of profit from the crown, mentioned in Schedule II, are not required to vacate their seats on the acceptance of another office.*

By 33 & 34 Vict. c. 81 (which by s. 1 may

be cited as *The Meeting of Parliament Act, 1870*), s. 2, *parliament may be summoned by a royal proclamation in manner provided by 87 Geo. 3, c. 127, and 39 & 40 Geo. 3, c. 14, to meet on any day not less than six days from the date of such proclamation, and the said acts, so far as they relate to such summoning of parliament, shall be construed as if six days were therein substituted for fourteen days.*

By 34 & 35 Vict. c. 50, *peers who become bankrupts are disqualified from sitting or voting in the House of Lords.*

As to election of members,—see **ELECTION LAW.**

The provisions of the Bankruptcy Act, 1869, ss. 121, 122, relating to the vacating of his seat in parliament by a member of the House of Commons who has been adjudged bankrupt, do not apply to the case of a member whose affairs are in liquidation by arrangement. *Pooley, Ex parte, Russell, In re*, 41 L. J., Bank. 67; 7 L. R., Ch. 519; 20 W. R. 735; 26 L. T., N. S. 813.

The duty cast upon the Court of Bankruptcy by s. 122, of certifying a member's bankruptcy to the speaker, is an ex-officio duty as between the court and the House of Commons, and an application for such a certificate should not be made by a creditor. *Id.*

**Speaker and officers.]**—[By 2 & 3 Will. 4, c. 105, *the speaker of the House of Commons is disabled from holding an office of place or profit during pleasure under the crown.*

By 18 & 19 Vict. c. 84, *if during a session of parliament the speaker is temporarily absent from the house, and a deputy speaker shall thereupon perform the duties, and exercise the authority of speaker, pursuant to the standing orders, or other order or resolution of the house, every act done and proceeding taken in or by the house pursuant to any statute, shall be as valid and effectual as if the speaker himself were in the chair, and every act done and warrant, order, certificate, notice or other document issued, signed or published in relation to any proceedings of the house by the deputy speaker is to have the same effect and validity as if done by the speaker.*

19 & 20 Vict. c. 1, *vests the appointment of the clerks assistant of the House of Commons in her Majesty.*

The salary of the assistant parliamentary counsel to the treasury is not assignable. *Cooper v. Reilly*, 2 Sim. 500; 1 Russ. & Mylne, 560.

**Legislative authority, in general.]**—The British parliament has no authority to legislate for foreigners out of the dominions and beyond the jurisdiction of the crown, yet it can by statute fix the time within which application must be made for redress to the tribunals of the empire. This, being matter of procedure, becomes the law of the forum, by which all mankind are bound. *Lopez v. Burslem*, 4 Moore P. C. C. 300.

As to colonial legislatures,—see **COLONIES.**

As to operation and effect of statutes,—see STATUTE.

**Private bills; committees, and proceedings before them.**—[By 34 & 35 Vict. c. 83, The Parliamentary Witnesses Oaths Act, 1871, s. 1, the House of Commons may administer an oath to the witnesses examined at the bar of the House.

Any committee of the House of Commons may administer an oath to the witnesses examined before such committee.

Any person examined as aforesaid who willfully gives false evidence shall be liable to the penalties of perjury.

Where any witness to be examined conscientiously objects to take an oath he may make his solemn affirmation and declaration in the words following:

"I, A. B., do solemnly, sincerely and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely and truly affirm and declare," &c.:

Any solemn affirmation and declaration so made shall be of the same force and effect, and shall entail the same consequences as an oath taken in the usual form.

Any oath or affirmation under this act may be administered by the speaker of the House of Commons, or by such person or persons as may from time to time be appointed for that purpose, either by him or by any standing order or other order of the House.

By s. 2, the previous statutes on this subject, 21 & 23 Vict. c. 78, and 34 & 35 Vict. c. 3, s. 3, are repealed.

28 & 29 Vict. c. 27, empowered the committees of both houses of parliament to award costs on private bills. See 33 & 34 Vict. c. 1, repealed by 34 & 35 Vict. c. 83, s. 1.

By 30 & 31 Vict. c. 136, s. 1, the courts of referees on private bills were empowered to administer oaths to witnesses, as committees on private bills, and by s. 3, to award costs.]

The application to the taxing officer of the House of Commons, under 30 & 31 Vict. c. 136, must be not until one month after the delivery of the bill of costs. *Williams v. Swansea Canal Navigation Company*, 37 L. J., Exch. 107; 3 L. R., Exch. 158.

The provision in s. 5, that the validity of the taxing officer's certificate shall not be called in question, only applies where a certificate has been given in conformity with the act. *Id.*

To an action for a debt, the defendants pleaded as a set-off that the plaintiffs were the promoters of a private bill within 28 & 29 Vict. c. 27; that the defendants were petitioners against the bill before a committee of the House of Lords; that the committee decided that the preamble of the bill was not proved; that the defendants were vexatiously subjected to expense in defending their rights proposed to be interfered with by the bill, and awarded costs; and that the taxing officer duly delivered a certificate; and averred generally performance of conditions

precedent:—Held, that the moment the costs were taxed, in pursuance of the report, a debt from the defendants to the plaintiffs was created; that it was not necessary to aver a demand, in pleading the debt as a set-off; and that, even if it was necessary, it was sufficiently averred in the allegation of performance of conditions precedent; that the plea impliedly averred all the matters necessary to sustain it, such as the unanimity of the report of the committee, and that the certificate was conclusive evidence of the defendants' right to recover the amount named in it. *Newry and Armagh Railway Company v. Ulster Railway Company*, 4 Ir. R., C. L. 63—C. P.

The practice of the committees in not insisting on the insertion of special clauses in bills, at the instance of persons alleging grounds for their introduction, if agreements have been entered into between the promoters and the persons asking for the special clauses, whereby the promoters engage that the company when incorporated shall give to the persons asking for the insertion of the special clauses the same benefit as if such clauses were introduced into the bill, observed upon. *Caledonian and Dumbartonshire Junction Railway Company v. Helensburgh Harbour Trustees*, 2 Jur., N. S. 695—H. L.

**Parliamentary agents.**—[By 31 & 33 Vict. c. 125, s. 57, parliamentary agents may practice before the tribunal constituted by that act.]

The 10 & 11 Vict. c. 69, or the 13 & 13 Vict. c. 78, does not deprive a court of equity of its jurisdiction to order taxation of a bill of costs for parliamentary business. *Stratton, In re*, 3 Kay & J. 518; 3 Jur., N. S. 736; 28 L. J., Chanc. 695.

The lien of a parliamentary agent attaches to books and papers intrusted to him by the law clerk of the trustees of a public road to obtain a renewal of their act of parliament. *Ridgway v. Lees*, 25 L. J., Chanc. 584—R.

A parliamentary agent, though nominated by the law clerk, has, in the absence of any agreement, a right to be paid his bill by the trustees directly, and not through the law clerk who nominated him. *Id.*

A claim by a parliamentary agent to participate in the profits of a solicitor's bill was rejected, as no such agreement was proved to have been made. *Id.*

**Parliamentary deposits.**—It is not contrary to the policy of the 9 & 10 Vict. c. 29, providing for a deposit in respect of the estimated cost of works for which parliamentary authority is sought, to make the deposit with borrowed funds. *Scott v. Oakley*, 10 Jur., N. S. 648; 33 L. J., Chanc. 613; 12 W. R. 723; 10 L. T., N. S. 801.

When a bill is introduced into parliament for the construction of several railways, and the money is paid into court under the standing orders, and afterwards the bill is withdrawn as to some of the railways, a court of equity will not order a proportional part of



no fund in respect of the abandoned railways, to be paid out to the promoters. *Aberystwith Railway Company, In re*, 7 Jur., N. S. 510, 564; 80 L. J., Chanc. 674; 4 L. R., N. S. 587—L. J.

An order can be made for the return of a deposit on the withdrawal of a railway bill under 9 & 10 Vict. c. 20, s. 5, upon production of a certificate signed by the deputy speaker of the House of Commons in the speaker's absence. *Stockbridge Railway Bill, Ex parte*, 2 L. R., Eq. 364.

A sum of money deposited in the Bank of England, pursuant to 9 Vict. c. 20, is not cash under the control of the court within the order of the 1st of February, 1861, and can only be invested in consolidated or reduced bank annuities, or in government securities, as provided by s. 4. *Great Northern Railway Company, Ex parte*, 9 L. R., Eq. 274—R.

**Publication of parliamentary papers.]—**[The 3 & 4 Vict. c. 9, gives a summary protection to persons employed by either house of parliament in the publication of parliamentary papers.]

Before this statute the house had not the privilege of printing and publishing defamatory matter except to and for the use of its members; and the printer employed by the house was liable to an action for such publication. *Stockdale v. Hansard*, 3 P. & D. 1; 9 A. & E. 1; 3 Jur. 905; see *Wason v. Walter*, 19 L. T., N. S. 409—Q. B.

Under 3 & 4 Vict. c. 9, on a certificate of the speaker of the House of Commons, it is imperative on the court to stay proceedings. *Stockdale v. Hansard*, 3 P. & D. 330; 11 A. & E. 297.

Upon an application to stay proceedings in an action upon the production of a certificate of the speaker of the House of Commons, it is not necessary that it should be stated in the certificate, that the speaker had read or seen the declaration in the cause. *S. C.*, 8 D. P. C. 699; 4 Jur. 338.

The court will presume that the speaker, giving the certificate pursuant to the act, has availed himself of the proper sources of information, to enable him to grant the certificate, without his stating on the face of it what those sources are. *Id.*

The office copy of the declaration produced to the court should be verified by affidavit. *Id.*

**Privilege, in general; breach of privilege, contempt, &c.]—**The House of Commons having a clear right to commit for contempt, the speaker may justify breaking open a house to arrest a party under his warrant. *Burdett v. Abbot*, 5 Dow, 165; 14 East, 1, 154; 4 Taunt. 401. And see *Burdett v. Colman*, 14 East, 168; 18 East, 27.

And under a warrant stating generally, that a contempt has been committed, without setting out the particulars of the contempt. *Reg. v. Gossett*, 3 P. & D. 349; *S. C.*, nom. *Stockdale v. Hansard*, 4 Jur. 70; *Reg. v.*

*Boona*, 8 D. P. C. 451; *In re Middlesex (Sheriff)*, 11 A. & E. 273.

Where a committal, by the house, under such a warrant, is returned to a writ of habeas corpus, the 56 Geo. 3, c. 100, s. 8, does not apply, so as to enable the courts of law to inquire into the existence of the contempt alleged. *Id.*

A member, committed for breach of privilege, cannot be discharged by a writ of habeas corpus during the session. *Brass Crosby's case*, 2 W. Bl. 754; 3 Wils. 198.

The House of Lords having voted the defendant guilty of a breach of privilege, in publishing a libel upon a member of their house, and having sentenced him to pay a fine, and to be imprisoned six months and until such fine was paid, which commitment was returned into the court, upon a habeas corpus sued out by the defendant, the court refused to discharge him out of custody. *Reid v. Flower*, 8 T. R. 314.

The house having voted the defendant guilty of a breach of their privileges, for publishing a libel upon the house, and having ordered him to be committed to Newgate during their pleasure, and the speaker's warrant being returned into the court upon a habeas corpus sued out by the defendant, the court refused to discharge him out of custody. *Reid v. Hobhouse*, 2 Chit. 207; 3 B. & A. 420.

One committed for a contempt of the House of Commons, cannot be bailed by the court. *Murray's case*, 1 Wils. 299.

But where a plaintiff had obtained a judgment in an action against the printers of the House of Commons for a libel, he might (before 3 & 4 Vict. c. 9), notwithstanding any resolutions of privilege, or assertion of the right of the house to publish libels, proceed to sue out and execute a writ of inquiry as in any ordinary case. *Middlesex (Sheriff), Ex parte*, 8 D. P. C. 148; 3 Jur. 1030—B. C.

Officers of the House of Commons who have a warrant of the speaker to take a person therein named, although they may have a right to enter his house (having been peaceably admitted) and to search the house, have no right, in case they do not find him, to remain there to await his return; and if they stay several hours in the house for that purpose, they are trespassers ab initio. *Howard v. Gossett*, Car. & M. 380—Denman.

On a trial, a member may be asked who was speaker on a particular day, but if he is asked how a member voted, he will not be compelled to answer if he declines doing so, and has not the leave of the house to give evidence. *Chubb v. Salomons*, 3 C. & K. 75—Pollock.

A member of the house who acts as a teller on a division is not an officer of the house. *Id.*

The house has power to order the attendance of witnesses, and in case of disobedience to bring them in custody to the bar for the purpose of examination. It has power, in case of a charge of contempt and breach of privilege, and willful disobedience of an order

on the person charged to attend and answer it, to cause the person to be taken into custody and brought to the bar to answer the charge. The house alone is the proper judge when these powers are to be exercised. *Gossett v. Howard* (in error), 10 Q. B. 859; 11 Jur. 750; 16 L. J. Q. B. 845—Exch. Cham.

A warrant of the house is to be construed as a mandate or as a writ of a superior court, acting according to the course of the common law, and not as the warrant of a justice of the peace, or of a court acting under a special statutory authority. *Id.*

When the legislature has directed that a particular rule as to evidence shall be adopted in every court of civil jurisdiction, though these words do not include a committee of privileges, such committee will, if the rule itself is convenient, adopt and act upon it. The 17 & 18 Vict. c. 125, s. 27, which permits, in all courts of civil jurisdiction, comparison of handwriting, as a means of evidence, was therefore adopted by the committee. *Shrewsbury Passage*, 7 H. L. Cas. 1.

**Privilege of members from legal process.]**—[By 2 Will. 4, c. 39, proceedings against members of parliament are to be taken, in all cases, by writ of summons, as in ordinary cases.

By 12 & 13 Vict. c. 106, s. 66, if any trader having privilege of parliament shall commit any act of bankruptcy, he may be dealt with in like manner as any other trader.]

Since a member of either house of parliament is privileged from arrest, a writ of capias against him is irregular, and will be set aside; although, in the case of a member of the lower house, the writ is not intended to be put in execution till his privilege expires; nor although, in either instance, no proceedings are contemplated against the person of the member, but the writ is only sued as part of process to outlawry. *Cassidy v. Stewart*, 2 Scott, N. R. 432; 2 M. & G. 437; 9 D. P. C. 866; 5 Jur. 26.

The privilege of a member from arrest on a ca. sa. exists for forty days before, and forty days after a meeting of parliament. The rule of privilege is the same in the case of a dissolution as in that of a prorogation. *Goudy v. Duncombe*, 1 Exch. 430; 5 D. & L. 209; 17 L. J., Exch. 76.

A judgment debtor summons will not lie against a member, and the privilege of parliament is not affected by the circumstance that the member has not been sworn in. *European and American Finance Corporation v. M. P.*, 14 W. R. 135; 13 L. T., N. S. 447.

An unprivileged person, in custody in execution, is entitled to his discharge on motion on his being elected a member of parliament. *Phillips v. Wellesley*, 1 D. P. C. 9.

A., having privilege of parliament, owed B. a sum of money, for which B. sued him; in consequence of which, C. entered into a bond together with A., conditioned for the payment to B. of such sum as B. should recover in the action against A., in pursuance of 4 Geo. 3, c. 88; B. obtained judgment,

and put the bond in suit against C.:—Held, that to the action on the bond, C., being under terms to plead issuably, might plead in bar, that a writ of error was pending on the judgment against A. *Curling v. Innes*, 2 H. Bl. 372.

The privilege of parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind. *Long Wellesley, In re*, 2 Russ. & Mylne, 631.

Privilege of parliament exists at common law, and is not taken away by implication because a statute makes persons enjoying it subject to the law of bankruptcy, and does not specially reserve the privilege. *Newcastle v. Morris*, 4 H. L. Cas. 661; 19 W. R. 26; 23 L. T., N. S. 569.

Before the Bankruptcy Act of 1861, traders having privilege of parliament were rendered liable to the bankrupt laws, but the privilege of freedom from personal arrest was expressly reserved to them. By s. 69 of that act all debtors (non-traders as well as traders) were made liable to the bankrupt laws. Nothing was said in the act to reserve to debtors who had privilege of parliament their freedom from personal arrest:—Held, that the statute included all debtors whatever, but that such debtors as were entitled to privilege of parliament still continued to enjoy its protection. *Id.*

**Impeachment.]**—The 12 & 13 Will. 3, c. 2, s. 3, which enacts that no pardon, under the great seal, shall be pleadable in bar to an impeachment by the commons in parliament, renders a pardon, under the great seal, wholly inoperative to prevent impeachment by the House of Commons, and so getting rid of the judgment of the House of Lords; for that purpose a subsequent pardon must be granted by the crown. *Reg. v. Boyes*, 7 Jur., N. S. 1158; 30 L. J., Q. B. 301; 9 W. R. 690; 5 L. T., N. S. 147; 1 B. & S. 311.

## II. APPELLATE JURISDICTION OF HOUSE OF LORDS; AND PROCEEDINGS.

### 1. Before The Judicature Acts.

**Jurisdiction and hearing of appeals; and matters of practice.]**—A court of appeal will not entertain an appeal for costs alone. *Horne v. Pringle*, 8 C. & F. 264.

In a writ of error where no one appeared for the plaintiff in error, the counsel for the defendant in error was required to state the nature of the case, and the judgment of the court below was then affirmed, with costs. *Jones v. Cannock*, 3 H. L. Cas. 700.

Where the crown, by any of its officers, is a party respondent in an appeal, it is not the usage of the house to allow the counsel for the crown a general reply after the reply for the appellant. *Lord Advocate v. Douglas*, 9 C. & F. 174.

Where no person appeared on the part of an appellant, when his appeal was called on, and the agent only of the respondent appeared, alleging that he had retained counsel, and

prayer that the appeal be dismissed with costs, it was dismissed with costs. *Sherburne v. Middleton*, 9 C. & F. 72.

Where no appellant appears to support an appeal, the only order the house can make will be to dismiss the appeal for want of prosecution, with costs. *Scanlan v. Usher*, 8 C. & F. 501.

If a party should make default on the day appointed for the hearing of his cause, he must pay the opposite party, not in default, the costs of the day; and, if it should appear that he has not instructed counsel for that day (not intending to appear in person), his cause may be struck out of the list. *Flight v. Thomas*, 8 C. & F. 231.

The house will not permit parties on appeal to raise objections which they did not raise in the court below. *Kay v. Marshall*, 8 C. & F. 245.

Where an appellant does not appear to support his appeal, it may, on the application of the respondent, be dismissed, with costs. *Smith v. Durant*, 9 H. L. Cas. 192; 81 L. J., Chanc. 383.

The house will not postpone the hearing and decision of any appeal on account of the absence of counsel, but will call on the counsel on either side in attendance to proceed with the argument. *Mellish v. Richardson*, 1 C. & F. 224.

If an appellant does not appear to support his appeal, the respondent's counsel are not compellable to go on, but the appeal may be dismissed, and the house will afterwards exercise their discretion as to the costs. *Gardiner v. Simmons*, 1 C. & F. 85.

Where respondents have different defenses, the house will hear two counsel for one on the whole case, and two for the other on the points wherein their defenses differ. *Horne v. Pringle*, 8 C. & F. 265.

It is an inflexible rule to hear only two counsel for each party in any one case; and the house will not avoid the effect of this rule by permitting one senior and one junior counsel to be heard in the opening, and a third counsel to reply. *Reg. v. Millis*, 10 C. & F. 534.

Where there were two respondents having distinct interests, the house allowed two counsel to be heard for each. *South Leith (Parish) v. Allen*, 1 Macq. II. L. Cas. 98.

When it is ordered that counsel be heard on a question as to the regularity of an appeal, the party objecting has the right to begin. *Geils v. Geils*, 1 Macq. H. L. Cas. 86.

On the hearing of a cause, in which the question intended to be brought up for decision depended on the form of the pleadings, and the house, after argument, was of opinion that the pleadings would not allow that question to be properly decided, time was given to allow an arrangement between the parties, by which the pleadings might be altered for that purpose. *Bristol v. Robinson*, 4 H. L. Cas. 1688.

The house will refuse to allow a cause to stand over indefinitely, though upon an under-

standing that the appeal is to be compromised, but will require it to be proceeded with in its regular turn, or to be withdrawn. *London (Mayor) v. Combe*, 4 H. L. Cas. 1089.

The fact that the court below has given leave to appeal will not make the appeal competent where it is excluded by statute. *North British Railway Company v. Wauchope*, 4 Macq. II. L. Cas. 352.

The standing order No. 58, directing that no counsel shall sign an appeal to the house unless he was of counsel in the same cause in the courts below, or attends as counsel at the hearing at the bar of the house, is not to be departed from, although there may be exceptions. *Price v. Seeley*, 10 C. & F. 28.

Though an appellant comes to London long before it is necessary to do so, in order to attend the hearing of his cause, so that if there arrested he could not be discharged, yet if no arrest is made until his cause is actually in the paper, he will be discharged out of custody. *Perase v. Perase*, 5 H. L. Cas. 671.

An appellant died pending the consideration of his case. The house, however, delivered judgment. *Braybrook v. Att. Gen.*, 7 Jur., N. S. 741—H. L.

A counsel cannot be heard to argue his own case with another counsel; he must either appear in person or by counsel. *New Brunswick and Canada Railway Land, &c., Company v. Conybeare*, 31 L. J., Chanc. 297; 9 H. L. Cas. 711.

The appeal committee cannot decide what documents are and what are not necessary to be printed in an appendix to a case. *Spread v. Morgan*, 11 H. L. Cas. 588.

A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The house would not afterwards hear it discussed, and refused to make any order as to the costs of the appendix. *Id.*

The house strongly condemned the custom of each party printing an appendix to his case, and desired that in future a joint appendix might alone be printed. *Piers v. Piers*, 2 H. L. Cas. 331; 13 Jur. 509.

The House of Lords will not, on the application of a person not an appellant against a decree, make an alteration in it. If a change in the details of the decree should be necessary, his application for it should be made in the court below. *Yates v. University College, London*, 7 L. R., H. L. Cas. 408; 32 L. T., N. S. 43.

**Attendance and opinion of the judges.**—The judges declined to answer a question proposed to them by the house, in terms which rendered it doubtful whether it did not extend to the construction of a bill before the house. *London and Westminster Bank, In re*, 1 Bing. N. C. 197; 1 Scott, 4; 2 C. & F. 191.

The house has a right to require the judges to answer abstract questions of existing law. *Macnaghten's case*, 10 C. & F. 200.

The house is at liberty, without regard to the form of an appeal, or the points raised upon it, to put questions of law to the judges. *Bright v. Hutton*, 3 H. L. Cas. 341; 16 Jur. 605.

The Lords allowed the opinion of a judge who had been present at the hearing of the cause, but who was unable to attend when the judge's opinions were delivered, to be read by one of his brethren; but it was expressly declared that this could not be done as a matter of course. *Stephenson v. Higginson*, 3 H. L. Cas. 638.

The judges were required to answer a question put by the house. One of them differed from the rest. The opinions of the majority were stated by one of their number, and in the statement the principle on which the dissentient judge formed his opinion was set forth to his satisfaction. The house did not require him to state his reasons at length. *Salmon v. Webb*, 3 H. L. Cas. 510.

The judges were summoned to answer questions of law; they differed in opinion on these questions. Most of the judges being on circuit, two attended on a day fixed by the house for receiving the answers, and proposed to read answers which embodied their own opinions and those of their brethren. The house adjourned the matter till the majority of the judges should have returned from the circuit, so as to be able to attend in person, and individually express their reasons for their opinions. It was intimated that this permission to dispense with the attendance of any of the judges to whom questions had been put, and who differed in their answers, must not be drawn into a precedent. *Egerton v. Brownlow*, 4 H. L. Cas. 1.

The house will not receive from the agent of a plaintiff in error a petition to refer to the judges the legal points in the case. *Rickets v. Lewis*, 1 Bing. N. C. 196.

The Lord Chancellor and Lord St Leonards (the only law peers present) being divided in opinion, the decision of the court below was affirmed; and an application by the appellant's counsel for a re-argument before other peers, was refused. *Finnis v. Glasgow and South Western Railway Company*, 3 Macq. H. L. Cas. 177.

**Finality and obligatory force of judicial decisions.**—The court of ultimate appeal will not easily overturn a series of decisions which have long regulated the settlement and devolution of property. *Young v. Robertson*, 4 Macq. H. L. Cas. 337.

A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by act of parliament. *Tomney v. White*, 3 H. L. Cas. 49.

Quære, whether the house, like any other court of justice, may, in a subsequent case, overrule a previous decision of its own? *Bright v. Hutton*, 3 H. L. Cas. 341; 16 Jur. 605.

A judgment of the house given on an appeal cannot be reversed; but where such

appeal and judgment have been obtained by suppression and misrepresentation, the house will afterwards discharge the order granting the leave to appeal and the order constituting the judgment thereon. *Tomney v. White*, 4 H. L. Cas. 313.

A decision of the house in a particular case is conclusive in that case, and cannot be reversed except by act of parliament; but if the house should afterwards be of opinion that an erroneous principle had been adopted in the first case, the house would not be bound in any other to adhere to such principle. *Wilson v. Wilson*, 5 H. L. Cas. 49; 23 L. J., Chanc. 697.

A decision of the house is as binding upon the house itself as upon any inferior court. *Att. Gen. v. Windsor (Dean and Canons)*, 3 H. L. Cas. 369; 30 L. J., Chanc. 529; 6 Jur. N. S. 833.

Where there is an equal division of opinion among the lords, and, in consequence, the judgment of the court below stands, the result is the same as to authority as if the lords had been unanimous in their judgment. *Id.*

The house will not reconsider a question which it has once decided. *Thelluson v. Rendlesham*, 7 H. L. Cas. 429.

The decisions of the House of Lords are conclusive declarations of the existing state of the law, and are binding upon itself, when sitting judicially, as much as upon all inferior tribunals, and can only be altered by act of parliament.—Per Lord Campbell, C. *Att. Gen. v. Windsor (Dean and Canons)*, 6 Jur. N. S. 833; 3 H. L. Cas. 369.

Observations made by members of the house, beyond the ratio decidendi which is propounded and acted upon in giving judgment, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities. *Id.*

Where a case involves a clear principle which has been the subject of decision by the house, that decision must be followed by every inferior court. *French v. Macaulay*, 3 Dru. & W. 269; 1 Con. & L. 459. (Irish.)

The rule of law laid down by the house as the ground of its judgment, sitting judicially as the supreme court of appeal, must be taken for law until altered by act of parliament. If the law were not binding upon the house it would be arrogating to itself the right of altering the law, and legislating by its separate authority. *Beames v. Beames*, 9 H. L. Cas. 274; 8 Jur., N. S. 770—Per Lord Campbell, C.

An order of the house, affirming a decree in chancery, is final and conclusive, but does not preclude a bill of review. *Hobbing v. Terry*, 7 L. T., N. S. 52; 8 Jur., N. S. 975; 10 W. R. 884—P. C.

How far other tribunals are bound by the reasons given by the house for their decisions, see *Paul v. Joel or Jewell*, 3 H. & N. 435; 4 Jur., N. S. 1086; 27 L. J., Exch. 330.

Decisions of the House of Lords upon questions of law, as the construction of statutes and especially of fiscal acts, are binding

**Don** the house in subsequent cases. *Commissioners of Inland Revenue v. Harrison*, 43 J., Exch. 138; 7 L. R., H. L. Cas. 1; 22 V. R. 559; 30 L. T., N. S. 274.

**Costs, interest, &c.]**—The house will, as a general rule, make the costs of an appeal follow the affirmance of a judgment of the court below. *Stewart v. Menzies*, 8 C. & F. 309.

Where a party is served with the certificate of costs, and a personal demand is made, and he does not pay them, the house will, on petition of the party entitled, order the recognizances to be estreated, for the purpose of enforcing payment of them, with costs of the petition. *Callaghan v. Callaghan*, 8 C. & F. 709; *Carter v. Palmer*, 8 C. & F. 708.

Where the judgment of the court below was affirmed:—Held, that the judgment ought to be affirmed, with costs, they being a legal consequence, not a result necessarily affected by the conduct of the parties. *Clarke v. Hart*, 6 H. L. Cas. 633; 5 Jur., N. S. 447.

Although the rule of the House of Lords, where the decree appealed from is reversed or varied, is that the respondent is not fixed with the costs of the appeal, yet where an appellant had offered to withdraw the appeal and to pay the respondent's costs, on condition that the respondent submitted to a variation in the decree to which the house held that he was entitled, and the respondent refused to consent to the proposal, the house marked its disapproval of the respondent's conduct by directing him to pay all the costs incurred after the date of the making of the offer by the appellant. *De Vitre v. Betts*, 43 L. J., Chanc. 841; 21 W. R. 705—H. L.

When the decision of the court below is confirmed on appeal to the House of Lords the respondent is entitled to costs, although the ground of the decision on appeal is different from that in the court below. *Peck v. Gurney*, 22 W. R. 29—H. L.

When the judgment of a superior court is affirmed with costs, in the Exchequer Chamber, and such decision of the Exchequer Chamber is subsequently affirmed, on appeal by the House of Lords, who order the costs incurred by the successful party, in respect of the appeal, to be paid to him, "the amount thereof to be certified by the clerk of parliament," the superior court has power to allow interest only on the sum for which judgment was originally signed in such superior court, for such time as execution has been delayed by the proceedings in the appeals to the Exchequer Chamber and the House of Lords, that is, for the period between the date of the original judgment and its final affirmance by the House of Lords; but it has no jurisdiction or power to give interest on the costs incurred in such appeal. *Lancashire and Yorkshire Railway Company v. Gidlow*, 29 L. T., N. S. 399; 22 W. R. 17.

As to proceedings in peerage cases,—see PEER AND PEERAGE.

## 2. Under The Judicature Acts and The Appellate Jurisdiction Act, 1876.

**Practice on appeal since the Judicature Acts and Rules.]**—The practice with regard to appeals to the House of Lords is unaltered by the Judicature Acts and Rules. *Justice v. Mersey Steel and Iron Company*, 1 L. R., C. P. Div. 575; 24 W. R. 955—C. A.

Therefore, on an appeal from a decision of the Court of Appeal in an action attached to one of the common law divisions of the High Court, the appellant cannot obtain a stay of execution of the judgment pending the appeal, unless he gives bail in error, as provided by the Common Law Procedure Act, 1852, s. 151; and on doing that he is entitled to a stay of execution as a matter of right. *Ib.*

An application to enlarge the time for giving bail in error must be made, not to the Court of Appeal, but to that division of the High Court to which the action is attached. *Ib.*

When a plaintiff, after an order to file the affidavit as to documents, persisted in not filing a sufficient affidavit, the house sustained the decree of the Court of Chancery, fixing a time at which the bill should be dismissed, and the money in court repaid to the defendant who had paid it in. The house will not interfere with the discretion of the judges who have had the administration of the suit in such a matter as the time to be fixed for dismissal, under circumstances like the above. *Republic of Liberia v. Royo*, 24 W. R. 907—H. L.

**Provisions of The Appellate Jurisdiction Act, 1876.]**—[By 39 & 40 Vict. c. 59, The Appellate Jurisdiction Act, 1876, s. 3, subject as in the act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following; that is to say,

- (1.) Of her Majesty's Court of Appeal in England; and
- (2.) Of any court in Scotland from which error or an appeal at or immediately before the commencement of this act lay to the House of Lords by common law or by statute; and
- (3.) Of any court in Ireland from which error or an appeal at or immediately before the commencement of this act lay to the House of Lords by common law or by statute.

By s. 4, every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before her Majesty the Queen in her court of parliament, in order that the said court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

By s. 5, an appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this act designated Lords of Appeal; that is to say,

- (1.) *The Lord Chancellor of Great Britain for the time being; and*
- (2.) *The Lords of Appeal in Ordinary to be appointed as in this act mentioned; and*
- (3.) *Such peers of parliament as are for the time being holding or have held any of the offices in this act described as high judicial offices.*

By s. 11, error shall not lie to the House of Lords, and an appeal shall not lie from any of the courts from which an appeal to the House of Lords is given by this act, except in manner provided by this act, and subject to such conditions as to the value of the subject-matter in dispute, and as to giving security for costs, and as to the time within which the appeal shall be brought, and generally as to all matters of practice and procedure, or otherwise, as may be imposed by orders of the House of Lords.

By s. 12, except in so far as may be authorized by orders of the House of Lords, an appeal shall not lie to the House of Lords from any court in Scotland or Ireland in any case, which, according to the law or practice hitherto in use, could not have been reviewed by that house, either in error or on appeal.]

## Parol Agreement.

See CONTRACT OR AGREEMENT; SALE; AND THE TITLES OF THE VARIOUS CLASSES OF AGREEMENTS.

## Parol Evidence.

See EVIDENCE.

## Parson.

See ECCLESIASTICAL LAW.

## Partiality.

- I. OF JUROR. See JURY; NEW TRIAL.
- II. OF ARBITRATOR. See ARBITRATION AND AWARD.

## Particeps Criminis.

See CRIMINAL LAW.

## Particulars.

- I. WHEN PARTICULARS OF DEMAND OR OF SET-OFF MAY BE FURNISHED OR REQUIRED, 9598.
- II. PROCEEDINGS TO OBTAIN; ORDER FOR DELIVERY AND ITS EFFECT, 9604.
- III. FORM, REQUISITES AND SUFFICIENCY, 9607.
- IV. OPERATION AND EFFECT, 9612.
- V. OF NAME AND ADDRESS.
  1. Of Plaintiffs. See PRACTICE.
  2. Of Attorneys. See ATTORNEY AND SOLICITOR.
- VI. IN EJECTMENT. See EJECTMENT.
- VII. ON INFRINGEMENT OF PATENT. See PATENT.
- VIII. ON BREACHES OF COVENANT. See EJECTMENT.

- I. WHEN PARTICULARS OF DEMAND OR OF SET-OFF MAY BE FURNISHED OR REQUIRED.

Effect of special indorsement on writ of summons.—[By 15 & 16 Vict. c. 76, s. 25, in all cases where the defendant resides within the jurisdiction, and the claim is for a debt or liquidated demand in money, with or without interest, arising upon a contract, express or implied, as, for instance, on a bill of exchange, promissory note, or check, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guaranty, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, check or note, the plaintiff shall be at liberty to make upon the writ of summons and copy thereof a special indorsement of the particulars of his claim, and when a writ of summons has been indorsed in the special form, the indorsement shall be considered as particulars of demand, and no further or other particulars of demand need be delivered, unless ordered by the court or a judge.]

Where a writ of summons is specially indorsed under this provision, semble, that it is irregular to deliver any other particulars than those indorsed on the writ without leave. *Fromant v. Ashley*, 1 El. & Bl. 723; 17 Jur. 1050; 22 L. J., Q. B. 237.

But where a plaintiff delivered with his declaration other particulars without leave, and the defendant, instead of objecting, pleaded and went to trial:—Held, to have waived the irregularity, and he was allowed to avail himself of the second particulars. *Id.*

When to be delivered with declaration or plea of set-off.—With every declaration (unless the writ has been specially indorsed, under the provisions contained in s. 25 of the C. L. P. Act, 1852), delivered or filed, containing causes of action such as those set forth in schedule B of that act, and num-



ered from 1 to 14 inclusive, or of a like nature, the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios; and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios;

And with every plea of set-off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver or file particulars, the defendant shall in like manner deliver particulars of his set-off;

And to secure the delivery or filing of particulars in all such cases, it is ordered, that if any such declaration shall be delivered or filed, or any plea of set-off delivered, without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. Reg. Gen., Q. B., C. P. and Exch., H. T. 16 Vict. r. 19; 1 El. & Bl., App. v.

Where the particulars exceed three folios, the court will order the plaintiff to deliver to the defendant full particulars of his demand, the defendant paying the costs of the particulars, and, if necessary, taking short notice of trial, even though the defendant has had full particulars of the account before action. *James v. Child*, 2 C. & J. 252; 2 Tyr. 302; 1 D. P. C. 810.

Though a declaration is delivered without any particulars, the plaintiff may sign judgment if the defendant does not plead in due time; and it makes no difference in the time for pleading, that particulars are afterwards delivered in lieu of those originally delivered, which were a nullity. *Jones v. Fowler*, 4 D. P. C. 232; 1 Gale, 256.

A declaration, indorsed to plead in four days, being delivered with particulars annexed, the plaintiff, two days afterwards, finding that the particulars were wrongly entitled, delivered fresh particulars entitled; and, for want of a plea within the four days signed judgment:—Held, that the judgment was regular, the accepting the amended particulars being a waiver of the objection to the first. *Id.*

The omission, in an action under Lord Campbell's Act, 9 & 10 Vict. c. 93, to furnish particulars with the plaint, is ground for setting aside the service of the writ, but not for setting aside the writ itself. *McCabe v. Guinness*, 9 Ir. R., C. L. 510—Exch.

**Annexing to record.**—A copy of the particulars of the demand and set-off shall be annexed by the plaintiff's attorney to every record at the time it is entered with the proper officer. Reg. Gen., Q. B., C. P. and Exch., H. T. 16 Vict. r. 19; 1 El. & Bl., App. v.

If particulars are not annexed to the record, the cause may be struck out as irregularly entered. *Coulson v. Hanson*, 2 F. & F. 812—Martin.

Where the particulars are appended to the record, it is not necessary to prove their delivery. *Macarthy v. Smith*, 8 Bing. 145; 1 M. & Scott, 227; 1 D. P. C. 253.

But they are not to be considered as incorporated with the declaration. *Booth v. Howard*, 5 D. P. C. 438.

Nor resorted to for the purpose of explaining the pleadings in the cause. *Kilner v. Bailey*, 5 M. & W. 382.

A plaintiff, in his further and better particulars, delivered under a judge's order, omitted all mention of a sum, for which he had given the defendant credit in the particulars delivered with the declaration. At the trial, it appeared that the further particulars were alone annexed to the record, but the defendant offered in evidence the particulars in which the credit was given him. The undersheriff having refused to receive these particulars, the jury, notwithstanding, found a verdict for the defendant. On motion for a new trial, on the ground of the verdict being against the evidence:—Held, that the court would not grant a new trial, as the particulars tendered ought to have been received, and if that had been done the verdict would have been warranted. *Boulton v. Pritchard*, 4 D. & L. 117; 11 Jur. 64; 15 L. J., Q. B. 850—B. C.—Wightman.

Where a plaintiff annexed to the record particulars varying from those delivered to the defendant, and, there being no evidence of the particulars delivered, got a verdict upon an item not included in the particulars delivered, the court granted a new trial, without costs; but refused to nonsuit the plaintiff, because the defendant was not in a condition to raise the question at the trial, and the point was not reserved. *Morgan v. Harris*, 2 C. & J. 461; 2 Tyr. 385; 1 D. P. C. 570.

**As to what matters particulars may be required, generally.**—A plaintiff will not be compelled to give particulars of matters which he does not claim to recover. *Luck v. Handley*, 4 Exch. 486; 13 Jur. 982; 19 L. J., Exch. 129.

The court will not compel a plaintiff, suing for the breach of an agreement, and assigning, by way of special damage, that he has incurred certain expenses, to furnish particulars of such special damage. *Restalick v. Hawkes*, 1 M. & W. 573.

Or, in an action for the breach of warranty of a horse, the court will not order the plaintiff to give particulars of the unsoundness complained of. *Pylis v. Stephen*, 6 M. & W. 813; 8 D. P. C. 871; 4 Jur. 852.

In an action on the case, the court will not require the plaintiff to deliver a particular of his claim, where, from the mode of alleging it in the declaration, there is no ambiguity as to the transaction in respect of which the

action is brought. *Stannard v. Ullithorne*, 5 D. P. C. 370; 3 Scott, 771; 3 Bing. N. C. 826; 2 Hodges, 247.

Where a plaintiff declares only on a bill of exchange, the defendant is not, except under very special circumstances, entitled to particulars of demand. *Brooks v. Farlar*, 8 Scott, 654; 3 Bing. N. C. 291; 5 D. P. C. 36; 2 Hodges, 264.

The acceptor of two bills for 250*l.* each was arrested upon a capias, indorsed thus, "Bail for 240*l.* and upwards. The plaintiff claims 200*l.*, with interest thereon, from the 30th December to the day of payment, for debt, and 8*l.* 10*s.* for costs, &c." The declaration was upon the two bills, and the particulars stated that the action was brought to recover 500*l.*:—Held, that the defendant was entitled to better particulars. *Dawes v. Anstruther*, 5 D. P. C. 736; 2 M. & W. 817; M. & H. 268; 1 Jur. 949.

The court will not compel a plaintiff suing for the balance of an account, to furnish a statement of moneys received by him from the defendant. *Penprase v. Crease*, 1 M. & W. 36; 4 D. P. C. 711.

In an action on a bond for breach of covenants in a lease, where breaches are not assigned in the declaration, copies of the covenants alleged to be broken are sufficient particulars of demand, if there is no plea of performance. *Souter v. Hitchcock*, 5 D. P. C. 724; W., W. & D. 361; 1 Jur. 658.

In an action against his banker by a customer for a balance, the question being as to certain overcharges by way of discount, interest and commission, the plaintiff having before action applied for, but failed to obtain, any other information than was afforded by his pass-book, and having delivered particulars, claiming the whole amount of the gross balance, the defendant was not entitled to any further or better particulars, but the plaintiff was afterwards held entitled to particulars of gross charges for interest and commission. *Adams v. Aston*, 1 F. & F. 603.

A carrier, suing a railway company for the amount of overcharges on hundreds of items for the carriage of parcels, is not obliged to furnish particulars of the overcharges until they have furnished him with a copy of their tariff and charges. *Sutton v. Great Western Railway Company*, 10 W. R. 563—Exch.

In ordering further and better particulars, the court will not compel the plaintiff to give particulars of payments made by the defendant. *Fusell v. Gordon*, 18 C. B. 847.

As to sufficiency of particulars,—see this title, III.

**Particulars of objections to title on sale of property.**—In an action by a vendee against a vendor, to recover back the deposit, the conditions not being complied with, the defendant may obtain a particular of the grounds on which the plaintiff seeks to recover, to which the latter will be confined at the trial. *Squire v. Tod*, 1 Camp. 293—Mansfield.

So, in an action for the non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having alleged that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable," the court obliged the plaintiff to give a particular of all objections to the abstract arising upon matters of fact. *Collett v. Thompson*, 3 B. & P. 246.

In an action to recover back the deposit paid to the auctioneer upon the sale of an estate, on the ground of objections to the title, the defendant is entitled to particulars of the objections arising upon matters of fact, but not of objections in point of law. *Roberts v. Rowlands*, 8 M. & W. 543.

Particulars stated the action to be brought to recover the deposit paid upon the sale of an estate, to which the defendant was unable to make a good title. A summons was taken out for better particulars, which was dismissed upon the plaintiff's attorney stating that the objections were matters of law only. Subsequently, a notice was delivered to the defendant's attorney, that the objections were set forth in the plaintiff's answer to the defendant's bill in chancery. At the trial it appeared that the only objection was matter of fact. The court refused a new trial, the defendant's attorney declining to make an affidavit that he had been misled. *Correll v. Cattle*, 5 D. P. C. 598; M. & H. 89.

— of grievances or injuries complained of, in actions of tort.]—The court will not grant particulars in an action of trespass on the mere affidavit of the defendant that he had read the declaration, and that, from its general and vague form, he was unable to ascertain the grievance on which the plaintiff intended to rely; but some special ground must be shown as a reason for granting the rule. *Horlock v. Lediard*, 10 M. & W. 677; 2 D., N. S. 277; 12 L. J., Exch. 83.

In an action of trespass, where the locus in quo was of considerable extent, and related to a right to moor ships, the plaintiff was required to give particulars of the trespass. *Kirwin v. Jones*, 3 Hodges, 230.

In an action for an injury by the careless driving of a servant of the defendant, the court refused to make an order for particulars of the injury sustained by the plaintiff. *Wicks v. Macnamara*, 3 H. & N. 568; 27 L. J., Exch. 419.

In an action against the marshal of the King's Bench prison for an escape, the plaintiff was bound to give a particular of the escape relied upon, and the judge's order for a particular should require the precise day of the escape to be stated, which the plaintiff must state in his particular, if within his knowledge. *Davis v. Chapman*, 1 N. & P. 699; 6 A. & E. 767; W., W. & D. 273.

In an action to recover damages for injuries sustained by the plaintiff through the negligence of the defendant, the defendant is not entitled to particulars of the injuries or

an affidavit merely stating that his defense is embarrassed by the want of such particulars. *Brown v. Great Western Railway Company*, 20 V. R. 585; 26 L. T., N. S. 398—Exch.

**Semble**, that the defendant would have been entitled to such particulars on an affidavit showing that he had no knowledge of the case the plaintiff intended to set up at the trial, and that the defendant had no means of acquiring such knowledge without the aid of the court. *Id.*

In an action for seduction, to entitle the defendant to an order for particulars, he must show special circumstances other than those which would tend to a mere restriction of the proof necessarily incident to such an action. *Lagan v. Gibson*, 9 Ir. R., C. L. 507—Exch.

— of allegations in pleas, generally.]—To an action commenced by a company, and continued by the official manager under the winding-up acts, for calls on shares held by the defendant, in the company, he pleaded that he was induced to become the holder of the shares by fraud, and within a reasonable time after he had notice of the fraud, and before he had received any benefit from the contract, he repudiated it:—Held, that the plaintiff was entitled to particulars of the acts of fraud and repudiation. *McCreight v. Steevens*, 1 H. & C. 454; 81 L. J., Exch. 455.

Particulars granted on a general plea (by way of equitable defense) of fraud on the part of a cestui que trust. *Pitts v. Chambers*, 1 F. & F. 684—Blackburn.

In an action on a policy of insurance, one of the questions put as the basis of the proposal was, whether the deceased had ever been afflicted with or had any symptoms of any complaint. The defendant having pleaded that the answer to this was untrue, as the deceased had had disease of the stomach, the court compelled him to deliver to the plaintiff particulars of those symptoms. *Marshall v. Emperor Life Assurance Society*, 6 B. & S. 886; 1 L. R., Q. B. 35; 12 Jur., N. S. 293; 85 L. J., Q. B. 89.

— in pleas of payment.]—A defendant who pleads payment of a sum of money, may be compelled to furnish the particulars of the payment. *Ireland v. Thompson*, 4 Bing. N. C. 716; 6 Scott, 601; 1 Arn. 271; 2 Jur. 518.

The court ordered particulars of a plea of exoneration and discharge. *Coombe v. Stephenson*, 23 W. R. 187; 81 L. T., N. S. 585—Q. B.; overruling *Phipps v. Sothorn*, 8 D. P. C. 208.

As to stating credits in particulars,—see this title, III.

— upon payment into court.]—In an action against a carrier for the loss of and injury to goods sent to different places at different times, comprising a variety of claims specified in the particulars delivered under a judge's order, he paid a sum of money into court, in satisfaction of the plaintiff's claim:—Held, that the plaintiff was entitled to an account of the particular items of the demand in respect of which the sum was paid into court. *Bazen-*

*dale v. Great Western Railway Company*, 5 H. & N. 95; 30 L. J., Exch. 63.

But particulars of the parts of a plaintiff's claim, in respect of which money is paid into court, will not be ordered, except under very special circumstances. *Thames Ship-Building Company v. Loyal Mail Steam-Packet Company*, 10 C. B., N. S. 375; 7 Jur., N. S. 972; 30 L. J., C. P. 205; 9 W. R. 577; 4 L. T., N. S. 250.

The court refused to order such particulars in an action for extras and alterations upon a ship-building contract. *Id.*

## II. PROCEEDINGS TO OBTAIN; ORDER FOR DELIVERY AND ITS EFFECT.

**At what time or stage of the proceedings particulars may be obtained.]**—A summons for particulars, and order thereon, may be obtained by a defendant before appearance, and may be made if the judge think fit, without the production of any affidavit. Reg. Gen. Q. B., C. P. and Exch., II. T. 16 Vict. r. 20; 1 El. & Bl., App. vi.

In an action for work and labor as a surveyor, the particulars stated, that the action was brought to recover a specified sum for surveying a number of miles between two places, which were named, at a certain rate per mile, in 1845. The defendant having pleaded only the general issue, and notice of trial having been given, a rule for further and better particulars was refused. *Irving v. Baker*, 15 L. J., Q. B. 322.

A defendant being served with a writ of summons, obtained an order for particulars before declaration; after waiting three months, the plaintiff refused to go on with the action, or to enter a *stet processus*; the court refused an application to compel him to do so. *Kirby v. Snowden*, 4 D. P. C. 191.

A British subject residing in France was there served with a writ of summons in the form prescribed by 15 & 16 Vict. c. 76, s. 13. The writ was specially indorsed with a claim in respect of promissory notes made abroad. The defendant appeared to the writ, and after declaration found that the cause of action did not arise within the jurisdiction of the court, and was not in respect of the breach of a contract made within the jurisdiction, whereupon he applied to set aside the writ and proceedings under it:—Held, that there was no irregularity in the writ itself, and that the defendant, by appearing, had given the court jurisdiction. In such case, the defendant should apply for particulars before appearance. *Forbes v. Smith*, 10 Exch. 717.

Where a defendant, after agreeing to try a question as to the proper mode of loading Canada ships, pleaded a set-off in order to snap a verdict, the court set aside the particular of set-off, on the plaintiff's paying the amount claimed by it. *Gould v. Oliver*, 4 Bing. N. C. 776; 6 Scott, 648; 1 Arn. 292.

**Terms of order for delivery.]**—A judge may engraft upon an order requiring a plaintiff

iff to deliver particulars, a direction to the defendant to pay the costs of the application. *Clement v. Waseer*, 3 M. & G. 551; 4 Scott, N. R. 229; 1 D., N. S. 193; 6 Jur. 62.

**Operation of order; and effect of refusal to deliver.**—An order for the delivery of particulars does not operate as a stay of proceedings, unless it is so expressed. *Doe d. Roberts v. Roe*, 13 M. & W. 691; 3 D. & L. 678; 14 L. J., Exch. 101.

Or unless drawn up and served on the plaintiff's attorney. *Wilson v. Hunt*, 1 Chit. 647.

An order for particulars does not suspend the time for pleading, and therefore the plaintiff may sign judgment immediately after delivering the particulars, if the time for pleading is then out. *Hifferman v. Langelle*, 2 B. & P. 363.

Where a defendant obtains an order for particulars, with a stay of proceedings, he may give notice of abandoning the order and demur or plead to the declaration without getting the order rescinded. *Maunder v. Collett*, 4 D. & L. 456; 3 C. B. 554; 16 L. J., C. P. 17.

A defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order which he had at the return of the summons, unless otherwise provided for in such order. Reg. Gen., Q. B., C. P. and Exch., 16 Vict. r. 21; 1 El. & Bl., App. vi.

Where a defendant, having obtained an order for a time to plead, takes out a summons for particulars, which is dismissed after the expiration of the time given for pleading, he is entitled only to the remainder of the same day for pleading. *Mengens v. Perry*, 15 M. & W. 537; 10 Jur. 742; 15 L. J., Exch. 807.

A defendant having obtained an order for further time to plead upon terms, did not draw up the order; but, on the same day, took out a summons for better particulars, with a stay of proceedings, and also a summons for further time to plead after the delivery of such particulars. On the following day, the plaintiff's attorney delivered the particulars, and signed judgment as for want of a plea, the original time for pleading having then expired:—Held, that the judgment was irregular. *Daley v. Arnold*, 1 D., N. S. 938—Exch.

A defendant obtained an order for particulars before declaration, with a stay of proceedings until delivery. After two terms had elapsed without such delivery, he obtained an order to rescind his former order, and served it with a demand of declaration within four days. No declaration having been delivered within the four days he signed judgment of non pros.:—Held, that the judgment was regular. *Johns v. Saunders*, 5 D. & L. 49; 2 B. C. Rep. 79—Erle.

If, upon an order, a party's attorney refers to another particular already delivered by his client, he is not obliged to deliver a fresh par-

ticular. *Hatchet v. Marshall*, Peake 172—Kenyon.

Where a defendant is under terms of pleading issuably, and one of the pleas is a set-off, obtaining an order for particulars of the set-off is a waiver of the objection that the pleas are not issuable. *Scott v. Watson*, 3 D. & L. 208; 1 C. B. 826.

A defendant who has not complied with a judge's order, to deliver particulars of set-off, with dates, will not be allowed to give any evidence of his set-off. *Swain v. Roberts*, 1 M. & Rob. 452—Tindal.

Particulars delivered, in which the only dates were "from January, 1828, to January, 1834," are not a compliance with such an order. *Id.*

An order for the delivery of particulars of set-off, and in default precluding the defendant from giving evidence of his set-off, makes such evidence inadmissible at the trial. *Young v. Geiger*, 6 C. B. 552; 6 D. & L. 337; 18 L. J., C. P. 43.

An order was made for delivery of particulars of set-off, with dates, and, in default, that the defendant should be precluded from giving evidence of set-off. Particulars were delivered, but without dates, subsequently to which the plaintiff replied, and the cause came on for trial, when the judge refused to receive the evidence of set-off:—Held, that the evidence was properly rejected, the order not having been complied with, and that the plaintiff had not waived the objection by replying to the plea. *Ibbett v. Leaver*, 4 D. & L. 716; 16 M. & W. 771; 11 Jur. 415; 16 L. J., Exch. 208.

If a plaintiff delivers one particular under an order, and afterwards a second without an order, he cannot give evidence of any demand in the second which was not included in the first. *Brown v. Watts*, 1 Taunt. 353.

An order was obtained for delivery of particulars of set-off within a fortnight; they were not delivered for five weeks, but after the delivery an order was made by consent for the amendment of the declaration:—Held, that this was a waiver of the irregularity in the delivery of the particulars. *Wallis v. Anderson*, M. & M. 291—Tenterden.

But a demand of particulars of set-off delivered after a plea, which is a nullity, is no waiver of the plaintiff's right to sign judgment. *Ford v. Bernard*, 4 M. & P. 803; 6 Bing. 534.

By a judge's order, the defendant was required, within a limited time, to deliver particulars of set-off, and, in default thereof, the defendant was to be precluded from giving evidence in support of his set-off at the trial. The defendant neglected to comply with the terms of the order, and the cause was afterwards referred by an order of nisi prius; and after the arbitrators had proceeded with the reference, a judge, during the assizes, made an order for the delivery of the particulars of set-off:—Held, that he had no authority so to do under 1 Geo. 4, c. 55, s. 5, as, after the order of reference, the cause was

of court. *Ashworth v. Heathcote*, 4 M. & W. 396; 6 Bing. 596.

### III. FORM, REQUISITES AND SUFFICIENCY.

**Form and sufficiency, in general.]**—It is no objection to the use of particulars of set-off, that they are headed in a different court from that in which the action is brought, if they have not been delivered pursuant to a judge's order. *Lewis v. Hilton*, 5 D. P. C. 207; 2 H. & W. 314.

The object of particulars is to control the generality of the declaration, and a defendant is entitled to such particulars of the plaintiff's demand as will give him that information which a reasonable man would require respecting the matters against which he is called upon to defend himself. *Bennis v. Beresford*, 4 Railw. Cas. 129; 8 D. & L. 464; 15 M. & W. 78; 10 Jur. 76; 15 L. J., Exch. 78.

In an action by an engineer against a railway company, for surveying their line, and for money paid, a general particular for surveying the country between certain places, including traveling charges and assistance, is sufficient, without specifying the number of fields surveyed, or how much of the charge is for the engineer's skill, time and labor, and how much for traveling expenses and assistance. *Id.*

In actions by engineers and other persons employed in constructing railways, the particulars must be as specific as it is possible for the plaintiffs to make them, and a mere statement of aggregate sums claimed in respect of tavern bills, assistant-surveyors, &c., finding surveyors, meeting and arranging with solicitors, &c., will not be sufficient. *Prichard v. Nelson*, 6 M. & W. 778; 5 Railw. Cas. 20; 4 D. & L. 693; 11 Jur. 373; 16 L. J., Exch. 207.

In an action by a sworn broker for the price of scrip bought for the account of the defendant, the particulars should state the names of the persons from whom, and the price at which the scrip was bought, and the date of the purchase within a few days. *Berkley v. De Vere*, 4 D. & L. 97; 15 L. J., Q. B. 328—B. C.—Wightman.

Action by assignees of a bankrupt. The first four counts were for goods sold, money paid, and had and received, and on an account stated, laying the promises to the bankrupt; the fifth, and sixth and seventh counts were for goods sold, money had and received, and on an account stated, laying the promises to the assignees. Pleas, first, except as to 320*l.*, parcel, &c., and except as to 140*l.*, parcel of the sums in the first, second, third and fourth counts, non assumpsit; secondly, as to 140*l.*, parcel of the moneys in the first, second, third and fourth counts, a plea of mutual credit, which had been demurred to, and on argument, judgment given for the defendant; thirdly, as to the 320*l.*, payment of that sum into court, which the plaintiffs took out, and joined issue on the plea of non assumpsit.

The following were the particulars delivered prior to the pleas:—"This action is brought to recover 140*l.*, the value of certain yarn; also 816*l.*, the proceeds of a bill of exchange, drawn by J. M., and indorsed by the bankrupt to the defendant; also 4*l.*, the proceeds of a check; and 80*l.*, in cash; the yarn, bill of exchange, check, and cash, having been received by the defendant, from or by the authority of the bankrupt, about the months of September or October, 1839. The particular date is known to the defendant." At the trial, the cause proceeded for the recovery of 140*l.* only, and no evidence was adduced as to the 80*l.* cash. It was objected that the plaintiffs were not entitled to go into evidence as to the 140*l.*, as that sum was already satisfied by the judgment upon the demurrer, and that that sum must be struck out of the particulars:—Held, that the plaintiffs were entitled to give evidence of goods sold to the amount of 140*l.*, upon the other counts, to which the plea was not pleaded, and might apply the particulars to those counts. *Russell v. Bell*, 10 M. & W. 340.

Action for work and labor as an architect, and for commission. The particulars claimed 5*l.* per cent. for commission:—Held, that the plaintiff might recover for work and labor, although the jury negatived the right to commission. *Mayor v. Ward*, 10 Jur. 796—Q. B.

Where a particular stated that the plaintiff claimed for work and labor under an agreement:—Held, that he might recover for extras. *Lines v. Rees*, 1 Jur. 593.

Particulars stated the action to be brought to recover from the defendants 450*l.*, claimed by the plaintiff for his services as clerk or manager to the defendants from October, 1837, to October, 1839. An order was made for further and better particulars, when the plaintiff delivered the same with the addition of the words, "after the rate of 200*l.* per annum:—Held, that the plaintiff could not give evidence of a claim for commission on the amount of business done by the defendants through his introduction. *Lowe v. Thompson*, 4 D. & L. 54; 15 M. & W. 541; 15 L. J., Exch. 335.

Particulars as follows:—"This action is brought to recover 3,901*l.*, being a sum claimed by the plaintiff for the amount of sums in cash paid, and the value of bills given by the plaintiff to the defendant at various times between the 1st November, 1842, and the 12th May, 1843, as and for the purchase-money of the paintings hereunder mentioned, the making of which payments and giving of which bills the defendant procured from the plaintiff by false and fraudulent representations; and in respect of the plaintiff having discounted and paid the bills," followed by a list of paintings with the price marked against each, give sufficient information of the nature of the action, and for what it is brought. *Archbutt v. Pennell*, 1 D. & L. 318; 7 Jur. 519—Exch.

Where particulars stated that the action was brought to recover a bet lost by R:—Held, that the plaintiff was bound by his particulars, and could not show he had rescinded the bet before the event. *Davenport v. Davies*, 2 Gale, 119; 1 M. & W. 570.

The plaintiff and others having each deposited 2*l.* with the defendant in a lottery upon the Derby, the plaintiff brought an action for the whole amount, claiming to be the drawer of the winning horse. The particulars stated that the action was brought to recover 18*l.* 16*s.*, being money received by the defendant to the use of the plaintiff:—Held, that the plaintiff was not entitled to recover his stake of 2*l.* *Mearing v. Hellings*, 14 M. & W. 711; 15 L. J., Exch. 108.

If a bill of particulars states the demand to be for goods sold and delivered to the defendant, no evidence can be received of goods sold by the defendant, as agent for the plaintiff. *Holland v. Hopkins*, 2 B. & P. 248; 2 Esp. 168.

**Under special counts.]**—It will not prevent a plaintiff from giving evidence on a special count in his declaration, that he has not included that part of his claim in his particular of demand, as a particular is only necessary to explain the common counts. *Day v. Davies*, 5 C. & P. 340—Tindal.

A count alleged that the plaintiff was employed by the defendant as a carman, at wages after the rate of 100*l.* a year, and claimed damages for his discharge without just cause during the year; there was also a count for work and labor. The particulars stated that the plaintiff, besides seeking to recover damages under the special count, also sought to recover, under the common count, 87*l.*, the balance of account for a quarter's work done by him for the defendant, commencing on the 30th June, and ending on the 30th September, 1842, after giving credit for 3*l.* paid on account. It appeared that the plaintiff was discharged on the 30th July, 1842, for misconduct, which the jury found to be a sufficient cause for his dismissal; that he worked out that day, and that on the next morning, the defendant sent for him, and he remained working there that day also, and then left. The jury found that the value of those two days' work was 40*s.*, but that he was entitled to a month's wages; and he accordingly had a verdict for 10*l.* 6*s.* 8*d.*, allowing for the 3*l.* which had been paid in advance:—Held, that the plaintiff was not precluded by his particulars from recovering this sum. *Heirum v. Stericker*, 10 M. & W. 558; 2 D., N. S. 524; 12 L. J., Exch. 17.

A plaintiff declared on a contract with the defendants to retain him in their service for one year, at a salary of 200*l.* per annum, alleging for breach, that they improperly dismissed him before the end of the year; and in a second count, for work and labor. The particulars were as follows:—"This action is brought to recover one year's salary, from, &c., to, &c., at the rate of 200*l.* per annum,

or damages for the dismissal of the plaintiff before the end of such year:—Held, that evidence of services actually rendered was admissible under this particular, upon failure to prove the special contract. *Harris v. Montgomery*, 11 C. B. 393; 2 L., M. & P. 425; 15 Jur. 757; 20 L. J., C. P. 221.

A plaintiff sued on a breach of warranty on the sale of wheat. The declaration stated a warranty that the wheat would grow, and a breach that it would not, and that the plaintiff was deprived of great gains. The declaration also contained counts for money had and received, and on an account stated. The particulars were for the price of the wheat, but were expressly limited to the common counts:—Held, that this did not prevent the plaintiff from giving evidence of what the value of the crops might have been, with a view to his damages on the first count. *Pope v. Patey*, 8 C. & P. 769—Patteson.

**Under counts on bills of exchange and promissory notes.]**—Where a particular states a note only, which cannot be received in evidence for want of a stamp, the party admits that his only claim is on the note, and he cannot give evidence of the consideration. *Wade v. Bosley*, 4 Esp. 7—Kenyon.

Under a particular, stating that the action is brought to recover the amount of a note, interest on it is recoverable. *Blake v. Lawrence*, 4 Esp. 147—Ellenborough.

A declaration on a note, with a count on an account stated; the particulars specifying that "the action is brought to recover 55*l.* due on the note set forth in the first count, with interest; and that the plaintiff, for recovery thereof, will avail himself of the whole or any part of the declaration:—Held, that the note, being invalid, was not, by this particular, made admissible evidence of the account stated. *Hedley v. Bainbridge*, 3 Q. B. 316; 2 G. & D. 483.

**Under a count on an account stated.]**—A first count was on an undertaking to pay such costs, charges, and expenses as the plaintiff (an attorney) should incur in an action to be brought by him against G. on a bill of exchange, drawn by the defendant only, which was lying due, and which the plaintiff had agreed to take up for the honor of the defendant. In a second count the plaintiff declared as indorsee of the bill; the third was for money paid, and the fourth on an account stated. On the first count the defendant paid into court a sum covering the plaintiff's costs out of pocket. On the second count, the ultimate issue was, whether a bill subsequently given by the defendant to the plaintiff, was given in satisfaction of the first, or as a collateral security. The plaintiff first gave a particular applicable only to the count on the bill of exchange. The defendant obtained an order for particulars "of the bill of costs, charges, and expenses mentioned in the first count of the declaration," and the plaintiff thereupon delivered a particular containing a copy of his whole bill of costs in the action.



against G., and also the amount of the bill of exchange. At the trial, the judge ruled that the costs out of pocket only could be recovered on the first count:—Held, that the particulars were sufficient to enable the plaintiff to recover the rest of the bill of costs under the account stated. *Fisher v. Wainwright*, 1 L. & W. 480; 5 D. P. C. 102.

The defendant gave in evidence, for the purpose of proving that the second bill was given by way of satisfaction, an unsigned account of the plaintiff's claims, which had been delivered by him to the defendant, for the purpose of their being proved under G.'s bankruptcy, and one item of which was the amount of the bill of costs:—Held, that this was not such evidence of an account stated as would have enabled the plaintiff to recover the costs on the account stated, if his particulars had been insufficient for that purpose. *Id.*

Particulars stated that the plaintiff sought to recover 50*l.*, the amount of the note in the first count, and 50*l.*, the amount of the note in the second count, for the recovery whereof he would avail himself of the whole, or any part, of the declaration. No evidence was given in respect of the notes:—Held, that, under these particulars, an admission by the defendant that he owed the plaintiff 100*l.*, could not be given in evidence in support of the account stated. *Roberts v. Elsworth*, 2 D., N. S. 456; 10 M. & W. 653; 6 Jur. 456; 12 L. J., Exch. 15.

A declaration contained a count on a deed whereon the sum of 1,500*l.* was claimed as due for principal and interest, and also a count on an account stated. The particulars claimed 1,170*l.* for principal and interest due on the deed set forth in the first count. The defendant pleaded non est factum to the first count, and never indebted to the second. Before the trial the first count was struck out, but the pleadings and particulars were not altered:—Held, that the plaintiff might prove a written admission of 1,170*l.* being due for principal and interest, and recover that sum on the account stated. *Simmons v. Wood*, 5 Q. B. 170; D. & M. 355; 8 Jur. 355; 13 L. J., Q. B. 49.

A declaration contained two counts, each on a bill of exchange. The particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiff would rely on the whole or any part of the declaration for the recovery thereof:—Held, sufficient to entitle the plaintiff to proceed on the second count. *Hay v. Fisher*, 2 M. & W. 722; M. & H. 286.

The indorsement on a writ of summons was as follows: "The following are the particulars of the plaintiff's claim: 500*l.* for principal money due upon a warrant of attorney, executed by the defendant's wife (before her marriage with him), bearing date the 20th February, 1855. Interest thereon at the rate of 5*l.* per cent. per annum, from the 20th of February to the day of obtaining judgment in this cause. The plaintiff will also seek to recover the 500*l.* upon an account stated

between the plaintiff and the defendant's wife before her marriage." Upon an order for a further or better account, with dates and items of the particulars of the demand, the following was delivered: "1855, February 25th. Amount due to the plaintiff upon an account stated on this date, between the plaintiff and the defendant's wife, before her marriage, 500*l.*:"—Held, no compliance with the order. *Bayntun v. Satchell*, 17 C. B. 383.

**Stating credits.**—Where there is a debtor and creditor account, the particular should specify the matters for which credit is meant to be given. *Mitchell v. Wright*, 1 Esp. 280—Kenyon.

And stating the debtor side only is not sufficient. *Adlington v. Appleton*, 2 Camp. 410—Ellenborough.

The rule which requires the sum or balance claimed to be stated, does not require the plaintiff to state the items in reduction of his demand; it is sufficient if he states the credit which he gives generally, so as to show the balance he claims. *Smith v. Eldridge*, 5 N. & M. 408; 1 H. & W. 527; 4 A. & E. 64.

A plaintiff is not bound to give the defendant a statement of the items of the sums for which he has given the defendant credit in his particulars. *Myatt v. Green*, 13 M. & W. 377; 14 L. J., Exch. 34.

As to effect of giving credit in particulars, —see this title, IV.; of errors and variances, —see this title, IV.

#### IV. OPERATION AND EFFECT.

**In aid of declaration.**—The object of particulars is to inform the defendant of the nature of the plaintiff's claim, and to limit the proof of the latter to the amount therein mentioned; but it forms no part of the record itself. It cannot, therefore, be used in aid of the declaration. *Dempster v. Funnell*, 3 M. & G. 375; 4 Scott, N. R. 30; 1 D., N. S. 168.

**By way of explanation or of admission.**—An item of the plaintiff's demand appearing on the face of the particulars of the defendant's set-off given under a judge's order, is not such an admission as to supersede the necessity of proving it. *Miller v. Johnson*, 2 Esp. 602—Eyre.

Particulars cannot be resorted to for the purpose of explaining the pleadings. *Kilner v. Bailey*, 5 M. & W. 382.

Particulars stated a claim for wages, at 15*s.* per week, amounting altogether to 148*l.*, and gave credit for payments on account to the amount of 70*l.* At the trial, the defendant put the particulars in evidence, as showing a payment of 70*l.*; and the jury having found that the plaintiff was only entitled to wages at the rate of 7*s.* per week (which destroyed the balance of 78*l.*, claimed by the plaintiff), gave a verdict for the defendant:—Held, that the particulars were properly received, as an admission of the payment; and it not having

been objected, that they could only be used in reduction of damages, and not in bar of the action, that the verdict ought not to be disturbed. *Kenyon v. Wake*, 2 M. & W. 764; 6 D. P. C. 105. See *Nicholl v. Williams*, 2 M. & W. 758.

Although a plaintiff cannot give evidence beyond his particulars, he may take advantage of any evidence produced by the defendant to increase his demand. *Hurst v. Watkins*, 1 Camp. 68—Ellenborough.

When a plaintiff recovers a greater sum than he claims by his particulars, and upon discussion the court sanctions the principle on which he recovers, and judgment is entered up accordingly, no objection having been made to the excess above the particulars either at the trial or on the argument, the court will not reduce the judgment to the sum claimed by the particulars. *Bell v. Puller*, 2 Taunt. 285; 12 East, 496, n.

In an undefended action upon a note for payment of principal and interest by installments a verdict was not allowed to be taken for a larger amount than claimed in the particulars. *Walker v. Wadsworth*, 1 F. & F. 397—Crompton.

Particulars applying a payment to and satisfying the claim on one count:—Held, that the defendant must have a verdict on that count. *Swindel v. Jeffery*, 2 F. & F. 451—Blackburn.

A plaintiff is not precluded from explaining admissions in his particulars of payments made to him by the defendant, and of showing on what account such payments were made. *Mercy v. Gabat or Galot*, 6 D. & L. 656; 8 Exch. 651; 18 Jur. 419; 18 L. J., Exch. 347.

Particulars stated, that the action was brought to recover "cash received by the defendant, being 10*l.* in the pound on a debt of 52*l.* 5*s.*, at one time due from the plaintiff to the defendant, and which had been previously paid by the plaintiff to the defendant:—Held, that he was not bound by his particulars to prove an actual cash payment of 52*l.* 5*s.* to the defendant, and that he was entitled to succeed, on proof of payment of 80*l.* 10*s.*, being the amount of the bill, less a large percentage by way of discount, which the defendant had agreed to deduct. *Gaskill v. Skene*, 14 Q. B. 664; 14 Jur. 597; 19 L. J., Q. B. 275.

To the common counts, the defendant pleaded a set-off, and delivered particulars of his set-off with the plea. He afterwards withdrew his plea, and pleaded *puis darrein continuance*, that there had been a controversy between the plaintiff and himself about other matters in addition to those in the cause, that a balance of accounts had been struck between the parties, that the plaintiff admitted the set-off pleaded to be due, and that it was agreed that the balance struck should be paid by installment; and that the defendant should release the plaintiff from all liability on a certain contract, and that this agreement was accepted by the plaintiff

in satisfaction of his action. The plaintiff replied that he had been induced to enter into this agreement by fraud:—Held, that the particulars of set-off delivered with the original plea of set-off, and in which particulars the statement of account differed from the statement upon which the agreement was founded, were admissible for the purpose of explaining the plea. *Beckmaster v. Meiklejohn*, 8 Exch. 684; 23 L. J., Exch. 249.

Particulars of set off are merely explanatory of the plea of set-off, and the plaintiff, by putting them in evidence to prove his case, *ex gratia*, to rebut the defense of the Statute of Limitations, does not thereby admit the correctness of their contents. *Burkitt v. Blamchard*, 8 Exch. 89; 18 L. J., Exch. 34.

In an action which contained several demands, the defendant pleaded, except as to one, a set-off, and the Statute of Limitations. The plaintiff, in order to take the case out of the statute, put in evidence the particulars of set-off, containing an item, "Paid to the plaintiff, 15*l.*:"—Held, that the particulars were no evidence in support of the plea of set-off. *Id.*

Effect of giving credit in particulars.]—In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set-off, it shall not be necessary for the defendant to plead the payment or set-off of such sum or sums of money. Reg. Gen. Q. B., C. P. and Exch., T. T. 16 Vict. r. 13; 1 El. & Bl., App. lxxxi.

But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set-off where the plaintiff does not state the particulars of such set-off. *Id.*

Giving credit to the opposite party in a particular is not an admission that the money was due. *Miller v. Johnson*, 3 Esp. 602.

In an action by the payee against the maker of a note, dated the 28th day of June, 1837, the plaintiff, in his particulars, gave credit for payment of three years' interest on account. The note was actually made in 1839:—Held, that the interest for which credit was given was to be computed from 1837, and not from 1839. *Cheetham v. Sturtevant*, 13 M. & W. 515; 1 D. & L. 631; 13 L. J., Exch. 108.

Where a plaintiff gives credit in his particulars for a sum paid by the defendant, such payment is put on the same footing as if there had been a plea of payment; but it cannot be taken as an admission as against the defendant, with respect to any of the items in the entire account. *Gostley v. Harring*, 12 L. J., C. P. 32.

Where a plaintiff admits a payment gen-

ally,—as thus, “Cr. by bills, 1,500*l*.”—this is to be taken as a payment admitted to have been made to the plaintiff by the defendant. *Smethurst v. Taylor*, 12 M. & W. 545; 14 L. J., Exch. 86.

A declaration claimed 44*l*. 8*s*. The particulars, after giving credit, stated the balance due from the defendant to be 13*l*. 4*s*. The defendant pleaded payment of 15*l*. in satisfaction, and obtained a verdict:—Held, that the plaintiff was not entitled to judgment non obstante veredicto; inasmuch as credits given in the particulars need not be pleaded, a less sum than the debt in the declaration might, with credits so given, be equal to such debt. *Turner v. Collins*, 3 L. M. & P. 99; 15 Jur. 177; 30 L. J., Q. B. 259—B. C.—Erle.

A plaintiff, in his particulars, made charges subsequent to action brought, but gave credit also to the defendant for payments made after the commencement of the action. The defendant not having objected to the mode in which the plaintiff stated his claim in his particulars, until the under-sheriff was summing up:—Held, no misdirection on the part of the under-sheriff, that the jury should find for the balance claimed by the plaintiff. *Alexander v. Porter*, 1 D., N. S. 332; 6 Jur. 1124—B. C.—Coleridge.

Where a plaintiff's attorney accidentally gives credit in his particulars for a sum of money, which the defendant sets up as a cross demand, the court will allow the particulars to be amended on terms. *Preston v. Whiteheart*, 5 D. P. C. 720; W., W. & D. 363.

**Effect of variances and errors.**—A plaintiff may recover a demand in his particular, although he may have omitted to include such demand in a bill previously sent to the defendant. *Short v. Edwards*, 1 Esp. 374—Kenyon. And see *Blake v. Lawrence*, 4 Esp. 147.

A particular is not to be construed so rigidly as to nonsuit a plaintiff for inaccuracies which could not mislead. *Harrison v. Wood*, 8 Bing. 371; 1 M. & Scott, 536.

An error in a date, or other inaccuracy, will not warrant a nonsuit, unless the particular is so framed as to be reasonably calculated to mislead. *Id*.

In an action by assignees of a bankrupt, the declaration stated the cause of action to be money had and received to the use of the bankrupt; the particulars described it as had and received to the use of the plaintiffs:—Held, that it was not such a variance as would prevent the plaintiffs from recovering, it not appearing that the defendant could be misled by it. *Tucker v. Barrow*, M. & M. 137; 8 C. & P. 85; 7 B. & C. 622; 1 M. & R. 518.

In ejectment, to recover premises for non-payment of rent, a variance between the amount of rent stated in the particulars, and the amount proved at the trial to be due, is immaterial. *Tenny d. Gibbs v. Moody*, 10 Moore, 252; 3 Bing. 3.

In an action for not accounting for goods, and also for goods sold and money had, a bill

of particulars stating the demand to be for the goods (which it specifies), and for money had and received, is sufficient. *Hunter v. Welch*, 1 Stark. 224—Ellenborough.

The plaintiffs, spirit merchants, inadvertently delivered a bill of particulars for goods sold to the defendant in their trade of brewers. A verdict having been given for the plaintiffs on proof of delivery of spirits, the defendant obtained a rule nisi for a nonsuit, on the ground that he had been surprised by the variance between that particular and the proof; it appearing, however, that he had been neither surprised nor misled, the court discharged the rule. *Lambirth v. Roff*, 8 Bing. 411; 1 M. & Scott, 597.

A plaintiff, in his declaration and particulars, claimed damages for certain articles deposited with the defendant, which had not been returned, and of which due care had not been taken. Under the former description, in his particulars, he set out certain articles of glass, which, however, turned out to have been destroyed:—Held, that, under such particulars, he was not entitled to recover damages in respect of those articles. *Moss v. Smith*, 8 D. P. C. 537—C. P.

A plaintiff's particulars were for goods sold on the 6th January; the evidence given at the trial was of goods sold on the 28th May. A verdict having been found for the plaintiff, the court refused to set it aside, all other accounts between the parties having been settled. *Flemming v. Crisp*, 5 D. P. C. 454; M. & H. 28.

In his particulars of set-off a defendant claimed, “Cash, being the amount of the plaintiff's dishonored acceptance and charges, 21*l*. 6*s*.” dated August, 1840. He gave evidence of a bill of exchange for 19*l*., on which an action had been commenced, dated June 23d, 1840, and payable two months after date, indorsed to him by the plaintiff:—Held, that there was no variance by which the plaintiff could have been misled. *Parsons v. Wilson*, 4 Scott, N. R. 1; 1 D., N. S. 181; 5 Jur. 991.

A defendant cannot make at the trial of the cause any objection to the particulars which, if made earlier, the plaintiff or the court might have rectified. *Lovelock v. Cheveley*, Holt, 552—Gibbs.

As to amendment of particulars,—see AMENDMENT.

## Part-Owners.

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## Part Payment.

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## Parties.

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  - 1. *Generally.* See CONTRACT OR AGREEMENT.
  - 2. *Particular Contracts or Instruments.* See THE SEVERAL TITLES.
- II. TO ACTIONS.
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  - 2. *Particular Actions or Proceedings.* See THE SEVERAL TITLES.
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  - 4. *Adding or Amending.* See AMENDMENT.
  - 5. *Effect of Absence, Disability, &c.* See LIMITATION OF ACTIONS AND SUITS; NEW TRIAL.
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- III. RIGHTS AND REMEDIES PECULIAR TO PARTICULAR CLASSES OF PERSONS OR PERSONAL RELATIONS. See THE SEVERAL TITLES.

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## Partnership.

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The law as to partnership is a branch of the law of principal and agent. A partner embraces both characters; and where a man orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, he is the principal, and the person so employed is the agent; and the principal is liable for the agent's contracts. *Wheatcroft v. Hickman*, 9 C. B., N. S. 47; 8 H. L. Cas. 268; 7 Jur., N. S. 105; 30 L. J., C. P. 125; 8 W. R. 754.

A right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim; but the real ground of the liability is that the trade has been carried on by persons acting on his behalf. The liability of one partner for the acts of his copartner is in truth the liability of the principal for the acts of his agent. *Per Lord Cranworth. Ib.*

The law of partnership is a branch of the law of agency, and the test of partnership is not simply whether the alleged partner was to receive a share of profits, but whether he constituted his alleged copartners his agents for carrying on business. The receipt of profits is only important as a consequence of such agency, and a ground for inferring it in certain cases. *English and Irish Church and University Assurance Society, In re*, 1 Hem. & M. 85; 11 W. R. 681; 8 L. T., N. S. 724.

The test whether a person who is not an ostensible partner in a trade, is nevertheless, in contemplation of law, a partner, is, not whether he is entitled to participate in the profits, although this affords cogent, often conclusive, evidence of it, but whether the trade has been carried on by persons acting on his behalf. *Kilshaw v. Jukes*, 8 B. & S. 847; 32 L. J., Q. B. 217; 9 Jur., N. S. 1231.

When a person is sought to be made liable on the ground of his being a partner, the true test is, whether or not he has constituted the other alleged partner his agent in respect of the partnership business. *Bullen v. Sharp*, 1 H. & R. 117; 1 L. R., C. P. 86; 12 Jur., N.

S. 247; 35 L. J., C. P. 105; 14 W. R. 338; 14 L. T., N. S. 72—Exch. Cham.

A participation in the profits, though cogent, is not conclusive evidence of a partnership. *Ib.*

As to power of partners to bind each other, in general,—see this title, II., 2; III., 2; after change in or dissolution of partnership,—see this title, V., 2; VI., 2, *b.*

**II. WHAT CONSTITUTES; PARTNERSHIP AGREEMENTS AND ARTICLES.****1. Who are Partners, generally, and as between the Parties themselves.**

(a) Agreements to become Partners; Partnership Deeds and Articles, and their Effect, in General.

**Terms and conditions; when partnership commences.]—**Where no time is fixed for the commencement of a partnership in an agreement between the parties, it must be taken to have commenced on the date of the agreement. *Williams v. Jones*, 5 B. & C. 108; 7 D. & R. 549.

A. and B. agreed to become partners from a subsequent day, upon certain terms, which were to be embodied in a deed, to be executed on such subsequent day. The deed was executed on a day later than that appointed:—Held, that B. was bound by the contract of A., entered into in the name of the firm, between the day appointed for the execution of the deed and that on which it was actually executed. *Battley v. Bailey or Lewis*, 1 Scott, N. R. 143; 1 M. & G. 155; 4 Jur. 537.

In May, 1839, A., a creditor of the firm of B. and S., proposed to become a partner with them, the terms of the intended partnership being, that A. should bring in 1,000*l.* in money and 1,000*l.* in goods, and should be entitled to one-third of the profits, and be a dormant partner: the name of the firm was to be changed to B., S. & Co., and the partnership was to date from the 1st April, 1839, but A. reserved to himself the option of determining, at any period within twelve months from that day, whether he would become a partner. The name of the firm was altered accordingly, and a new banking account was opened in the name of B., S. & Co.; and A. advanced the 2,000*l.* to the firm; but within the twelve months he declared his determination not to enter into the partnership:—Held, that A. was not liable for goods supplied to the firm after May, 1839, for that he never became a complete partner. *Gabriel v. Exill*, 9 M. & W. 297; Car. & M. 358. S. P., *Turguand, the parts*, 2 Mont., D. & D. 339.

As to agreements to continue or renew partnerships after dissolution,—see this title, V., 1; VI., 2, *a*; for continuance by representatives after death of partner,—see this title, V., 1.

**Power to nominate partner.**—A covenant by A. to admit a nominee of B. as a partner with him, will not of itself create a partnership between them. *Davies, Ex parte*, 4 De G., J. & S. 523; 9 Jur., N. S. 859; 32 L. J., Bank. 68; 8 L. T., N. S. 745—C.

An agreement was entered into between A. and B., whereby in effect A. was to carry on a certain business in the name of A. & Co., for the benefit of himself and any person whom B. might at any time within eight years nominate; B. was to make certain advances to A. for the purpose of the business, and become surety for him to a certain company; A. was to give B. promissory notes for his advances and any sums he might pay as surety, and to carry on the business in partnership with B.'s nominee for twenty-one years on certain specified terms: the profits of the business were to be for the first eight years applied in paying A. 100*l.* a year, and then in paying B. his advances with interest; and the residue was to be divided between A. and B.'s nominee in certain specified proportions, and losses were to be borne in the same proportions. The agreement gave B. a right to see the accounts relating to the business, and contained other special clauses under which B. might at any time within the eight years have nominated himself a partner. Before the eight years had elapsed, and before any nomination had been made by B., A. became bankrupt, being indebted to B. for advances. There being no person who claimed to be a joint creditor of A. and B.:—Held, that B.'s executor was entitled to prove against A.'s estate for the advances, the agreement not having constituted A. and B. partners as between themselves. *Id.*

A partner destined his two sons to be taken into the partnership business, but one of them only availed himself of the intention, and entered into the partnership. There was an understanding that on the death of a partner the interest should be confined in his family. The son who had entered the concern having died leaving several sons, and leaving his brother executor and trustee under his will, the brother nominated his own son to the business to the exclusion of his nephews. On a bill by the widow of the deceased partner, praying that the brother might be ordered to account for the benefit accrued to his son, which ought to have been enjoyed by the son of the deceased partner:—Held, that the widow not having claimed the benefit of the nomination, and having acquiesced in the appointment made, could have no claim in equity. *Vansittart v. Osborne*, 20 W. R. 195—R.

**Illegality.**—When parties enter into a contract of partnership in violation of the law it is void, and will confer no right on either party as against the other. *Armstrong v. Lewis*, 2 C. & M. 274; 4 M. & Scott, 1—Exch. Cham.

S., an attorney, entered into articles of partnership with the defendant, by which,

after reciting that S. held many offices, clerkships and stewardships of manors, it was agreed that the defendant should enter into partnership with S. in the business of an attorney, and that the emoluments from the offices, clerkships and stewardships held by S. should be considered partnership property, and be distributable accordingly; and if S. should die during the partnership, the defendant should be interested in one moiety of the partnership business, and his executor should be entitled to the profits of the remaining moiety. At the time of the agreement S. was clerk of the peace for a liberty, clerk to the magistrates, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the deputy-lieutenants, steward of certain manors and coroner for the liberty:—Held, that the articles of partnership were not void, as being in contravention of the Sale of Offices Acts, 5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126. *Sterry v. Clifton*, 9 C. B. 110; 14 Jur. 312; 19 L. J., C. P. 237.

Two persons entered into an agreement to be partners in the business of pawnbrokers, to be carried on under the firm of one of them; and, in pursuance of the articles of agreement, that one's name alone was painted over the door of the premises; the license also was taken out, and the tickets to the customers were issued in his sole name; while the other partner (carrying on another business) attended occasionally to inspect the books of the firm, and drew a percentage on his share of the capital out of the profits:—Held, that the agreement constituted a secret partnership, and was therefore illegal and void, as being in contravention of the policy of 39 & 40 Geo. 3, c. 99. *Gordon v. Houden*, 12 C. & F. 237.

A partnership of twenty persons for carrying on the business of farming, is within the Companies Act of 1862 (25 & 26 Vict. c. 89, s. 4), and if not registered under that act, is illegal. *Harris, app., Amery, resp.*, 1 L. R., C. P. 148; 12 Jur., N. S. 165; 35 L. J., C. P. 89.

Contracts restraining partners from carrying on the same trade for their private benefit are legal. *Morris v. Colman*, 18 Ves. 433.

**Effect of fraud and misrepresentation.**—If a person is induced by false representations as to the nature and profits of a business to enter into and continue in partnership with another, and to give him money as part of the capital of the concern (the whole scheme not being a mere sham), the latter cannot be indicted for having obtained the money by false pretences. *Reg. v. Watson, Dears. & B. C. C.* 348; 4 Jur., N. S. 14; 27 L. J., M. C. 18.

It is no answer to an action for breach of an agreement to enter into partnership with the plaintiff that, after the agreement, and before breach, the defendant discovered that the plaintiff had, before the agreement, acted with fraud and dishonesty towards a former partner of the plaintiff in the conduct of the partnership business, which had been carried



by the plaintiff and such partner, and that such fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the agreement. *Andrews v. Garslin*, 7 Jur., N. S. 1124; 31 L. J., C. P. 15; 10 C. B., N. S. 444; 9 W. R. 782; 4 L. T., N. S. 580.

Misrepresentation of material facts is a ground for setting aside a partnership contract. *Rawlings v. Wickham*, 1 Giff. 355; affirmed on appeal, 3 De G. & J. 304; 5 Jur., N. S. 278; 28 L. J., Chanc. 188.

B. and W., who were partners in a bank, agreed to take R. into partnership with them. W., who took no actual part in the business, and was known to R. not to do so, joined with B. in producing to R. during the negotiation, as a true account of the affairs of the bank, a paper stating the amount in which it was indebted to customers to be 11,000*l.*, the amount being in fact, 20,000*l.* R. entered into the partnership without examining the books, and continued in it for four years, taking no part in the business, and never examining the books. At the end of that time the bank turned out to be insolvent. R. then filed a bill against B. and the executors of W., asking to have the agreement for partnership rescinded, and to have an indemnity against the debts of the concern:—Held, that the delivery of the paper to R. as a true account of the state of the bank was such a misrepresentation as entitled R. to have the contract rescinded. *Id.*

Held, that the case as regarded W. was not varied by the facts that W. took no part in the affairs of the bank, and was known by R. not to do so, and did not know the representation to be untrue. *Id.*

A. and B., in 1856, entered into partnership as surgeons, B. paying A. 75*l.* premium, upon the representation that A.'s profits were 700*l.* per annum. Disputes subsequently arose, and it was alleged by B. that the profits of A. were not half the amount represented, an allegation which was supported by A.'s income tax returned and other evidence. There was no evidence of the actual receipts of A. Romilly, M. R., decreed a dissolution of the partnership, and a return of one-half the premium; and this decision was affirmed on appeal, on the ground of the misrepresentation as to the amount of A.'s profits previously to the partnership. *Jauncey v. Knowles*, 29 L. J., Chanc. 95.

A person agreed to purchase a share in a partnership business, on the footing of a balance sheet prepared by an accountant employed by the vendor, which all parties believed (with the exception of slight errors) to be, and was treated as, generally correct. It turned out to be grossly inaccurate in regard to the existing liability. The court set aside the contract. *Charlenworth v. Jennings*, 34 Beav. 96.

**Actions for breach.**—An action cannot be maintained for the breach of an agreement for not entering into partnership with the plaintiff,

without proof of the terms on which the parties agreed to become partners. *Figes v. Cutler*, 3 Stark. 139—Abbott.

An action will lie for the breach of an agreement entered into by one of several partners to admit a stranger into the firm; for he is bound to procure the assent of his co-partners. *M'Neill v. Read*, 2 M. & Scott, 89; 9 Bing. 68.

In such an action it is a sufficient consideration for the defendant's promise, that the plaintiff is willing to become a partner. *Id.*

It was averred and proved, by way of special damage, that the plaintiff had relinquished a valuable appointment, in order to be ready to avail himself of the contract:—Held, that the jury was properly directed, that they might, in estimating the damages, take into their consideration what he had lost by such relinquishment. *Id.*

By articles for a copartnership, the plaintiff agreed to take the defendant as a partner, and give him half the interest in the lease of a house, to commence from and after the 29th September: and the defendant covenanted to pay 300*l.* on or before that day, as a premium to be admitted a partner:—Held, that on non-payment of the money at the day the plaintiff might sue, averring his readiness to have taken the defendant as a partner, without executing or tendering articles of copartnership, or a conveyance of the lease. *Walker v. Harris*, 1 Anst. 245.

A declaration alleged that, in consideration that the plaintiff and D. would sell and assign to the defendant a copartnership business, the defendant promised the plaintiff to pay him all the money that he had advanced in respect of the copartnership, and also promised the plaintiff and D. that he would discharge all the debts due from them as such copartners, and all liabilities to which they were subject as such. The declaration after averring performance by the plaintiff and D., averred that the plaintiff had, at the time of making the promise, advanced a certain sum in respect of the copartnership, and for which the copartnership was, at the time of the promise, accountable to him, and laid as a breach the non-payment by the defendant to the plaintiff of that sum:—Held, good, on motion in arrest of judgment. *Jones v. Robinson*, 1 Exch. 454; 11 Jur. 933; 17 L. J., Exch. 36.

By articles of partnership it was agreed that, except as thereafter provided, none of the partners should hire any clerk or servant in the business, but T., one of the partners, might introduce two of his sons as pupils or clerks, at a salary, such sons to have an option of becoming partners. T. introduced two sons, the second of whom died without becoming a partner:—Held, that T. could not introduce or employ a third son as pupil or clerk. *Watney v. Trist*, 45 L. J., Chanc. Div. 412—V. C. H.

Held, also, that an action to restrain the breach of a partnership covenant would lie,

though the plaintiff did not pray for a dissolution. *Ib.*

**Enforcing specific performance.**—A bill does not lie for specific performance of a partnership agreement, where the sole relief sought is the payment of a sum of money, for which there is a remedy by action. *Bagnell v. Edwards*, 10 Ir. R., Eq. 215—V. C.

**Recovering back consideration of agreement.**—A plaintiff agreed to enter into partnership with W., who owed money to the defendant. The plaintiff, with the sanction and authority of W., wrote to the defendant, inclosing the halves of two bank notes, and asking for a statement of the full amount due from W. The defendant wrote, acknowledging the receipt of the half notes, and stating that on receipt of the second halves he would send a stamped acknowledgment. The agreement for the partnership between the plaintiff and W. went off, and the plaintiff required the defendant to return the half notes; on his refusal to do so, he brought an action for their recovery:—Held, that he was entitled to recover. *Smith v. Mundy*, 6 Jur., N. S. 977; 20 L. J., Q. B. 172; 3 El. & El. 22; 8 W. R. 561; 2 L. T., N. S. 373.

As to construction of partnership agreements and articles in respect of relative rights, powers and duties of partners,—see this title, III., 1.

(b) Joint Adventures and Speculations; Participation in Profits and Losses.

**Joint interest in adventure or undertaking, in general.**—Two persons contracted to assist another, in running a stage coach, with their respective horses, but to give in their accounts separately:—Held, separate contracts. *Smith v. Taylor*, 2 Chit. 142.

The plaintiff and defendant ran a stage-coach from Bath to London, the former providing horses for one part of the road, and the latter for another, and the profits of each party were calculated according to the number of miles his horses went; and the plaintiff received the fares of the passengers, and gave a weekly account thereof to the defendant:—Held, that they were partners. *Fremont v. Coupland*, 9 Moore, 319; 2 Bing. 170; 1 C. & P. 275.

Under an agreement between the plaintiff and the defendants, that D. should be employed by the "said parties hereto" for a certain time, and the plaintiff should be employed for a certain time also; and "that the said parties hereto" should be allowed to have the use of certain property for a certain period, and at the expiration of the agreement the property should be given up to the plaintiff:—Held, that the words the "said parties hereto" meant the defendants only, and therefore that the plaintiff was not a partner with the defendants in the property. *Bryant v. Wardell*, 2 Exch. 479.

A., P. and B., members of a provisional

committee of a projected company, hired some premises on the 11th April, 1846, as joint tenants, for the offices of the company, of which the company took possession on the 7th April following. On the 29th September, 1846, the deed of settlement was registered, having been executed by A. and P., which recited that the company was indebted to P. in 550*l.* for money advanced by him for the formation of the company and rent of offices, and named A. and P. as two of the directors. The rent being in arrear, the lessor sued A., P. and B. on the demise, and, after verdict, levied for debt and costs on A. In an action by A. against P. for his proportion:—Held, that no partnership existed between the parties, and that A. was entitled to recover contribution from P. *Boulter v. Peplow*, 9 C. B. 493; 14 Jur. 248; 19 L. J., C. P. 191.

Two defendants who carried on business in partnership as ship and insurance brokers, and the plaintiff, who carried on business alone as a merchant and commission agent, jointly agreed to supply arms to a foreign government. In the first contract with that government the defendants were described only by their partnership name, and it was signed on their behalf in that name. The second contract was signed by an agent of the plaintiff and the defendants, who was described in it as acting on behalf of the defendants (giving only the name of the firm) and the plaintiff, and as "agent of the two houses above named":—Held, that on the form of these contracts, in the absence of evidence to the contrary, the adventure must be considered to have been undertaken by the defendants as one person and the plaintiff as another person, and not by the three as individuals, and that the plaintiff was entitled to a moiety of the profits. *Warner v. Smith*, 1 De G., J. & S. 337; 32 L. J., Chanc. 573.

E. experimented in sewage. B. in yeast, and W. supplied both of them with money for the purpose. The three traded ostensibly as partners under the names of Stuart & Co., Ward & Co., and Hofmann & Co., and ultimately under that of Hofmann, Bowing, Ellis & Co. Prior to 1869, the terms of the ostensible partnership subsisted in parol only, the two businesses being speculative and hazardous; but in 1869, success in the yeast manufacture appearing to have been at last obtained, a draft deed of partnership was prepared, but before its execution a rupture occurred among the partners or intending partners, and the deed remained unexecuted. B. and W. expelled E. forcibly from the premises, and subsequently took out a patent for the yeast invention in their own names. E. filed a bill claiming to be restored to the partnership and to have the benefit of the patent, and an injunction and an account. It was proved that no yeast had ever been sold:—Held, that these circumstances showed no partnership between E. and W. and B. *Ellis v. Ward*, 21 W. R. 100—V. C. B.

A. and B., together with others, entered

into and signed the following contract:—  
 “Being desirous that the communication between London, Herne Bay and Margate, should be kept open during the ensuing winter, by means of a small steamboat, we hereby authorize Mr. G. A. B. to charter the Brockel Bank, or any other suitable vessel for that purpose, on the best possible terms, and to make the necessary arrangements for her running on the station during the whole or such part of the winter as may be deemed expedient, on our joint account; each of us taking a proportionate interest in this enterprise, according to the amount subscribed, and the profit or loss to be divided among us in proportion to our subscription. In order to form a fund for defraying the necessary expenses, we have each of us paid 10*l*. per cent. on the amount of our subscriptions, and we bind ourselves, and agree to pay Mr. G. A. B. such further installments, each of us in proportion to his subscription, as it may be necessary to call for from time to time, should the earnings of the boat not be sufficient to pay the expenses; it being, however, understood that our liability is not to extend beyond the amount subscribed by us respectively.”—Held, that this agreement constituted a partnership between the parties who signed it; and that A., who had paid such debts arising from the undertaking, as the earnings of the boat were insufficient to satisfy, could not maintain an action for money paid against B., who had not paid up his subscription; but that the proper form of action was a special action for the non-performance of the undertaking to pay A. the installments from time to time. *Brown v. Tapscott*, 6 M. & W. 119.

By the rules of a society for the protection of trade, the professed object of which was to watch the progress of measures through parliament affecting the trade interest, and to protect its members from the practices of the fraudulent and dishonest, the committee had the appointment of the printer and stationer to be selected from among the members of the society, and to the committee was to be referred the defraying of expenses and the applying and disposing of the moneys of the society. It was also provided by the rules that the sum of 10*l*. should be left in the secretary's hands to meet the current expenses, but that all orders for the payment of money should be drawn by the secretary upon the treasurer at a committee meeting. The plaintiff was appointed printer and stationer to the society, and shortly afterward paid his subscription. The defendants, who were members of the committee, passed the resolution for the orders for printing and stationery, which were supplied by the plaintiff:—Held, that the plaintiff was not precluded by the rules from suing the defendants, as the rules did not create a partnership between the members of the society, and that it was not to be inferred from the rules that the plaintiff looked to the fund, and not to the parties who gave the orders. *Caldicott*

*v. Griffiths*, 8 Exch. 898; 23 L. J., Exch. 54; 1 C. L. R. 715.

A horse-dealer and jobber, by a deed, assigned all his stock in trade to trustees, for the benefit of his creditors, until all his then debts should be paid off, to hold, on trusts, that so long as A. should observe the orders of the trustees he was to be allowed to carry on and conduct the business, subject to their orders, but that they should have the power to determine his possession, on his failing to observe their orders; that all moneys received in the business were to be paid to the account of the trustees, and all moneys paid by their checks; and that A. was to receive a weekly salary. The creditors also advanced a large sum of money to carry on the business. The business was carried on by A. for some time, his name being over the door at the place of business, and he had dealings with various persons as if he carried on the business on his own account; but on his neglecting to observe the orders of the trustees, they determined his right to carry on the business, and he admitted in writing that they had a right to and did assume the possession of the stock in trade. The trustees thereupon gave notice to the parties who had some of the horses, part of the stock in trade, that they belonged to them. Two days after this notice, A. committed an act of bankruptcy. On an interpleader issue to try whose horses these were:—Held, that the deed did not create a partnership between A. and the trustees; and that the trustees, by allowing A. to carry on the business in his own name, were not estopped from denying the horses were A.'s. *Price v. Groom*, 2 Exch. 542; 17 L. J., Exch. 346.

A deed of assignment in the usual form to trustees for the benefit of creditors, which empowers the trustees to employ the debtor or other person in winding up his affairs, and in collecting and getting in his estate and in carrying on his trade if thought expedient, does not constitute a partnership between the creditors. *Coate v. Williams*, 7 Exch. 205; 21 L. J., Exch. 116.

**Agreements for participation in profits, or in profits and losses, generally.**—A. purchased two bullocks, and agreed to turn them upon the lands of B., and when fattened to sell them, and divide with him the net profits; this was held to be no partnership, but a mode of paying for the pasture. *Wish v. Small*, 1 Camp. 331, n.—Thompson. And see *Benjamin v. Porteus*, 2 H. Bl. 590.

Where the plaintiff recommended the defendant to make consignments to a merchant abroad, and it was agreed that the commission on all sales of goods so recommended should be equally divided, without allowing any deduction for expenses:—Held, that this was a participation in profit, and constituted a partnership between the plaintiff and such foreign merchant. *Cheap v. Cramond*, 4 B. & A. 663.

The plaintiff agreed with the defendant to convey by horse and cart the mail between N.

and B., at 9*l.* a mile per annum, and to pay his proportion of the expense of the cart, &c.; money received for the carriage of parcels to be divided between the parties, and the damage occasioned by loss of parcels, &c., to be borne in equal portions:—Held, that the agreement constituted a partnership, and not a mere measure of wages, and consequently the plaintiff could not sue the defendant for the 9*l.* per mile. *Green v. Beesley*, 2 Scott, 164; 2 Bing. N. C. 108; 1 Hodges, 199.

Where a merchant employed a broker to purchase goods on speculation, and agreed verbally to allow him a certain proportion of the profits arising from the sale, as a remuneration for his trouble, and by way of brokerage, and that he should also bear a proportion of the losses:—Held, that the broker could not be considered such a partner with the merchant, as to vest in him a property in goods so purchased, or in the proceeds thereof, as against the assignees of the latter, after he became bankrupt; although, as to third persons, he might have been liable as a partner. *Smith v. Watson*, 3 D. & R. 751; 2 B. & C. 401. But see *Caldwell v. Gregory*, 1 Price, 115.

A partner in a firm contracted to give his clerk one-third portion of his (the partner's) own share in the profits. The other partners knew of and assented to the arrangement:—Held, that this did not make the clerk a partner. *Holme's case*, 2 Lewin C. C. 256—Chambre.

A. having neither money nor credit, offered to B. that if he would order with him certain goods to be shipped upon an adventure, and if any profit should arise from them, B. should have half for his trouble; B. having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B. alone:—Held, that such contract did not constitute a partnership as between themselves, but only an agreement for a compensation for trouble and credit, though B. was liable as a partner to third persons, creditors. *Hesketh v. Blanchard*, 4 East, 143.

A. sold to B. his interest in the profession and practice of a surgeon and an apothecary, carried on by him in Park street, for 900*l.*; 500*l.* to be paid on the execution of the deed, and 400*l.* at the expiration of a year. A. covenanted not to exercise the profession within three miles of his then place of business, and, also, that during one year from the date of the deed, he should continue to reside in Park-street, and to carry on and attend to the profession and practice, as he had hitherto done, and that he would, to the utmost of his power, introduce B. to his patients, and do every reasonable act for promoting the interest of the concern. And B. covenanted to allow A., during the year, a moiety of the clear profits of the concern, to be paid at the expiration thereof:—Held, that the parties were not thereby constituted partners during the first year, and, therefore, that B. might sue A. for moneys received by

him from their patients during that year. *Rawlinson v. Clarke*, 15 M. & W. 293; 15 L. J., Exch. 171.

A. and B. were tailors; A. employed B. to obtain orders for him, and agreed to allow him a share of the profits by way of commission upon such orders. B. carried on the business with A., but his name was not joined with that of A. All goods were ordered and paid for by A., and all debts were paid to him alone. B. set up a partnership:—Held, that a right to a share of the profits did not necessarily create a partnership, and there was no evidence to prove a partnership on the part of B. *Andrews v. Pugh*, 24 L. J., Chanc. 59.

An agreement between underwriters to act in concert, and share equally the profit and loss of all insurances, constitutes a partnership, though each underwrote policies in his own name for distinct sums. *Brett v. Beckett*, 3 Jur., N. S. 31; 26 L. J., Chanc. 130—R.

An agreement between two persons to divide the profit or loss upon a sale of goods which are to be bought and paid for by one of them does not create a joint property in the goods. *Alfaro v. De la Torre*, 24 W. R. 510; 34 L. T., N. S. 123—R.

Y., a merchant in Costa Rica, obtained from A. an introduction to T., a merchant in London, upon an agreement that A. should share the profit or loss upon all consignments made by Y. to T. Y. purchased produce with his own moneys and consigned it for sale on his account to T., drawing bills against the consignments, and at the same time informing T. of the interest which A. had in the transaction. A. (without the knowledge of Y.) wrote a letter to T., pledging his interest in the consignment to secure an antecedent debt of his own to T. T. having failed to meet the bills, and the goods consigned not having been resold, T. claimed an interest in the goods under the pledge by A.:—Held, that the arrangement between Y. and A. constituted no such partnership as to entitle A. or any one claiming under him to an interest in the goods themselves as against Y. *Id.*

**Agreements for payment for services out of profits.**—An agent who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods. *Meyer v. Sharpe*, 5 Taunt. 74; 2 Rose, 124.

By indenture between the plaintiff of the one part, and the defendants, who were partners in a manufacture of which the plaintiff had been the patentee, of the other part, it was stipulated that the plaintiff should have the conduct and management of the business, and that the remuneration which he should receive in respect of his services should be such a sum of money as would be equal to 40*l.* per cent. upon the net profits; that a reduced amount should be paid to his executors in the event of his death until the expiration of the license; that the plaintiff might purchase the business on certain terms; that the defendants might determine the plaintiff's engagement as manager if he should not in every respect perform the covenants

maintained in the indenture, but that so long as he continued to observe them his appointment as manager should be irrevocable during the continuance of the license, and that nothing therein contained should extend to constitute a partnership:—Held, there being an absence of every incident of partnership except that of sharing in the profits, that that circumstance alone did not constitute the indenture a contract of partnership, but that it amounted only to a contract of hiring and service. *Stocker v. Brocklebank*, 3 Mac. & G. 250; 15 Jur. 591; 20 L. J., Chanc. 401.

The following agreement: "S. W. engages to take charge of the glebe land of the Rev. J. C., his wife undertaking the dairy and poultry, at 15s. a week, till Michaelmas, 1850, and afterwards at a salary of 25l. a year, and a third of the clear annual profit after all expenses of rent, rate, labor and interest on capital, &c., are paid, on a fair valuation, made from Michaelmas to Michaelmas; three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by S. W., who occupies it as bailiff, in addition to his salary. March 12, 1850. (Signed) J. C., S. W.," is not a contract of partnership, but an agreement for the hire of a laborer. *Reg. v. Wortley*, 2 Den. C. C. 833; 15 Jur. 1137; 21 L. J., M. C. 44.

In June, 1844, A. entered the service of B., as book-keeper and cashier, and so continued until December, 1848, without coming to any agreement as to the amount of his salary. It was stated by A., that in December, 1848, it was agreed between him and B., that the salary should be at the rate of 250l. a year, from June, 1844, and that the reason that such arrangement was not made before was, that B. was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which A. expected to be paid. B. became bankrupt in February, 1849:—Held, that A. was a clerk, and not a partner, and was entitled to prove for his salary. *Hicken, Ex parte*, 3 De G. & S. 662; 14 Jur. 405; 19 L. J., Bank. 8.

On a negotiation for a partnership, it was agreed in writing that B. should not be a partner, but a clerk only, for three years to T. B.'s salary was to be ascertained by the profits of the business, but so as not to render B. a partner. B. appeared to act in the business as a partner, and the business was carried on under the name of T. & Co.:—Held, that the agreement did not constitute a partnership. *Edmondson v. Thompson*, 5 L. T., N. S. 428; 31 L. J., Exch. 207; 8 Jur., N. S. 235; 10 W. R. 300.

In April, 1854, A. contracted with the Admiralty for conveyance of mails by steam-vessel. The contract was to continue till October, 1858, and should then determine, if either party should have given twelve months' notice, or it might continue longer, being determinable on similar notice at any time. On 30th November, 1854, A. engaged B. during the existence of this contract, as superintending engineer of the vessels employed in

performing it, at a yearly salary, and, in addition thereto, a sum equivalent to 10 per cent. on the net profits. On 20th June, 1855, A.'s contract with the Admiralty was annulled, and a fresh one was entered into, determinable in 1863:—Held, that the contract between A. and B. was one of hiring and service, and not a partnership. *Harrington v. Churchward*, 6 Jur., N. S. 576; 29 L. J., Chanc. 521; 8 W. R. 303—V. C. W.

An agreement dated in August, 1864 (previously to the passing of 28 & 29 Vict. c. 86), provided that an underwriting account at Lloyd's should be carried on in the name of the defendant, and the subscription paid in his name; that all policies, losses, and averages should be signed and settled by the defendant, or by the plaintiff as his agent; that the plaintiff should apply the whole or such part of his time and attention to the business as might be required for conducting the same; that proper books of accounts should be kept by the plaintiff, he obtaining such assistance from time to time as he might find necessary, subject to the approval of the defendant; that the plaintiff should be paid or allowed a salary of 150l. by the defendant; that the profits should be divided between the plaintiff and the defendant in the following proportions, viz., that the defendant should be entitled to four-fifths and the plaintiff to one-fifth; that if in any one year the business should not yield any profit, but a loss should accrue to the defendant, then he alone should bear and pay the loss, and the plaintiff should be entirely exempt from bearing or paying any part or proportion thereof, and any profit arising from the business of any one year should not be set off against or reduced by the loss in any other year; and that if after the division of profits in any one year any unexpected claim or demand should be made upon the partners, they should advance and pay their respective proportions, nevertheless so that the plaintiff be not called upon to pay any greater sum of money in respect of the business of any one year than the amount of the sum he should then have received as and for his share of the profits in respect of the business for that same year:—Held, that the contract was one of hiring and service, and not of partnership. *Rosa v. Parkyns*, 20 L. R., Eq. 331; 44 L. J., Chanc. 610—R.

**Agreements for repayment of advances out of profits.**—A. being established in trade, and wishing to increase his capital, entered into a deed of copartnership with B. for ten years, who advanced 20,000l. upon a covenant that he should receive 2,000l. per annum, during the partnership, out of the profits, if there were any, and if none, out of the capital; that he should not be answerable for any losses or expenses incident to the concern, and that the business should be carried on in the name of A. only; that at the end of the ten years, if the partnership determined by efflux of time, he should be repaid the 20,000l. by installments at three months' date, bearing legal interest; and that if default should be

made in the annual payment of 2,000*l.*, or the joint capital should be at any time reduced to 20,000*l.*, then he should be at liberty to terminate the partnership, and repay himself the 20,000*l.* advanced immediately:—Held, that, upon the face of the deed A. and B. were partners. *Gilpin v. Enderby*, 1 D. & R. 570; 5 B. & A. 955; 5 Moore, 571.

W. agreed with E. to advance him a sum of money, for the purpose of manufacturing certain inventions; and it was agreed, that if the inventions should become of public or private use, W. should be entitled to one-third of the profits of the inventions. The agreement contained an express promise, on the part of E., to repay the sums of money advanced by W.:—Held, in an action brought by W. to recover the money thus advanced, that this agreement did not constitute a partnership between the parties with respect to that sum. *Elgie v. Webster*, 5 M. & W. 518; 8 Jur. 1107.

W., being in difficulties, mortgaged to M. certain patents, to secure advances previously made for the purpose of developing the patents, and paid him, out of the proceeds of the patents, 6*l.* a week:—Held, that this payment did not constitute a partnership between them. *Macmillan, Ex parte, Whittaker, In re*, 24 L. T., N. S. 143—Bank.

K. advanced money to G. on the faith of a letter which he insisted constituted a contract of partnership in the profits of the business of the Italian Opera at Covent Garden. G. insisted that it amounted to nothing but an agreement to pay the amount of the loan and the interest on it out of the profits (if any should arise), but that the concern remained his alone. The letters which passed between the parties were held to bear this construction, and, therefore, an account as of the profits of a partnership was refused. *Knox v. Gye*, 5 L. R., II. L. Cas. 656.

The advance was made with reference to the business of the Italian Opera at Covent Garden, the lease of which theater was in the name of G. alone. That theater was burnt down in 1850, and G. hired another theater (the Lyceum) and carried on the business of the Italian Opera there, and in two years' time returned to a new theater at Covent Garden, which had been built in the interval, and of which the lease, as in the former case, had been granted in his name alone:—Held, that the true construction of the letters between the parties showed that the agreement between them was confined to the old Covent Garden theater alone, and, therefore, an account of profits alleged to have arisen at the Lyceum and the new Covent Garden theaters was refused. *Id.*

**Agreements for payment of annuities out of profits.**—In consideration of B. guaranteeing 5,000*l.* to S. in his business of an underwriter, until by such business he should acquire from the profits 5,000*l.* clear, S. promised that he would pay B. an annuity of 500*l.*; and if at the end of three years it should

appear that one-fourth of the net annual profits amounted to more than 500*l.*, S. further promised that he would increase the annuity to a yearly sum equal to one-fourth of such net annual profits. On his marriage, S. executed a deed of settlement, by which he conveyed all the proceeds of his underwriting business to trustees, of whom B. was one, in trust, first, to pay the annuity to B.; secondly, to pay S. an allowance of 500*l.* a year, to be increased to 750*l.* if the business prospered; and when the accumulated surplus had reached 8,500*l.*, and so remained for two years, then, thirdly, to re-assign the money and profits to S. After the marriage this deed was acted on by B. and his co-trustee:—Held, that neither by the deed nor by any other proceeding had B. established such a relation between himself and S., in his business of underwriter, as to constitute him a partner. *Bullen v. Sharp*, 1 H. & R. 117; 1 L. R., C. P. 86; 12 Jur., N. S. 247; 85 L. J., C. P. 105; 14 W. R. 888; 14 L. T., N. S. 72—Exch. Cham.

For analogous decisions upon what constitutes a partnership as to third persons,—see this title, I., 2, a; as to when executors or administrators of deceased partner continuing business become partners,—see this title, V.

## 2. Who are Partners, in Respect of Liability to Third Persons.

### (a) Joint Interest; Participation in Profits and Losses.

**Purchases for joint account.**—To constitute a partnership, the parties must participate as well in the losses as in the profits. *Grace v. Smith*, 2 W. Bl. 1000.

A., B. and C. entered into an agreement to purchase goods in the name of A. only, and to take aliquot shares of the purchase, but it did not appear that they were jointly to resell the goods:—Held, that on failure of A., the ostensible buyer, B. and C. were not answerable to the seller as partners. *Id.*

A., at the suggestion of B., by letter, ordered a cargo of timber of C. The invoice was made out in the name of A., and a bill of exchange was drawn by B. on A. for the amount of the freight, which was paid by A. In an action brought by C. against A. and B. for the price of the goods, it is competent to C. to show that A. and B. were jointly interested in the purchase. *Ruppell v. Roberts*, 4 N. & M. 81.

The mere circumstance of two individuals (not in partnership) joining in giving an order for a shipment of goods, will not render them joint contractors, so as to be liable each for the whole amount, where, upon the reasonable construction of the whole of the correspondence between the parties, and other facts, it may be collected that it was understood between them that the contract should be several, and payment had been made by bills for the amount drawn by the vendee upon the vendees severally, each for a moiety.



*Edson v. Lupton*, 2 M. & Scott, 371; 9 Bing. 297.

**Participation in profits and losses, generally.**—One who takes a share of the profits, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which creditors have a right to rely for payment. *Pott v. Eytton*, 3 C. B. 32; 15 L. J., C. P. 257.

Yet the receipt of a percentage upon the gross amount of sales made to certain customers by the person who recommended such customers, does not constitute him a partner as against third persons. *1b*.

One who stipulates for a share of the clear profits of a particular adventure is, quoad third persons, a partner. *Heyhoe v. Burge*, 9 C. B. 431; 10 L. J., C. P. 243.

A. and B. by a memorandum in writing, agreed, "for services performed, "to allow C. a fourth share of the clear profits arising from a contract for the construction of a line of railway; and there was evidence to show that C. had acted upon the agreement (though not formally a party to it), and that he had to some extent interfered in the work:—Held, sufficient to show that C. was a partner in the transaction, quoad third persons. *1b*.

A., B. and C. verbally agreed that they should bring out and be jointly interested in a periodical publication. A. was to be the publisher, and to make and receive general payments; B. to be the editor, and C. the printer; and after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper and charge it to the account at cost prices. No profits were ever made, nor any accounts settled. The plaintiff furnished paper to A., for the purpose of being used by him in printing the periodical:—Held, that B. and C. were not jointly liable with A. for the price of it. *Wilson v. Whitehead*, 10 M. & W. 503; 12 L. J., Exch. 48.

A. and B., ship agents at different ports, entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c.:—Held, that by this agreement they became liable as partners to all persons with whom either contracted as such agent; though the agreement provided, that neither should be answerable for the acts or losses of the other, but each for his own. *Wagh v. Carver*, 2 H. Bl. 235.

A. and B. carried on business together as a firm of attorneys, under an agreement, by which B. was to receive 800*l.* per annum out of the profits, upon which he was to have a lien to that amount, but was not to be liable for any losses. In an action for business done by one of the firm:—Held, that they were rightly joined as plaintiffs. *Bond v. Pittard*, 3 M. & W. 357.

The proper test of liability as a partner is not whether the party sought to be charged

has stipulated for the participation in profits as such, but whether the person by whom the trade was actually carried on conducted it in the capacity of agent for him. *Wheatcroft v. Hickman*, 9 C. B., N. S. 47; 8 H. L. Cas. 268; 7 Jur., N. S. 105; 30 L. J., C. P. 125; 8 W. R. 754.

A. and B., who carried on the business of iron masters in copartnership, by a deed, purporting to be made between A. and B. of the first part, five persons named as trustees of the second part, and the several persons whose names were contained in a schedule as creditors for the sum therein mentioned, and who should execute the deed, of the third part, reciting that A. and B. were indebted to the several persons, parties thereto of the third part, and that they had agreed to assign all their estate and effects for the benefit of such creditors, assigned the works and all their property and effects to the trustees upon trust to carry on the business under the name of the Stanton Iron Company, and out of the profits to pay interest on mortgages, &c., and to pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B. in ratable proportions, according to the amount of their respective debts:—Held, that, under this deed, the creditors executing it did not become liable as partners for debts contracted by the trustees in carrying on the trade. *1b*.

B. agreed with a builder that the builder should find the stock, plant and materials for building houses, and he would find the funds, the ground landlord granting leases of the houses on completion, by which they would become in equity the joint property of B. and the builder; the houses were then to be sold, and the proceeds brought into account, B. being credited with advances and debited with receipts of purchase-money, the builder to be debited with certain allowances, and the balance of profit and loss to be divided equally. A joint account was to be opened at a bank, and either party could draw on it for the purposes of the agreement:—Held, that B. and the builder were partners, so that the builder could pledge B.'s credit for plant, stock, and materials for the houses. *Noakes v. Barlow*, 20 W. R. 386; 26 L. T., N. S. 186—Exch. Cham.

A partnership may exist in a particular concern, which shall charge the parties to engagements only connected with such concern. *De Berkow v. Smith*, 1 Esp. 20—Kenyon.

A. and B., general partners in trade, being indebted to C. on the joint account of the three in a special joint adventure, with a view to liquidate that balance, C. agreed with A. and B. to join with them in another adventure, of which he was to have one moiety; and it was agreed that A. and B. should purchase goods for the adventure, and pay for them; and the returns of such adventure were to be made to C., to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, and also to receive

his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to A. and B.:—Held, that this agreement constituted a partnership between the three in the adventure at and from the time of the purchase of the goods for the adventure by A. and B., although C. did not go with them to make the purchase, nor authorize them to purchase on the joint account, but A. and B. alone in fact made the purchase; and although C. also purchased in his own name, and paid for goods to be sent out at the same time, in which B. was to share the profit or loss, and these goods were consigned for sale and return to the same person who went out as supercargo on the joint account of the three. *Gouthwaite v. Duckworth*, 12 East, 124.

A., B. and C. agreed that each should furnish 3,000*l.* worth of goods, to be shipped on a joint adventure, the profits to be divided according to the amount of their several shipments:—Held, that this did not constitute a partnership between the three, so as to make B. and C. responsible for goods bought by A. to furnish his quota of the cargo. *Heap v. Doboan*, 15 C. B., N. S. 460.

**Payment for services out of profits.**—A merchant carrying on trade on his separate account, introduced into his firm the name of a clerk who had no participation in the profits or losses, but continued to receive a fixed salary:—Held, that in a bill transaction he was a partner. *Guildon v. Robson*, 2 Camp. 302—Ellenborough.

But he would not be liable to parties who had notice of his real situation. *Alderson v. Pope*, 1 Camp. 404, n. And see *Teed v. Blworthy*, 14 East, 214.

Where there was an agreement between the sole owner of a lighter and his man, that the latter should work her, and the net profits should be equally divided between them:—Held, that they were partners in the concern, and that the man was liable for repairs as well as his master. *Dry v. Boswell*, 1 Camp. 320—Ellenborough.

But, if the agreement had been, that the man, in consideration of working the lighter, should receive half the gross earnings, it would not have constituted a partnership, being only a mode of paying the man for his labor. *Id.*

In pursuance of an agreement between A. and B., A. took premises in his own name, and purchased silk materials on his own account, to carry on the business of a silk lace-maker, and provided all the machinery and implements of trade; and B. was employed to superintend the manufacture of goods. The agreement also stipulated, that all the silk and materials, and all the manufactured goods, and all the machinery and implements, should be the sole property of A., and that B. should receive for his remuneration half the profits, as soon as any accrued, and until such time should receive 2*l.* per week from A.:—Held, that this agreement, when carried

into effect, did not constitute a partnership between A. and B. as to the separate creditors of B.; and that, therefore, where a sheriff seized goods, manufactured under such agreement, in execution of a writ sued out by a separate creditor of B., and sold the same, the gross receipts of the sale might be recovered by A. in an action for selling the goods against the sheriff. *Burnell v. Hunt*, 5 Jer. 650—Q. B. See *Wilson v. Whitehead*, 10 M. & W. 503; 12 L. J., Exch. 43.

E., being concerned in a colliery, entered into an agreement with J. for opening at aliyshop near it, for the purpose principally of supplying goods to the workmen. E. built the shop, and his name was placed over the door. J. managed the shop. E. received in the first instance 7*l.* per cent., and afterward 5*l.* per cent. on the amount of all sales to his workmen, and J. received all the rest of the profits. The plaintiffs were the assignees of bankers with whom J. had opened an account, and who had advanced money to J. for the purchase of goods for the shop. There was no evidence to show that credit was in fact given to E. The jury having found that there was no sharing of profit and loss between E. and J., and that credit was not given by the bankrupts to E.:—Held, that the verdict was not against the evidence; that as credit was given to J. alone, E. could only be liable on the ground of an actual partnership between him and J.; and that E.'s taking 5*l.* per cent. on the sales to his workmen, did not, as a matter of legal inference, render him liable as a partner to third persons, but was in the nature of a commission on certain sales supposed to be effected through his influence over his workmen. *Pott v. Eytton*, 3 C. B. 82; 15 L. J., C. P. 257.

**Payment of advances or liabilities out of profits.**—A party who, from 1829 till 1833, advanced various sums, with a view to a partnership in a market about to be erected, knew that the money was applied towards the erection, and was consulted in every stage. In October, 1833, by a written agreement, it was settled that the market should be valued, and the defendant have a seventh share:—Held, that he was not liable as a partner till October, 1833, notwithstanding profits had been made, but not accounted for to him before that time. *Howell v. Brodie & Bing*, N. C. 44; 8 Scott, 872.

In 1820, W. advanced 24,000*l.* to J. C. S. and W. S., traders, and jointly with them executed a deed, by the express terms of which a partnership stock was created, in which they had all a joint property. W. was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, and to receive 2,000*l.* or 2,400*l.* a year, as the case might be, out of the profits. W.'s name never appeared to the world as a partner:—Held, that W. was a partner in the concern. *Chuck, Ex parte*, 1 M. & Scott, 615; 8 Bing. 469.

N., being proprietor of a newspaper, es

tered into an agreement with L. for the sale to him of the paper for 1,500*l.*, which was agreed to be paid, with interest, by annual installments, extending over a period of seven years. By the agreement, N. undertook to guarantee to L. the clear yearly profit of 150*l.* over and above the annual payments of the 1,500*l.* and interest; and in consideration of such guaranty, L. agreed to pay all surplus profits over and above 150*l.* a year to N., until the same surplus profits should amount to 500*l.* If such surplus profits should amount to 500*l.*, L. was to pay, above the purchase-money and the 500*l.* profit, the then present liabilities; but if not to 500*l.*, then N. was to pay such liabilities:—Held, that, under this agreement, N. was a partner with L. in the concern as regarded third persons. *Barry v. Neesham*, 8 C. B. 641; 10 Jur. 1010; 16 L. J., C. P. 21.

A., an ironmonger, having supplied ironmongery to the amount of 189*l.* to B. and C., who were builders, agreed to join them in the purchase of some land for building, on the conditions that B. and C. should build the houses, A. supplying the ironmongery required, and that on the completion and sale of the houses A. should be paid the 189*l.* and the price of the ironmongery and no more, and that if no profit was realized A. should be a loser. An agreement was accordingly entered into by all three with the land-owner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the building, and the three being jointly bound to pay the purchase-money, and the conveyance when all was paid to be to the three, or as they should direct. B. and C. having ordered timber of D., it was supplied on their credit (D. being ignorant of A.'s having any interest in the building), and it was used on the building:—Held, that A. was not jointly interested with B. and C. in such a way as to make him a partner and liable for the timber. *Kilshaw v. Jukes*, 9 Jur., N. S. 1231; 3 B. & S. 847; 32 L. J., Q. B. 217; 11 W. R. 690; 6 L. T., N. S. 387.

Agreement in writing entered into between W. & Co., British merchants, carrying on business at Calcutta with a Hindoo rajah, by which, in consideration of moneys already advanced, and which might be thereafter advanced by the rajah to them, they agreed to carry on the business subject to the control of the rajah in several particulars, stipulating that the rajah should receive a commission of fifty per cent. on all profits made by the firm, until the whole amount of the debt due to him should be paid off, with twelve per cent. interest upon all cash advances which had been or might be thereafter made by him to the firm. Further advances having been made by the rajah to the firm, W. & Co. executed to him a mortgage of certain tea plantations to secure the then amount of his advances, and the rajah by a deed released

his right to commission and interest under the original agreement between them. No proceeds of the business were ever received by the rajah, and though he was credited in the books of the firm with a considerable sum, that sum was never received by him, and was afterwards written back in the books of the firm. The rajah did not interfere or exercise any such control in the business as to make him an ostensible partner in the firm:—Held, that having regard to the restrictions and modifications made of late in the rule of law formerly prevailing, that participation in the net proceeds of the business made the participant liable as a partner to third parties; and, looking at the whole scope of the agreement, the primary object was to give security to the rajah as a creditor of the firm of W. & Co., and that the participation given him in the net profits of the business was not sufficient to establish a partnership between W. & Co. and the rajah, as regarded third parties. *Mollwo v. Court of Wards*, 4 L. R., P. C. 419.

Although a right to participate in the profits of a trade is a strong test of partnership, and there may be cases where, from such perception alone, it may as a presumption, not of law, but of fact, be enforced; yet, whether that relation does or does not exist, must depend on the real intention and contract of the parties. *Id.*

For analogous decisions upon what constitutes parties partners as between themselves,—see this title, II., 1, *b*; effect of Partnership Law Amendment Act,—see this title, II., 3.

As to proof of existence of partnership,—see this title, IV., 2.

#### (b) Holding out or Acting as Partner.

**General principles.**—To make a man liable as a partner there must either be a contract between him and the ostensible person to share jointly in the profits and losses, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself. *Hoare v. Dawes*, 1 Dougl. 371. S. P., *Dickenson v. Vulpy*, 5 M. & R. 126; 10 B. & C. 128.

When a party is charged as partner, on the ground of his having held himself out as such, he can only be affected by acts of holding out prior to the contract. *Baird v. Planque*, 1 F. & F. 344—Bramwell.

A father, who holds out to the world that his son is his partner, and who sends bills and signs receipts in their joint names, in an action brought in his own name, is not precluded from showing that his son is not a partner. *Glossop v. Colman*, 1 Stark. 25.

A document, by which A. and B. agreed to give the defendant a share of the profits in a particular adventure, though insufficient in itself to constitute a partnership, for want of mutuality, is good evidence, along with evidence of interference by the defendant, to

prove that he was a partner. *Heyhoe v. Burge*, 9 C. B. 431; 19 L. J., C. P. 243.

**Instances.**—To an action for goods sold, the defendant pleaded in abatement that the debt became due from the defendant jointly with S. It was proved, that the defendant's business was carried on with the knowledge of the plaintiffs, under the name of "Bush & Co.;" and that the plaintiffs made out the invoice of the goods to "Bush & Co.;" and also that a partnership existed in fact between the defendant and S.—Held, that under these circumstances, the proper direction to the jury was, that the defendant was not liable, unless he alone constituted the firm of "Bush & Co.," or unless he held himself out to the plaintiffs as the only party constituting the firm. *Bonfield v. Smith*, 13 M. & W. 405; 13 L. J., Exch. 105.

Held, also, that with a view to prove the defendant's sole liability, a witness could not be asked with whom he dealt, the proper inquiry being as to what act was done. *Ib.*

In 1872, A. entered into a written agreement to lend B. 2,000*l.* as capital to enable him to develop certain coal and iron mines, the lease of the mines to be deposited with A. as security for the moneys advanced. The agreement also provided that A. was to be paid 8*d.* per ton on all coal and ironstone, by way of commission; that B. was to receive a salary, which was not to commence until all the moneys advanced by A. had been repaid; that "after payment of the above, and the royalties, and rents, and costs of raising and preparing, and delivering to market the produce of the mines," A. was to be entitled to three-fourths, and B. to one-fourth, of the net profits; and A. was to be free from all liability except in respect of the money advanced by him. B. worked the mines under the name of a company. In 1874, A. died, and there was then due to him the sum of 11,000*l.*, in respect of advances made by him to B. under the agreement. The mines proved a failure, and the creditors of the company, B. being insolvent, sent in their claims to the executors of A., alleging that A. was a partner in the company by virtue of the agreement, and by reason of his interference in the management and working of the company:—Held, that, upon the agreement, no partnership existed between A. and B.: and that, upon the evidence, there was no ground for inferring that A. had held himself out in any way to any person as a partner in the company. *Dean v. Harris, Harris v. Butterfield*, 33 L. T., N. S. 639—V. C. B.

J. gave to a bank a guaranty for 1,000*l.* in favor of A. & Co., representing at the time to the bank manager that he was a partner in that firm, but that he wished the fact of his partnership to be kept secret. The guaranty described him as a partner in the firm. Some time afterwards A. alone, as A. & Co., filed a liquidation petition, and the bank tendered a proof in the liquidation for advances which they had made to A. & Co. after the guaranty.

After this the bank sued J. for 5,659*l.*, alleging him to have been a partner with A. J. filed a bill in chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank and J., by which 2,850*l.* was paid to them in satisfaction of their claim against J. and of a claim which they made against S., who had also given them a guaranty on behalf of A. & Co. J.'s guaranty was given up to him, a receipt for 1,000*l.* being indorsed on it by the bank manager "in payment and discharge of the within guaranty, and also of all claims against J. in reference to or in connection with A. & Co.:"—Held, that J. must be taken to have been an actual partner with A., but that the receipt did not operate to release J. so as to preclude the bank from maintaining a proof against A.'s estate. *Armitage, In re*, 5 L. R., Ch. Div. 46; 46 L. J., Bank. 65; 25 W. R. 422—C. A.

As to effect of holding out or acting as partner after retirement from or dissolution of partnership, — see this title, V., 2; VI., 2, *b.*

### 3. Under The Partnership Law Amendment Act, 1865 (*Bovill's Act*).

**Statute.**—[By 28 & 29 Vict. c. 86, s. 1, the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

By s. 2, no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, or give him the rights of a partner.

By s. 3, no person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

By s. 4, no person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

By s. 5, in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20*s.* in the pound, or dying in insolvent circumstances, the lender of

*y such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration, in money or money's worth, have been satisfied.*

By s. 6, in the construction of the act the word "person" shall include a partnership firm, a joint-stock company, and a corporation.]

**Operation of the act in cases of participation in profits.]**—A., in June, 1869, borrowed 250*l.* from B., and, at the time, signed a paper in the following words:—"In consideration of 250*l.* this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern, to be drawn up under the Limited Partnership Act of the 28 & 29 Vict. c. 86, called 'An Act to amend the Law of Partnership.'"—Held, that this paper (which contained no provision as to the date or duration of the partnership) constituted a partnership at will; and that it was not put an end to by a letter, dated in August, 1872, in which A. promised to repay B. on the 1st of September, 1872, the principal, together with interest thereon (treating it only as a loan) such as should, as on a calculation of one-eighth of the profits, be found to be due to B. on that day. This letter was followed by a tender, which was not accepted. *Syers v. Syers*, 1 L. R., App. Cas. 174; 24 W. R. 970; 35 L. T., N. S. 101—H. L.

On a bill by B. for specific performance of the agreement to execute a partnership deed for one-eighth share of the profits, A. put in an answer in which he denied that there had been a partnership at all, but submitted that if any partnership had ever existed it was only a partnership at will, of one-eighth share of the profits (payment of which he offered to make), and he submitted that this partnership had been determined by the letter of August, 1872:—Held, that it had not been determined by that letter, but that the answer had the effect of putting an end to it; and that accounts must be directed to be taken as up to the day of filing the answer, and that these accounts must include the principal, the eighth share of the profits, and also the eighth share of the assets up to that day. *Id.*

A copartnership in profits is a copartnership in the assets by which the profits are made. *Id.*

In order to bring a case within the 28 & 29 Vict. c. 86, there must be a contract in writing, and the document must show on the face of it that the transaction is one of loan; and parol testimony to vary it is inadmissible. *Id.*

That act does not apply to any contract unless the advance of money under it would, independently of that act, have created the relation of debtor and creditor as distin-

guished from the relation of partners. *Pooley v. Driver*, 4 L. R., Ch. Div. 458; 46 L. J., Chanc. Div. 466; 25 W. R. 162; 30 L. T., N. S. 79—R.

An unsigned contract for an advance by way of loan to a trader is not "a contract in writing with a person" within s. 1, though it is admissible in evidence as showing the *Id.*

terms upon which the advance was made.

The act does not protect persons lending names, for partnership purposes, under agreements to share in the profits, unless the true relation of the parties towards each other is that of creditors and debtors, and not of active and dormant partners; and such agreements, in order to be effectual, must be in writing and signed by the parties. *Id.*

Messrs. A. advanced a loan to a firm for the purposes of the partnership, under a deed of contract which was expressed to be made under 28 & 29 Vict. c. 86, and provided that they might inspect and take copies of the partnership account; that the partners should, during the continuance of the loan, pay to Messrs. A. on account of the profits certain proportions of the yearly profits; and that within six months after the expiration or sooner determination of the partnership (which was for a term of fourteen years) a settlement of accounts should be made by the partners, who were then to repay the loan, less any sum overpaid on account of the profit, with an arbitration clause:—Held, that Messrs. A. were liable as partners for the debts of the firm, notwithstanding the act. *Id.*

A loan was made to a trader at a rate of interest varying with the profits of his business, the amount of the loan and the interest being secured by a mortgage to the lender, of the lease of the house where the business was carried on, and of the good-will of the business. The trader became bankrupt:—Held, that the rights of the mortgagee under his mortgage were in no way affected by s. 5 of the Partnership Law Amendment Act, 1865, 28 & 29 Vict. c. 86 (Bovill's Act). *Sheil, Ex parte, Lonergan, In re*, 4 L. R., Ch. Div. 789; 36 L. T., N. S. 270; 25 W. R. 420; 46 L. J., Bank. 62—C. A.

The question as to whether a person lending money to a firm is a partner in that firm or not is to be decided from the whole circumstances of the case; and the fact that there are provisions in articles of partnership, expressly stating that such person was lending the money under Bovill's Act, and was not to be considered a partner, will not negative the conclusion come to from the other circumstances. *D'Hauregard & Co., In re*, and *Megerand, In re, Delhase, Ex parte*, 26 W. R. 20; 37 L. T., N. S. 440—C. J. B.; affirmed on appeal, 26 W. R. 338—C. A.

Under an agreement dated in June, 1869, after reciting that M. and S. had agreed to become partners together in business upon the terms with each other and with D. thereafter contained, and that D. had agreed to

lend them 10,000*l.* for the purpose of investing the same in the business, it was agreed that M. and S. should be partners together under the name of D'H. & Co. for three years, from 1st July, 1869; that the capital should consist of 10,000*l.* and any further advances by either party; such 10,000*l.* and further advances to bear interest at 5*l.* per cent.; that the 10,000*l.* were advanced by D. by way of loan under the Partnership Amendment Act, 1865; that yearly accounts current should be remitted to D., and the yearly profit or loss divided between D., M. and S. in certain proportions; that in case of the death of any partner, or in case his original capital should be reduced by losses to one half, D. should have the option of dissolving the partnership; and that in case of his death his executors should not withdraw his capital until the partnership was dissolved. This agreement was renewed in 1872 and again in 1875 for three years. Upon the liquidation of D'H. & Co. in 1876, D. sought to prove against the firm for 6,717*l.*, being further advances made by him in addition to the 10,000*l.* originally advanced:—Held, that he could not prove in competition with the creditors of the firm, for that agreement constituted him a dormant partner. *Ib.*

A father, whose son was about to become a member of Lloyds and to commence the business of an underwriter, became security for him, in compliance with the rules of Lloyds, to the amount of 10,000*l.* The son executed a written agreement, which contained a recital of the security given by the father, and by which the son covenanted with the father that S., and no other person, should underwrite at Lloyds in the name of the son; that S. should be paid 200*l.* a year and one-fifth of the net profits of underwriting; that the father should be at liberty to withdraw the whole of his security on notice being given to the son and other necessary parties, and immediately after such notice S. should cease to underwrite for the son or in his name; and that half the net profits of underwriting, deducting the share of S., should, together with 25*l.* per annum, be considered as owing and should be paid to the father by the son. The business was carried on in the son's name alone, the creditors not knowing that the father was in any way connected with it:—Held, that no partnership was constituted between the father and the son. *Tennant, Ex parte, Howard, In re*, 6 L. R., Ch. Div. 303; 25 W. R. 834; 37 L. T., N. S. 284—C. A.

Participation in profits is not conclusive evidence of the existence of a partnership. It is very cogent evidence, and, if it stands alone, may be conclusive evidence of a partnership. But the effect of participation in profits may be outweighed by other circumstances. *Ib.*

As to effect of participation in profits independent of the provisions of the above statute, —see this title, II, 1, *b*; II, 2, *a*.

### III. POWERS, DUTIES, AND LIABILITIES OF PARTNERS.

#### 1. As to Each Other.

#### (a) Partnership Property, Dealings, and Profits.

**Interpretation and effect of partnership articles, generally.**—When articles of partnership are clear and distinct, then partners are bound by them; when they are ambiguous or silent, the course of dealing between the partners regulates the mode by which the court must deal with them, and in some cases the court has allowed the constant usage of partners to supersede the articles. *Covestry v. Barclay*, 33 Beav. 1.

Articles agreed on to regulate a partnership cannot be altered without the consent of all the partners. *Const v. Harris*, 1 Turn. & Russ. 517.

**Operation of articles after continuance or renewal of partnership.**—When a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contracts. *Clark v. Leach*, 1 De G., J. & S. 409; 9 Jur., N. S. 610; 33 L. J., Chanc. 290.

When one of the articles of a partnership for a term provided that either partner might, in the event of specified conduct on the part of the other, dissolve the partnership by notice, and that the latter partner should, in that event, be considered as quitting the business for the benefit of the former, this article is not properly applicable to a continuation of the partnership after the expiration of the term without any agreement for renewal. *Ib.*

When a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contract. *Hogg v. Hogg*, 35 L. T., N. S. 792—V. C. B.

**Respective shares of partners.**—An equal partnership implies not only an equal participation de facto in profit and loss, but a right in each partner to claim and insist on such participation. Thus, although in a case where parties had participated equally in profit and loss, the law would, in the absence of any contract, or any dealing from which a contract might be inferred, presume an equal partnership; yet this presumption would not arise if the books of the concern and the dealings of the parties showed that such could not have been the terms on which the business was carried on. *Stewart v. Forbes*, 1 Mac. & G. 187; 13 Jur. 523.

Where a father established in business, on his son's coming of age, tells him he shall have a share in it, and holds him out to the



world as his copartner; and the son acts as such for several years, but there is never anything settled as to the particular share which he is to have: under these circumstances, the law will consider that there was a partnership between the parties themselves, as well as with respect to strangers; but not that the son is entitled to a moiety of the profits; and it will be referred to the jury to say to what share he is reasonably entitled. *Peacock v. Peacock*, 2 Camp. 45—Ellenborough.

Where two persons are in partnership, the presumption is, that they are interested in the partnership stock in equal moieties. *Farrar v. Berwick*, 1 M. & Rob. 527—Parke.

In the absence of any evidence, the presumption is, that partners are equally entitled to the profits and equally liable to bear the losses of the business. *Collins v. Jackson*, 31 Beav. 645.

B., who was an architect, agreed with B. and K., who were wharf-building speculators and wharfingers, to render his financial and other assistance and supervision in the construction and completion of warehouses on two wharves, of which it was proposed to procure a lease; and in consideration of such his assistance and supervision, to receive one equal fifth part or share of the profits of the speculation and undertaking. A lease of the X. property was procured, but the negotiations for the Y. property fell through at the time. B., it was originally intended, should be one of five, the other four to consist of B. and K. and two capitalist gentlemen, whom it was intended to secure. Eventually, B. and K., in lieu of procuring two capitalists to be admitted into the partnership, borrowed 18,000*l.* on mortgage of the premises by way of raising capital for the concern. No new agreement was entered into regarding the shares of the three parties to the original agreement:—Held, that B. was only entitled to one-fifth share as fixed in the agreement, but that such share should not be liable to the mortgage debt of 18,000*l.* *Bell v. Barnett*, 21 W. R. 119—V. C. B.

The Y. property became the subject of new negotiations on behalf of the partnership, but these latter negotiations also fell through. Some years after the date of the original agreement relating to the property, B. succeeded in obtaining a lease of the property, and claimed to retain it for his own benefit. B. had not previously declared in express terms that he considered the original agreement at an end:—Held, that the property still remained subject to the partnership agreement, and that B. was entitled to one-fifth share in that property also. *Id.*

A. and B. had taken some pasturage jointly; each had turned his cattle on it, but in what number they had been turned on it by each did not appear. A. having paid the whole rent, and brought an action for one-half the amount:—Held, that the jury was not justified in finding that the share of each was a moiety. *Sharp v. Cummins*, 2 D. & L. 504;

9 Jur. 68; 14 L. J., Q. B. 10—B. C.—Patterson.

**Nature of interest of partner in the partnership property, generally.]**—A partner's interest in the partnership property is his share upon the division of the surplus, after payment of the partnership debts. *Garbett v. Venle*, 5 Q. B. 408; D. & M. 458; 8 Jur. 836; 13 L. J., Q. B. 98.

Where A. and B. are partners, and a *fi. fa.* is issued upon a judgment recovered against A., and the sheriff thereupon enters and takes possession of the partnership property, he thereby seizes in execution only the interest of such partner in the goods. *Johnson v. Evans*, 7 M. & G. 240; 7 Scott, N. R. 1035; 8 Jur. 341.

One partner cannot maintain trover against a sheriff for a mere sale of his share of the partnership property under a *fi. fa.* issued against the other partner for a separate debt. The sheriff in such case is in the same position, so far as regards his liability in trover, as if the sale had been by the execution partner. *Mayhew v. Herrick*, 7 C. B. 229; 13 Jur. 1078; 13 L. J., C. P. 179.

**Lands purchased or leased by partnership.]**

—There is no rule, that where lands are bought by partners in trade, and are paid for out of the partnership assets, they of necessity become part of the joint estate; nor, on the other hand, that if they are not bought for the purpose of the partnership business, they are not joint estate; nor does the form of the conveyance settle the question, which must be determined with reference to all the circumstances of the case. *McKenna, Ex parte*, 8 De G., F. & J. 645; 30 L. J. Bank. 25.

Although it cannot be laid down that in no case can a partner during the partnership contract for a new lease, to himself exclusively, of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere intimation to his partners of his intention to apply for such a lease after the dissolution is not sufficient to exclude their interest, although the partnership is at will. *Clegg v. Edmondson*, 8 De G., M. & G. 787.

A lease acquired for the purposes of a partnership, whether in the name of one or all of the partners, and dedicated to the partnership purposes, forms part of the partnership assets; but where an owner of a lease admits another to be his partner in the use of a part only of the demised property, and afterwards dissolves the partnership, the partner has no longer any interest in the lease. *Burdon v. Barkus*, 3 Giff. 412; 8 Jur., N. S. 130; affirmed on appeal, 8 Jur., N. S. 656; 31 L. J., Chanc. 521; 4 De G., F. & J. 42.

Where there is no agreement between partners for the stock and plant of the concern to be taken by either party at a valuation on the determination of the partnership, one party cannot either be compelled to take, or compel his copartner to take, the stock and

plant at a valuation, but each partner is entitled to have the value of the stock and plant ascertained by sale. *Ib.*

A., B., C. and D. joined in a partnership to work a fulling-mill. Money was subscribed by all the partners; with part of which freehold land was bought, which was conveyed to A. and B. in fee; with other part a mill was built on the land, and machinery for the mill was purchased. By a partnership deed executed by A., B., C. and D., the trusts of the land, mill, &c. were declared to be, that A. and B. should stand seized and possessed of all the estates, property, goods, &c., upon trust, for the benefit of themselves and their partners, as part of their partnership joint stock in trade. There was a provision in the deed that A. and B. might borrow money upon mortgage of the stock, property, estates, &c., belonging to the copartnership; and it was declared that the land, mill, &c., should be deemed and considered as, or in nature of, personal estate, and not real estate, and be held in trust for the partners, as part of their partnership stock in trade. A. and B., under the powers of the deed, borrowed money for the purposes of the partnership, for which they gave bonds and notes in their own names, but did not mortgage any part of the property:—Held, that each partner had an interest in the realty, corresponding with the amount of shares held by him in the partnership. *Baxter, app., Brown, resp., 7 M. & G. 198; 8 Scott, N. R. 1019.*

Held also, that the money so borrowed had not the effect of mortgages on the shares of the partners. *Ib.*

**Power to manage and dispose of partnership property.]**—One of two parties, joint tenants of a house where their joint business is carried on, has a right to authorize a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the service. *Donaldson v. Williams, 1 C. & M. 345; 3 Tyr. 371.*

A power of attorney given by one partner to another to deal generally within the scope of the partnership, with the partnership effects, does not authorize the partner to whom it is given to make a general assignment of all the funds and effects of the partnership for the benefit of creditors. *Harper v. Godsell, 18 W. R. 954; 39 L. J., Q. B. 185.*

As to powers of partners in dealing with third persons,—see this title, III, 2, b.

**Lien of partners on partnership property.]**—A. and B. were joint owners of a house, and A. had laid out on it moneys he had obtained from B.:—Held, that B. had no lien on the house for the amount. *Kay v. Johnston, 21 Beav. 536.*

A ship was purchased by a partner for himself, but was paid for out of the partnership assets. The firm became bankrupt:—Held, that the firm had no interest in the ship, nor any lien on it for the amount of the purchase-money. *Walton v. Butler, 29 Beav. 428.*

Upon the decease of a partner in trade, the firm was indebted to him for money advanced. The business was continued by the surviving partner, who with the money of the firm made additions to the stock in trade:—Held, as the executors of the deceased partner had permitted the continuance of the business, that they had no lien upon the subsequently-acquired stock in trade for the money advanced to the firm by their testator. *Payn v. Hornby, 4 Jur., N. S. 446; 27 L. J., Chanc. 689; 25 Beav. 280.*

**Right to profits.]**—S. and U. were solicitors and partners; S. was steward of a manor and receiver of rents. In the articles of partnership it was provided that steward's fees and receiver's salary of either partner should be deemed part of the profits of the partnership, but that the receipts and payments in respect thereof should be made by the partner conducting such business:—Held, that steward's fees and receiver's salary or commission are not profits on a trade or business in the ordinary sense of the term, and that, under the circumstances, balances due by S. as steward or receiver were not debts of the partnership. *Alston v. Sims, 1 Jur., N. S. 438; 24 L. J., Chanc. 553.*

A. and B. entered into a partnership for seven years; the business was carried on by and in the name of A. alone, B. being a mere sleeping partner. A. continued the business, after the expiration of the term, on the same premises:—Held, that B. was entitled to a share of the subsequent profits. *Parsons v. Hayward, 31 Beav. 199; affirmed on appeal, 8 Jur., N. S. 924; 31 L. J., Chanc. 666.*

Prima facie, the emoluments derived from offices of a clerkship to the guardians of a union do not fall within the ordinary description of profits of an attorney. *Collins v. Jackson, 31 Beav. 645.*

The profits of the offices of clerkship to poor law guardians, of superintendent registrar of births, deaths and marriages, treasurer of a turnpike trust, stewardship of a manor, treasurership of a charity and receivership of tithes, at a fixed salary, form part of a partnership between solicitors. *Ib.*

When one partner entered into a contract which turned out profitable, and which arose out of business originally partnership business, and did not communicate to his partner what he was engaged in:—Held, that the profits must be treated as attributable to the partnership. *Hancock v. Heaton, 23 W. R. 680; 80 L. T., N. S. 592—V. C. M.; affirmed on appeal, 23 W. R. 784.*

As to rights of partners in respect of property, profits, &c., after dissolution,—see this title, VI, 2, a.

#### (b) Actions between Partners.

**When maintainable, for individual or partnership demands or causes of action.]**—One partner may maintain an action against the other partner, for money received to the separate use of the former, and wrongfully

ried to the partnership account. *Smith v. Irons*, 2 T. R. 476.

J., T. and B. were jointly concerned in the sale of butters. J. consigned them to B., who sold them on their joint account. T., being requested to accept bills for the firm, refused to do so without some security, when B. engaged, if T. paid the bills, to repay him out of the proceeds received for butters already sold; and T. having accepted and paid the bills:—Held, that he might sue B. for money had and received to his use. *Coffee v. Brian*, 5 Bing. 54; 10 Moore, 341.

A. offered to B. to order and ship goods on an adventure, and that, if any profit should arise from them, B. should have half for his trouble; B. ordered the goods on their joint account and paid for them:—Held, that he was entitled to recover back such payment against A., who had not accounted to him for the profits. *Hesketh v. Blanchard*, 4 East, 141.

The partners in one house of trade cannot maintain an action against the partners in another house of trade, of which one of the partners in the plaintiff's house is also a member, for transactions which took place while he was partner in both houses; and that, whether the action is brought in the lifetime of the common partner, or after his decease; but after his decease, the surviving partners of the one house may sue the surviving partners of the other house, upon transactions subsequent to the decease of the common partner. *Bosanquet v. Wray*, 6 Taunt. 597; 2 Marsh 319. And see *Brooks v. Enderby*, 4 Moore, 501; 2 B. & B. 70.

The plaintiff and defendant were partners as attorneys: independently of the partnership account, there was a private separate account of moneys due from the defendant to the plaintiff; to recover the balance of which, the plaintiff sued. It had been previously agreed between them that the plaintiff should accept a gross sum for interest on the private account, to be made up to a certain day; that the plaintiff would accept  $2\frac{1}{2}\%$  per cent., for interest on the private account from that date for six months, and that after that period the interest was to be 5% per cent.; that the defendant's share of the partnership money then in the plaintiff's hands should be applied in liquidation of the balance of the private account; but that the amount of all the bills due to the firm should be received by the plaintiff, and applied in the first instance to discharge certain partnership liabilities, and then in discharge of the balance due from the defendant to the plaintiff on the private account:—Held, that the effect of the agreement, so far as it regarded the private account, was to insure to the plaintiff the right to have the defendant's share of the partnership moneys, whenever ascertained, applied in discharge of his separate claim upon the defendant; and that there was nothing to suspend the plaintiff's right of action against the defendant for the recovery of the balance of the private account. *Simpson v. Rackham*, 5 M. & P. 612; 7 Bing. 617.

A., receiving a bill of exchange in payment for part of a lot of cattle jointly purchased by himself and B., indorsed the bill to B., and B. indorsed it over; the bill being dishonored, B. promised to pay A. half of the amount if he would take it up:—Held, that A., after taking it up, could not maintain an action against B. while the partnership accounts remained unliquidated. *Robson v. Curtis*, 1 Stark. 78—Ellenborough.

A project having been formed for making a road, the plaintiff contracted with the committee to make the plans, for a certain sum. Before they were completed he became a shareholder in the concern:—Held, that he was entitled to recover the whole of the contract price; but that he could not recover for extra work done since he became a shareholder. *Lucas v. Beuch*, 1 M. & G. 417; 1 Scott, N. R. 350; 4 Jur. 631.

Action for money paid. Plea, that at the time of the commencement of this suit, and at the time of the accruing of the causes of action, the plaintiff and defendant carried on business in copartnership, and that the causes of action arose out of transactions between the plaintiff and defendant as such copartners; and that the accounts of the partnership were not settled or adjusted, or any balance struck between the plaintiff and defendant:—Held, that the plea was bad; first, because it did not show that this was a partnership transaction; secondly, nor that the debt was due to the plaintiff and defendant jointly; and thirdly, that if it was to be taken to be so alleged, the plea amounted to the general issue. *Worrall v. Grayson*, 1 M. & W. 166; 4 D. P. C. 718; 1 Gale, 375.

Resolutions were passed by a company, of which both the plaintiff and the defendant were directors, to rent the plaintiff's house. A draft agreement was drawn up, and the solicitors of the company were authorized by the directors to sign it. No objection was made to it by the plaintiff, but the document was never either signed, dated or stamped. The company occupied the premises, and the plaintiff, in an action for use and occupation against a co-director, offered this in evidence to show that the occupation was by the other directors, exclusive of himself:—Held, that as the plaintiff was a co-director, the law would imply he was a co-tenant, and therefore unable to maintain the action; that, to get rid of this implication, he was bound to show a special agreement; that if this document was not such an agreement, the plaintiff had not proved his case, and if it was, that it required a stamp. *Chadwick v. Clarke*, 1 C. B. 700; 9 Jur. 539; 14 L. J., C. P. 233.

**When maintainable for balance found due upon settlement of accounts.**—Upon a dissolution of a partnership, and a mutual statement and settlement of accounts, there is an implied promise in law on the part of him against whom the balance is found to pay his copartner; and an express promise to pay is not necessary. *Rackstraw v. Imber*, Holt, 368—Gibbs.

Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favor of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an action lies on such express promise. *Foster v. Allanson*, 3 T. R. 479.

Where two persons became partners in a particular commercial adventure, and the one sent an account to the other, stating a loss resulting from the speculation, and the latter, on an application being made to him for payment of one moiety thereof, said, that he would call and settle with the former:—Held, that this was sufficient evidence of an adjustment of the amount between the parties, in an action brought by the former to recover such moiety. *Clarke v. Glennie*, 3 Stark. 10—Abbott.

Where, in an action for use and occupation of stables, it appeared that the plaintiff and defendant had been engaged in running a stage-coach, and weekly accounts were delivered by the former to the latter, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the work done:—Held, that they were not evidence of set-off, for that, to become a matter of set off, the balance in a partnership account must be final. *Fromont v. Coupland*, 2 Bing. 170; 9 Moore, 319; 1 C. & P. 275.

Proprietors of a stage coach arranged among themselves that each should horse the coach for certain stages, and receive the payments, and make the requisite disbursements on such stages; and it was the practice that one or more of the partners every month made up, and sent round to the other partners, a written account from the way-bills, showing the receipts and disbursements of each proprietor, the share of net profits, if any, due to each, and the proprietors by and to whom the ascertained shares should be paid; and the payments were made accordingly. In an action by one partner against another, for a balance so adjusted and not paid (the partnership still continuing), the plaintiff's case rested upon a written account made out as above, but not stamped:—Held, that if an action would lie at all on a settlement of partnership accounts which was not a final close of all the partnership transactions, still the settlement in question, not appearing to have been agreed to by the partners generally, or by the plaintiff and the defendant, could be binding only as an award, and that it could not so operate for want of a stamp. *Carr v. Smith*, 5 Q. B. 123; D. & M. 192.

Two persons, who were not general partners, having been engaged in a partnership speculation, at its termination a paper was drawn up and signed by one of them, con-

taining a statement of the accounts between them, both in respect of that and other transactions, and in which the balance appeared to be against himself: subsequently to which, it was agreed that the amount was to be paid by him in butcher's meat:—Held, that he might be sued on an implied promise to pay the balance, and that the agreement to take the amount in butcher's meat was nudum pactum. *Way v. Milestone*, 5 M. & W. 21; 2 H. & H. 32; 3 Jur. 727.

A. and B. entered into partnership to work a coal mine, and the coal mine being worked out and the coal pit being filled up, A. said he would join in no more coal pits, and A. and B. agreed to divide the materials and utensils, each party taking one-half in value, article by article, according to a valuation to be made; and, after the valuation had been made, B. agreed to take the whole at the valuation, and accordingly took possession thereof:—Held, that A. had an immediate right of action for a moiety of the value of the materials and utensils. *Jackson v. Shepherd*, 2 C. & M. 361; 4 Tyr. 330.

Two proprietors of a stage-coach, A. and B., dissolved their partnership in November. During their partnership, monthly accounts were made up, on each of which a balance was struck in favor of A. These balances were never carried forward from one account to another. B. had paid A. the balance on the November account, which was made up to the time of the dissolution:—Held, that A. might maintain an action for the balances in his favor on the September and October accounts. *Rriely v. Cripps*, 7 C. & P. 702—Tindal.

Held, also, that the accounts kept by a clerk, who was the agent of all the parties, were receivable, without his being called as a witness. *Id.*

Where two persons jointly undertook to procure a cargo for a vessel for certain commission, which they agreed to divide equally between themselves, and one of them received on account of such commission a certain sum of money:—Held, that the other could not maintain an action for a moiety, the demand arising out of a partnership transaction, and no account having been settled between them. *Bovill v. Hammond*, 6 B. & C. 149; 9 D. & R. 186.

When maintainable for contribution and moneys paid.]—A., B., and C., having dissolved partnership, C., after such dissolution, drew bills in the partnership firm, in favor of D., he not knowing of such dissolution, upon which D. brought his action against all the former partners; and C., having pleaded his bankruptcy, D. entered a nolle prosequi as to him, and recovered judgment against A. and B., which was afterwards satisfied by the attorney of A. and B., who advanced part, and borrowed the rest of the money on their joint credit:—Held, that the sum so paid in satisfaction of the judgment might be recovered in a joint action by A. and B. against

1. *Osborne v. Harper*, 5 East, 225; 1 Smith, 11.

The defendant agreed in writing to take one half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills:—Held, that the plaintiff having paid the whole price of the goods which were to constitute the partnership stock, to which both parties were to contribute equally, an action lay against the defendant for his moiety of the price, which was to be furnished by him in the first instance, although there might be an account to be taken between them as partners upon the subsequent disposal of the joint stock. *Venning v. Leckie*, 13 East, 7.

An action does not lie by one subscriber for the purpose of procuring a bill in parliament against all or any one of the other subscribers. *Holmes v. Higgins*, 1 B. & C. 74.

A. recovered against B., C. and D., partners in trade, upon their joint contract, and took in execution B. only, who thereupon paid the whole sum recovered:—Held, that B. could not recover in a court of law against his co-defendants for contribution. His remedy was in equity, as in cases of a voluntary payment by one partner of a debt due from himself and his copartners upon their joint contract. *Sadler v. Hickson or Nixon*, 2 N. & M. 258; 5 B. & Ad. 936.

Where four persons, who had acted as directors of a proposed railway company, being sued for debts contracted on account of the concern, jointly retained an attorney to defend them on their personal responsibility:—Held, that one of the four, who had paid the attorney's bill, was entitled to sue the others for contribution. *Elger v. Knapp*, 6 Scott, N. R. 707; 5 M. & G. 753; 1 D. & L. 78.

A., B. and C., by an agreement in writing, hired premises of D. The premises so hired were intended to be, and were, used for the purposes of a company, of which A., B. and C. were at the time of the contract committeemen; rent was for some time paid by the company, but ultimately became in arrear; whereupon D. sued A., B. and C. upon the agreement; B. and C. suffered judgment by default, and D. recovered the amount of rent and costs against A.:—Held, that A. was entitled to sue B. and C. for contribution, and that his remedy against B. was not affected by the circumstance of B.'s having ceased to be a member of the committee before the accruing of the rent in respect of which the action was brought. *Boulter v. Peplow*, 9 C. B. 403; 14 Jur. 248; 19 L. J., C. P. 191.

A. applied to D. and S., who were in partnership, for a loan. D. and S. gave him an acceptance by D. alone, and A. signed an acknowledgment, in which he declared that, if he discounted D.'s acceptance, he would remit his own acceptance to D. and S. A. did get D.'s acceptance discounted, but did not remit his own acceptance. D. was after-

wards sued by the holder of his acceptance, and paid the amount out of the partnership funds:—Held, that D. was entitled to sue A. for money paid to his use, upon an implied contract by A. to indemnify him, arising upon D. being compelled to pay the acceptance, and that S. need not join in such action; although if an action had been brought against A. on the written agreement for not remitting the cross acceptance, S. must then have been a co plaintiff. *Drier v. Burton*, 17 Q. B. 989; 21 L. J., Q. B. 157.

A. and B., being partners, kept an account with a banker. On the banker's claiming a balance against the firm, A. demanded an explanation from B., and B. wrote to him that the firm had nothing to do with it. Subsequently B. gave the banker a promissory note for this balance, signed in the partnership name. A. having been compelled to pay this note:—Held, that he might recover the whole from B. as money paid to his use. *Cross v. Cheshire*, 7 Exch. 43; 15 Jur. 993; 21 L. J., Exch. 8.

The plaintiff and the defendant were shareholders in a mining company; money being required to work the mine, T., who was also a shareholder, applied to a bank for an advance of 500*l.*, which they, the bank, consented to make, on the security of a joint note of the plaintiff, the defendant and T. The note was given, and the money advanced, and applied to the purposes of the mine. The plaintiff having been compelled to pay more than his share of the note, sued the defendant for contribution:—Held, that this was not a partnership transaction, and therefore that the action was maintainable. *Sedgwick v. Daniell*, 3 H. & N. 319; 27 L. J., Exch. 116.

A. and B. being joint owners of a race-horse, it was agreed between them that A. should keep and train, and have the general management of the horse, conveying him to and entering him for the different races; that 3*s.* per week should be allowed for his keep, and that the expenses of keeping, training, and managing should be borne jointly by A. and B., and the horse's winnings be equally divided between them. A. having paid all the expenses of the keep and management of the horse, and there being no winnings to divide:—Held, that even assuming that this agreement constituted a partnership between A. and B., which the court thought it did not, A. was entitled to recover from B. a moiety of the disbursements made by him on account of the horse, as being in the nature of an advance of capital for B. *French v. Styring*, 2 C. B., N. S. 354; 3 Jur., N. S. 670; 26 L. J., C. P. 181.

As to suits for dissolution of partnership,—see this title, VI., 1, b.

## 2. As to Third Persons

### (a) In General.

**Acts within scope of partnership.**—If two are partners as attorneys and conveyancers,

and one receives money to be laid out on mortgage, the other is liable for the amount, though his partner gave a separate receipt for it. *Willett v. Chambers*, Cowp. 814.

One partner has no power to bind another by using the name of the firm in a matter which is not in the usual course of the partnership. *Hastham v. Young*, D. & M. 700; 5 Q. B. 205; 8 Jur. 338; 13 L. J., Q. B. 235.

Attorneys, as such, are not scriveners. *Harmis v. Johnson*, 2 El. & Bl. 61; 17 Jur. 1096; 22 L. J., Q. B. 297; 3 C. & K. 272.

It is therefore not within the scope of the partnership authority, so as to bind a partner without further proof of authority, for one attorney, without the knowledge of his partner, to accept money on deposit, until a good security can be found. *Ib.*

In March, 1832, B and C., who were then in partnership as solicitors, were employed by A. to lay out 500*l.* on mortgage. They lent the money to L. on the mortgage of premises, and retained possession of the deed. The premises were afterwards sold, subject to the mortgage, and the purchaser paid C. the 500*l.* and interest, but without the knowledge of B.; and the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any reconveyance or receipt executed or signed by A., who was not informed that the money had been paid. In December, 1832, C., without the knowledge of B., returned to the purchaser 300*l.*, and received back the mortgage deed, and no part of the 500*l.* was paid to A. Interest at first on the 500*l.*, and then upon the 300*l.*, was paid to C. by the purchaser, and entries were made in the books of B. and C., giving credit to A. for interest on the 500*l.*, and debiting him with interest paid to his agent. In July, 1833, they dissolved partnership. Up to the dissolution, interest on the 500*l.* was regularly paid to the agent of A. by C., by checks drawn by B. and C. on their bankers, and after the dissolution it was paid by C., sometimes in cash and sometimes by checks on his own banker. In some of the receipts the money was described as interest upon a mortgage. A. died in May, 1840. In December, 1840, the purchaser paid C. the 300*l.* and interest, and received from him the mortgage deed. B. was ignorant of the receipts and payments subsequent to the investment of the 500*l.* up to 1840. In 1848, the executors of A. discovered that the mortgage money had been repaid:—Held, that no action would lie against B., inasmuch as the subsequent receipt of the mortgage money by C. was wholly unauthorized, and not within the scope of the partnership business. *Sims v. Bruton*, 5 Exch. 802; 20 L. J., Exch. 41.

A., a partner in a banking firm, advised B., a female customer of the bank, to sell out some Dutch stock, telling her the firm could procure for her better security, and that he had one in view; he said the money was in fact wanted by his own son, who was in trade. B. sold out the stock, and paid the money into the bank; she then gave A. a check to draw

it out and invest it. He drew it out and misapplied it and absconded, the interest having been regularly carried to her account in the meantime in the books of the bank, at by whom it did not clearly appear. All these transactions took place at the banking-house, and B. had no acquaintance or dealings with A. except as a banker and a member of the firm. The other partners did not appear to have known of them at the time they took place, but they did before A. absconded:—Held, that they were not liable. *Bishop v. Jersey*, 2 Drew. 143; 2 Eq. R. 545; 18 Jur. 765; 23 L. J., Chanc. 483.

But a firm of stock-brokers purchasing, on behalf of a customer, foreign securities, passing by delivery, which in their usual course of dealing they retained in their own custody, are jointly and severally liable to make good the same if lost or misapplied. *De Libere v. Barclay*, 23 Beav. 107; 23 L. J., Chanc. 747.

Where a firm of solicitors received from a client a sum of money for which a receipt was given in the name of the firm, stating that part of the money was in payment of costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money:—Held, that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount. *Atkinson v. Mackreth*, 2 L. R., Eq. 570; 35 L. J., Chanc. 624; 14 W. R. 843; 14 L. T., N. S. 722—R. But see *Plumer v. Gregory*, 43 L. J., Chanc. 616; 31 L. T., N. S. 17; also *St. Aubyn v. Smart*, 5 L. R., Eq. 183; and *S. C.*, on appeal, 3 L. R., Ch. 646.

When a partner in a firm of solicitors, in negotiating a mortgage, falsified the abstract title delivered to the mortgagees for the purpose of concealing prior incumbrances, and substituting in the schedule of the draft of the mortgage deed for an unincumbered farm the name of a farm which he knew to be incumbered:—Held, on a claim by the mortgagees to prove against the estate of one of the other deceased partners for any deficiency in their security, that the profits of the transaction being for the general benefit of the firm, all the partners were liable for the fraudulent act of one partner. *Sargy v. Goodwin*, 15 W. R. 1008; 36 L. J., Chanc. 578—V. C. S.

The principal in a business who holds out an agent to the world as the ostensible principal, and carries on the business under the management of and in the name of such agent, is bound by all such acts and contracts of the agent as are incidental to the ordinary conduct of the business, and such liability, as to the rest of the world, cannot be restricted by any private arrangement between them. *Edmunds v. Bushell*, 35 L. J., Q. B. 20; 1 L. R., Q. B. 97; 12 Jur., N. S. 332.

**Fraud, misrepresentation, &c.]—**A firm cannot acquire property in goods obtained by the fraud of one partner, although the other



re not privy to it. *Killer v. Wilson, R. & I. 178*--Abbott.

A partner in a bank transferred certain stock out of a customer's name in the books of the Bank of England, under a forged power of attorney, and without any authority from her, and caused the produce to be mixed with the money of the firm: he having been convicted of another forgery, committed under similar circumstances, and executed:—Held, that the customer might recover against the surviving partners the amount, as money had and received to her use. *Marsh v. Keating, 1 Scott, 5; 1 Bing. N. C. 198; 2 C. & F. 250.*

Where one of two partners, with the intention of cheating the other, goes to a shop and purchases articles such as might be used in the partnership business, which he instantly converts to his own separate use; if there is no collusion between him and the seller, it is a partnership transaction, and the innocent partner will be liable for the price of the goods without any proof of previous dealings between the parties. *Bond v. Gibson, 1 Camp. 195*—Ellenborough.

A. employed B. and C., who were partners as wine and spirit merchants, to purchase wine and sell the same upon commission. C., the managing partner, represented that he had made the purchases, and that he had sold a part of the wines so purchased at a profit; the proceeds of such supposed sales he paid to A., and rendered accounts, in which he stated the purchases to have been made at a certain rate per pipe. In fact, C. had neither bought nor sold any wine. The transactions were entirely fictitious, but B. was wholly ignorant that they were so. Upon the whole account a larger sum had been repaid to A., as the proceeds of that part of the wine alleged to have been re-sold, than he had advanced; but the other part of the wine, which C. represented as having been purchased, was unaccounted for:—Held, that B. was liable for the false representations of his partner; and that A. was entitled to retain the money which had been paid to him upon these fictitious transactions, as if they were real. *Ropp v. Latham, 2 B. & A. 795.*

Held, also, that the supposed purchases having been represented to have been made at a certain specified rate per pipe, A. might maintain an action to recover the specific sum advanced for the number of pipes of wine unaccounted for. *Id.*

A. and B., having for many years been partners in business as solicitors, dissolved partnership in 1834, and the business continued to be carried on by A. alone, until 1841, when he became bankrupt, and it was then discovered that a sum of money which had been paid by a client into the joint account of the firm at their bankers' in 1820, for the purpose of investment, and which A. had shortly afterwards represented to have been invested accordingly, and on which he had regularly paid interest on that footing, had, instead of being invested in equity, been

appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money:—Held, that, even assuming the defendant to have been (as he alleged he was) personally ignorant of the whole transaction, and to have derived no benefit from the fraud, still he was bound by the representation of his partner; such representation relating to a matter within the limits of the partnership business, and amounting therefore to a guaranty by the firm to the parties concerned, that they should be placed in the same situation as if the fact represented were true. *Blair v. Bromley, 2 Ph. 354; 11 Jur. 617; 16 L. J., Chanc. 495.*

A., B. and C. executed to a banking firm, consisting of E., F. and G., a power of attorney, empowering them jointly and severally to receive the dividends, and to sell out the stock itself. The power was sent by the bankers to their broker, who deposited it with the Bank of England. F. alone clandestinely sold out the stock, but the firm had credit for the proceeds. The sale was concealed, and the amount of dividends for some time accounted for:—Held, that E. was liable for the sale, though it had taken place after the death of C. and G.; and that he would have been equally liable, though the proceeds had not been placed to the credit of the firm. *Suller v. Lee, 6 Beav. 324; 7 Jur. 476; 12 L. J., Chanc. 407.*

A partnership firm of W. and G. being in insolvent circumstances, a deed of dissolution was executed, whereby G. assigned to W. all his interest in the partnership assets, and W. covenanted to pay the partnership debts and indemnify G. from the liabilities of the partnership. Fourteen days afterwards W. and G. were adjudicated bankrupts:—Held, that the deed of dissolution was fraudulent and void as against the joint creditors, and that the whole of the partnership property as it existed at the date of the deed continued to be joint property. *Majors, Ex parte, 11 Jur., N. S. 433; 34 L. J., Bank. 25; 13 W. R. 620; 12 L. T., N. S. 254*—C.

**Illegal transactions.**—An action cannot be maintained by several partners for goods sold by one of them living in Guernsey, and packed by him in a particular manner for the purpose of smuggling, though the other partners who resided in England knew nothing of the sale; for it is a contract by subjects in England made in contravention of the laws, and this case must be considered in the same light as if all the partners resided in England. *Biggs v. Lawrence, 3 T. R. 454. And see Waymell v. Reed, 5 T. R. 599, and Clugus v. Penultima, 4 T. R. 466.*

If one of the partners of a foreign firm, who is resident in England, buys goods on their behalf, which are sent out to and sold by them, and accepts a bill of exchange for the price, the seller, knowing that he was dealing with the firm all along, may, on the English partner's bankruptcy, and his failure to realize under it the whole amount of the bill,

proceed against the other partners on the original cause of action, and recover for the residue. *Bottomley v. Nuttall*, 5 C. B., N. S. 122; 5 Jur., N. S. 315; 28 L. J., C. P. 110.

As to actions by and against third persons,—see this title, IV.

(b) Contracts, Conveyances and Dealings with Partnership Property or Business, Generally.

**Contracts, in general.]**—Where one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by or with the knowledge of the other partner:—Held, that he is bound by the contract made by his partner. *Sandilands v. Marsh*, 2 B. & A. 673.

Although one part owner of a ship has no implied authority as such to order insurances to be effected on account of the others, yet, if they are in partnership together, an order to insure given by one renders all liable. *Hooper v. Lusby*, 4 Camp. 66—Ellenborough.

In the absence of evidence of usage, a partner has no implied authority by law to bind his co-partner by a banking account opened by him in his own separate name, instead of in the name of the firm, although such account is for the purposes of the firm. *Alliance Bank v. Kearsley*, 40 L. J., C. P. 249; 6 L. R. C. P. 433; 19 W. R. 822; 24 L. T., N. S. 552.

A building committee having been formed for the purpose of erecting a church, the defendant became a member of it. The defendant at one meeting seconded a resolution that the design submitted by the architect should be adopted, provided the amount did not exceed 5,500*l.*, which resolution was carried. He was not present when the contract was made with the builder, nor did he attend any subsequent meetings; he, however, never formally resigned. In consequence of unexpected expenses, the amount required came to a sum considerably more than 5,500*l.*, and the subscriptions proved inadequate to pay the builder. In an action by the builder against the defendant, to recover the balance due to him:—Held, in the absence of evidence that the defendant had, after absentsing himself from the committee meetings, authorized any one to pledge his credit, or had subsequently ratified the acts of the committee, that he was not personally liable to the builder. *Whillier v. Roberts*, 28 L. T., N. S. 668—C. P.

**Purchase of goods.]**—If several persons horse (with horses their several property), the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the

coach along his part of the road. *Bates v. Hanson*, 2 Taunt. 49; 2 Camp. 97.

Both of two partners are liable for gas furnished, if they have both had the use of it, although the lease of the wharf upon which it is supplied is granted to one of them. *London Gas Light and Coke Company v. Nicholls*, 2 C. & P. 365—Best.

A., in 1847, agreed with B. to supply him with bricks whenever he wanted them, for 28*s.* per 1,000, ready money. In 1848 B. and C. became partners, and after that, B. from time to time ordered bricks of A., which were used for a partnership purpose:—Held, that C., as the partner of B., was liable to A. for the price of these bricks, each order being a new contract; but if the contract of A. and B. had been for the supply of a certain number of bricks at so much per 1,000, a subsequent partner would not have been liable. *Dyke v. Brewer*, 2 C. & K. 828—Erie.

Whether there is a partnership to carry on a work that would give each partner authority to make such contracts as would be proper for the completion of the work, and whether a contract is so or not, is a question for the jury. *Id.*

A person getting his paid servant to carry on business under the name of a firm, as merchants, is jointly liable with him for goods ordered by the servant in the way of the business. *Kirkwood v. Cheetham*, 2 F. & F. 798; 10 W. R. 670.

Certain persons, of whom the defendant was one, associated themselves together for the publication of a periodical work under certain regulations, one of which was, that a committee (naming them) should assist the editor in promoting the prosperity and circulation of the work, in obtaining as far as possible, without expense, literary contributions, and in all such matters connected with the work as the editor might require aid in, but not interfere with the editorial department:—Held, that this gave no authority to one member of the committee to contract for articles to be paid for so as to bind the proprietors. *Heraud v. Leaf*, 5 C. B. 157; 17 L. J., C. P. 57.

**Loans and advances of money.]**—Money lent to one partner for his own expenses while engaged in the partnership business is a partnership debt. *Rothwell v. Humphreys*, 1 Esp. 406—Kenyon.

But if money is lent to one of two partners, who says he borrows it for the firm, and he misapplies it, and there is proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover against the other partner. *Lloyd v. Freshfield*, 2 C. & P. 325; 8 D. & R. 19. But see *Okell v. Eaton*, 31 L. T., N. S. 330, 331.

If money is lent to one partner on his individual credit, the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment. *Id.*

The implied authority of a partner to bind his copartners for the repayment of money borrowed for partnership purposes, in the ordinary course of partnership transactions, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm. *Fisher v. Tayler*, 2 Hare, 218.

It is an incident of a common trading partnership that the managing partners have authority to borrow money for partnership purposes, which include the payment of partnership debts incurred in the ordinary course of business, and this authority is not excluded by special provisions in the partnership deed as to the raising of additional capital for supplying deficiencies in the funds by contributions of the partners. *Brown v. Kulger*, 28 L. J., Exch. 66; 3 H. & N. 853.

A., one of many co-adventurers in a mine, assumed the entire management of it, and, without the direction of his co-adventurers, opened an account with bankers in the name of the adventurers, and overdrew that account to a considerable amount. In an action by the bankers against B. and F., two of A.'s co-adventurers in the mine, for the balance of their account:—Held, that there was no implied authority to one adventurer from his co-adventurers in a mine to pledge their credit for money borrowed by him for the purposes of the mine. *Ricketts v. Bennett*, 4 C. B. 686; 11 Jur. 1062; 17 L. J., C. P. 17.

Where A., B. and C., not being general partners, entered into a joint speculation, and each was to contribute a third:—Held, that A., who had paid his share, was not liable to the bankers of B. for moneys advanced by such bankers on the individual credit of B., without the knowledge of A., though such moneys were applied in payment of bills drawn upon B. in the course of the joint speculation. *Smith v. Craven*, 1 C. & J. 500; 1 Tyr. 300.

When one partner borrows money on the credit of the partnership, and applies it to his own purposes, it is no defense to an action by the lender against the partnership that he negligently omitted to communicate with the other partners, and to make inquiries as to the borrower's authority to pledge the partnership credit, provided he acted bona fide in advancing the money. *Okell v. Eaton*, 31 L. T., N. S. 330—Q. B.

**Guaranties.**—One partner has no incidental authority to bind his copartner in the name of the firm by a guaranty of the debt of a third person; and therefore it is necessary to give evidence of authority from him who did not sign it or of his subsequent recognition. *Duncan v. Lowndes*, 3 Camp. 478—Ellenborough.

A., B. and C. were railway contractors, in partnership, and had entered into a contract to do work for a railway company. D. had entered into a sub-contract to do part of the work, for which part bricks were required, and it was necessary that D. should have coals to burn the bricks. In order to induce the plaintiffs to supply D. with coals, A.,

without the previous knowledge or subsequent assent of his co-partners, entered into a guaranty in the name of the firm, to secure the payment of the coals to be supplied to D. by the plaintiffs:—Held, that B. and C. were not liable on the guaranty. *Brettell v. Williams*, 8 Exch. 623; 19 L. J., Exch. 121.

The managing clerk of the firm, without the knowledge of B. and C., wrote letters to the plaintiffs, containing evidence of an account stated respecting the amount due under the guaranty:—Held, that as the giving the guaranty was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B. and C. *Id.*

**Receipts and releases.**—Where a receipt has been given by one partner in the name of the firm, but without the knowledge of the other partners, such receipt is not conclusive evidence against the firm in an action by them for their demand, and evidence is admissible to show that it was given fraudulently. *Farrar v. Hutchinson*, 1 P. & D. 437; 9 A. & E. 641; 2 W., W. & H. 106.

If A. and B. are in partnership, and C. owes them a sum of money on the partnership account, a receipt given by A. upon settling off a private debt due from himself to C. will be a bar to an action by A. and B. against C. for the debt due to the partnership. *Henderson v. Wild*, 2 Camp. 561—Ellenborough.

Either partner after a dissolution of partnership may receive debts due to the firm, notwithstanding a stipulation in the deed of dissolution that one only shall receive all debts; and, after a dissolution of partnership, either party may give a release to a debtor of the firm. *King v. Smith*, 4 C. & P. 108—Tenterden.

Payment to one of two partners of a partnership debt, after they had appointed a third person to collect the debts, and with notice of such an appointment, is good. *Porter v. Taylor*, 6 M. & S. 156.

If, after dissolution of partnership, and a notice in the Gazette requiring that debts due to the partnership shall be paid to one of the partners only, a receipt is given collusively by the other, dated prior to the dissolution, such receipt is void. *Henderson v. Wild*, 2 Camp. 561—Ellenborough.

A. and B. were partners in a firm. A. allowed a debtor to the partnership to set off a separate debt of his own against money due to the firm, the debtor knowing the interest which B. had in the debt. B. filed a bill against the debtor and against A., to have it declared that the debtor had no right to retain his share in the debt towards payment of the separate debt of A.:—Held, that, although one partner could bind another in the receipt and payment of partnership debts, he could not set off his separate debts against the debts due to the firm; and the debtor's knowledge of the co-partner's interest rendered the bill sustainable as against him. *Piercy v. Fynney*, 12 L. R., Eq. 69; 40 L. J., Chanc. 404; 19 W. R. 710—V. C. M.

Held, also, that this was a proper subject for a suit in equity, since one partner must sue in an action in the name of himself and his copartner. *Id.*

**Pledge, mortgage and other dispositions of property.**—A deposit of private deeds by one partner, made under a written agreement to secure payments made for him, will cover payments made on behalf of the firm, if there is evidence that the deposit was really made in respect of the partnership debts. *Chuck v. Freen*, M. & M. 259—Tenterden.

One of several partners in a contract with government cannot pledge goods consigned to him by another partner, for the purpose of performing the contract. *Smith v. Burridge*, 4 Taunt. 684.

A., a merchant in London, by letter, directed B., a broker in Liverpool, to purchase 1,000 bales of cotton, and stated that B. was to be allowed to be one-third interested therein, acting in the business free of commission. B. agreed to purchase the cotton, and to hold one-third interest therein, charging no commission. B. purchased the cotton, and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint concern, joint purchase, joint speculation and joint cotton adventure. B. transmitted policies of insurance against loss by fire to A., and stated that the cotton was deposited in rooms rented by him (B.), and that he held the key for their joint security:—Held, that B. was interested as a partner in the cotton; and consequently, that a pledge of the whole by him without any fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against A. *Raul v. Hollinshead*, 7 D. & R. 444; 4 B. & C. 807.

A pledge by one partner of joint partnership property will bind his copartners, although such pledge is made without their privacy or consent, provided the pledgee had no notice that the property was partnership property, and there is no fraud or collusion in the transaction. *Raba v. Ryland*, Gow, 132—Dallas. S. P., *Tupper v. Heythorn*, Gow, 135, n.

M. and L., a partnership firm, had a joint account with a bank with whom M. had also a separate account. M. having railway shares, which the bank knew to be his separate property, deposited them with the bank, accompanied with a written memorandum that they were to be held as a collateral security for a promissory note of his own which had been discounted by the bank, or for any other sums in which he was or might become indebted to them. M. and L. subsequently became bankrupt, being indebted to the bank on their joint account in a sum which was unsecured. Before the bankruptcy the shares had become the property of the firm:—Held, that the bank was not entitled to hold the shares as a security for the debt due to them from the firm. *McKenna, Ex parte*, 7 Jur., N. S. 588; 30 L. J., Bank. 20; 3 De G., F. & J. 620; 9 W. R. 490; 4 L. T., N. S. 164.

The plaintiff and W. were partners, and

during the partnership had dealings with the defendants. W. was indebted to them on his own account, and at his request they paid 1,000*l.* of the partnership money, paid by him to them, to the liquidation of his private debt. The plaintiff did not know or authorize this mode of applying the money, and had not conducted himself in such a manner as to make it reasonable for the defendants to believe that he had authorized it, nor they did in fact believe he had. Upon the dissolution of the partnership, it appeared from the accounts that the firm owed the defendants more than \$5,000*l.*, and the plaintiff accepted bills for the whole balance apparently due. These bills were handed to the defendants for the purpose of being discounted. Before they arrived at maturity, the plaintiff discovered the application by the defendants of the 1,000*l.* to W.'s private debt. He nevertheless met the bills, at the same time informing the defendants that he did so under protest, and only to save his father's credit, whose name was on the bills as drawer. In an action to recover the \$1,000*l.*, as money paid under a mistake of fact:—Held, first, that the defendants could not retain the money as against W.'s private debt, the plaintiff never having authorized his appropriation to that debt, nor conducted himself so as to give them reasonable grounds for believing that he had; and, secondly, that the plaintiff, having been ignorant of the real facts of the case when the bills were drawn, had not precluded himself from recovering by meeting them at maturity when he had discovered the facts, inasmuch as his so doing could not be regarded as a voluntary act. *Konlat v. Wood*, 3 L. R., Exch. 243.

Partners cannot effectually pledge partnership property, so as to make it available for their own private debts. To do so when the partnership is insolvent is to commit an act of bankruptcy. *Snodgrass, Ex parte, Douglas, In re*, 41 L. J., Bank. 49; 7 L. R., Ch. 534; 26 L. T., N. S. 894; 20 W. R. 786.

A partnership, consisting of A. and B., were in insolvent circumstances, the separate estates of the partners being also insolvent. On the 14th of September, B. executed a power of attorney to C., authorizing him in general terms to deal with his property. The power contained no reference to the partnership. It contained express powers as to a ship which was in reality partnership property; though the fact did not appear in the power. On the same day B. left England, under circumstances which constituted his departure an act of bankruptcy. In November, A. and C. (as B.'s attorney) executed a mortgage of all the partnership property to S., a creditor of the partnership, and also a separate creditor of both parties, to secure all the past debts and such future advances as might be made. At the same time a bill of sale of the ship was executed by A. and C. (as attorney), in consideration of a sum of money paid by S. on account of the partnership. In April, A. and B. were both adjudged

cated bankrupts. S., at the date of the deeds, knew the circumstances under which B. had left England, but he declared in his evidence that he did not infer that B. had any intent to delay or defeat his creditors, and therefore did not know that he had committed an act of bankruptcy:—Held, first, that the execution of the mortgage by C., as B.'s attorney, was void, as not being within the scope of the power of attorney. *Ib.*

Held, secondly, that the execution of the mortgage was an act of bankruptcy, on the ground of its being a mortgage of partnership assets to secure separate debts at a time when the partnership was insolvent. *Ib.*

Held, thirdly, that S. must be held affected with notice that B. had committed an act of bankruptcy by leaving England. *Ib.*

Held, fourthly, as a consequence of the above holding, that both mortgage and bill of sale were void as against the trustee of the joint estate. *Ib.*

#### Execution of deeds, powers of attorney, &c.]

—One partner cannot bind the other partners by deed, unless a particular power is given for that purpose. *Harrison v. Jackson*, 7 T. R. 207.

But if A. executes a deed for himself and his partner, by the authority of his partner, and in his presence, it is a good execution, though only sealed once. *Ball v. Dunsterville*, 4 T. R. 813.

A mere acknowledgment of the authority to the other partner to execute the deed is not sufficient, without production of the authority under seal. *Steiglitz v. Eggington*, Holt, 141—Gibbs.

A general power of attorney granted to one partner does not give any authority to the others. *Edmiston v. Wright*, 1 Camp. 88—Ellenborough.

An agreement for letting premises (under hand only) was signed "H. Curtis & Co.:" and it appeared that there were two persons trading under that firm, but it was not proved, through the absence of the attesting witness, in whose handwriting it was signed:—Held, upon evidence that both persons acted in the business, that there was sufficient proof of an execution by the partnership. *Evans v. Curtis*, 2 C. & P. 296—Abbott.

Where a deed of assignment, purporting to be made by all three partners of a firm, and to convey all their personal estate and effects whatsoever in trust for the benefit of creditors, was executed by one of them only:—Held, that it operated to convey the share of one who so executed. *Bowler v. Burdekin*, 11 M. & W. 128; 12 L. J., Exch. 329.

A company was formed in India to carry on the business of insurance, and A., residing in the Mauritius, gave special verbal instructions to B., who was the agent for the company in India, to execute the partnership deed for A., which was done, and A.'s name appeared in the list of shareholders. Afterwards, on the insolvency of the company, A. set up the defense that he was not a shareholder, for no power by deed was given to B.

to execute the deed in his name:—Held, that a partner might become liable in that character without having executed the partnership deed, if his name was put on the list of shareholders with his consent, so as to entitle him to share in the profits. *Leishman v. Cochrane*, 12 W. R. 181; 9 L. T., N. S. 104; 1 Moore P. C. C., N. S. 315.

**Submission to arbitration.]**—One partner has not implied authority to bind his copartner to a submission to arbitration, respecting the matters of the partnership. *Adams v. Bankart*, 1 C., M. & R. 631; 5 Tyr. 425; 1 Gale, 48. S. P., *Stead v. Salt*, 3 Bing. 101; 10 Moore, 389.

Where submission took place in an action brought by one partner in the name of both, to recover debts due to the firm, and there was an authority so to do, yet as the other partner, although apprised of the action, had no knowledge of the submission:—Held, that there was no evidence of any authority on his part to refer, and that he was not liable in an action on the award. *Hutton v. Royle*, 27 L. J., Exch. 486; 3 H. & N. 500.

**Legal proceedings.]**—One partner has no implied authority to consent to an order for a judgment in an action against himself and his copartner. *Hambridge v. De la Crouée*, 3 C. B. 742; 4 D. & L. 466; 10 Jur. 1096; 16 L. J., C. P. 85.

As to authority of partners, as between themselves,—see this title, III., 1, a; after change in firm or dissolution,—see this title, V.; VI., 2.

#### (c) Bills of Exchange and Promissory Notes.

**Authority to draw, accept, make or indorse, in general.]**—In drawing or accepting bills of exchange, one partner may bind the rest. *Harrison v. Jackson*, 7 T. R. 207.

Even by procuration. *Williamson v. Johnson*, 1 B. & C. 146.

Goods having been ordered by E. were invoiced to E. & Son, and a bill was drawn for the price on E. & Son. The bill was accepted in the handwriting of the son, in the name of E. & Son. The son was not a partner, and it was alleged that he accepted the bill only as his father's amanuensis:—Held, that if the son had so conducted himself that the drawer might reasonably have believed, and did believe, that he was a partner, he was liable on the bill. *Gurney v. Evans*, 3 H. & N. 122; 27 L. J., Exch. 160.

But the authority of one partner to bind another, by signing bills and notes in their joint names, is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them that the other would not be liable for it. And this, though it was represented to the holder by the party signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it was in fact so applied. Nor can he recover against the

other partner the amount of the sum so applied to the payment of the partnership debts against such notice. *Gallway v. Matthews*, 10 East, 264; 1 Camp. 403.

A joint interest in and occupation of a farm by two persons, is not a partnership, so as to convey to each an implied authority to bind the other by the acceptance of bills of exchange for payments in respect of the farm. *Greenlade v. Dover*, 1 M. & R. 640; 7 B. & C. 635.

One of several partners who do not form a trading partnership, cannot bind the others by drawing or accepting bills without an express authority. *Id.*

The implied authority of one partner to bind another by a note or a bill is confined to partnerships for the purpose of trade. *Hedley v. Bainbridge*, 8 Q. B. 816; 2 G. & D. 483; 6 Jur. 853.

One of two attorneys in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt, as for money handed to the firm by a client to be laid out on mortgage. *Id.* See *Levy v. Pyna*, Car. & M. 453.

A member of a firm of attorneys has no implied authority to bind his copartners by a post-dated check drawn in the name of the firm. *Forster v. Mackreth*, 2 L. R., Exch. 103; 36 L. J., Exch. 94; 16 L. T., N. S. 23; 15 W. R. 747.

The business of attorneys is not such as to render it either necessary or usual to draw or to indorse bills of exchange, and therefore a member of a firm of attorneys has not, as such, authority to bind his firm, either by drawing or by indorsing them. *Garland v. Jacob*, 28 L. T., N. S. 877; 21 W. R. 868; 8 L. R., Exch. 216—Exch. Cham.

The defendant, who carried on business on his own account, and in partnership, gave a general power of attorney to his wife and partners to act for him, and in his name, and to his use, and to indorse bills, &c., and generally to act for him while abroad. He gave another power to his wife alone, to act "for him and on his behalf, and to pay and accept such bills as should be drawn by his agents and correspondents, as occasion should require." One of the partners drew a bill on him for money to supply the partnership concerns, the defendant having received while abroad money on the partnership account, and the wife accepted this bill for her husband:—Held, 1st, that the partner could not be called his agent, and therefore the wife had not power to accept this bill; 2dly, that she had not power to accept a bill for partnership transactions, but only bills on his own account; 3dly, that the general words in the power of attorney were not to be construed at large, but as giving general powers for carrying into effect the special purposes for which they were given; and therefore that the indorsee who had not used due caution, could not recover. *Atwood v. Munnings*, 7 B. & C. 278; 1 M. & R. 78.

Where A. and B. agreed to take a farm,

and pay C., the former occupant, for certain articles, by bills at three months, and B. afterwards, without the knowledge or consent of A., entered into another agreement with C. to pay for such articles by bills at six and twelve months, and C. accordingly took bills from B. for the amount, payable at six and twelve months, accepted by B. in his own name and A.'s:—Held, that the latter could not be sued on the last-mentioned bills. *Greenlade v. Dover*, 7 B. & C. 635; 1 M. & R. 640.

Four firms, F. & Co., M. & Co., M. & L. and A. & Co., associated themselves in a trading adventure, under an agreement which provided "that the finance of the business be carried on by acceptances of the several parties interested, as may from time to time be arranged." The association was not registered, nor was its existence made known to the world, though it was known as the Adansonian Fibre Company among its members. The adventure had, before the association was formed, been carried on by F. & Co., in whose name it continued to be carried on. An order having been made for winding-up the association, an application was made to prove on ten bills of exchange, drawn by M. & Co. for the purposes of the adventure, and accepted, some by F. & Co., some by M. & L., and some by A. & Co.:—Held, that the proof could not be admitted, for that the bills bound only the individual firms by which they were drawn and accepted. *Adansonian Fibre Company, In re, Miles' Claim*, 9 L. R., Ch. 635; 31 L. T., N. S. 9.

**Use of partnership name.]**—A partner has no implied authority by law to bind his copartners by his acceptance of a bill except in the true style of the partnership. *Kirk v. Blurton*, 9 M. & W. 284; 12 L. J., Exch. 117.

Where a partner, accustomed to issue notes on behalf of the firm, indorsed a particular note in a name differing from that of the partnership and not previously used by it, which note was objected to on that account, in an action upon it by an indorsee, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the indorser must be taken to have issued the note on his own account and not in the exercise of his general authority as partner. *Faith v. Richmond*, 11 A. & E. 839; 3 P. & D. 187.

A., who was a cheesemonger at Woolwich, carried on at Woolwich the hosiery trade in partnership with C., but in his own name. C. accepted, in the name of A., a bill drawn for goods supplied to the partnership, and which was addressed to A. at Woolwich:—Held, that the acceptance was binding on A., although the bill was not addressed to the place where the partnership business was carried on. *Stephens v. Reynolds*, 5 H. & N. 518; 29 L. J., Exch. 278; 2 L. T., N. S. 222; 2 F. & F. 147.

A. employed B. to manage his business, and



to carry it on in the name of B. & Co. The drawing and accepting bills were incidental to the carrying on of such a business, but it was stipulated between them that B. should not draw or accept bills. B. having accepted a bill in the name of B. & Co.:—Held, that A. was liable on the bill in the hands of an indorsee, who took it without any knowledge of A. and B. or the business. *Edmunds v. Bushell*, 1 L. R., Q. B. 97; 12 Jur., N. S. 332; 35 L. J., Q. B. 20.

*Von S. & Co.*, merchants trading in Buenos Ayres under that title, agreed with the defendants, merchants trading in London under the title of R. B. & Co., to carry on joint exchange operations, by which Von S. & Co. were, at Buenos Ayres, to draw bills periodically on the defendants, at ninety days' sight, to sell them there, and to invest the proceeds, keeping the defendants out of cash advance by periodically remitting to them bills to the same amount on other firms, to be bought by Von S. & Co. These transactions were to be on the footing of a community of profit and loss. The plaintiffs, another firm of merchants at Buenos Ayres, bought there of Von S. & Co. certain of the bills drawn by the latter, in their own name, on the defendants, in the course of these operations. The plaintiffs were induced to buy the bills by the statement of a broker, employed by Von S. & Co. to procure purchasers, that "the bills were all in order, he having seen the defendants' letter of credit to Von S. & Co., in virtue of which the bills were drawn." The defendants refused to accept these bills on presentation. Von S. & Co. became bankrupts, and the plaintiffs proved on the bills against their estate, and recovered forty per cent. of the amount. The plaintiffs also brought an action against the defendants:—Held, that the plaintiffs had no cause of action against the defendants; that the defendants were not drawers of the bills, the signature "Von S. & Co." to the bills not including the defendants, though the agreement between Von S. & Co. and the defendants created a partnership between them; that the defendants were not liable for money lent, the plaintiffs having made no loan to Von S. & Co., or for money had and received, the plaintiffs not having paid money on a consideration which had wholly failed: that the defendants had not contracted with the plaintiffs to accept the bills; Von S. & Co. having no authority to make such a contract for the defendants, and not having in fact made any such contract, the broker's statement to the plaintiffs amounting merely to an expression of belief that the bills would be, not to a contract that they should be, accepted. *Nicholson v. Rickitts*, 2 El. & El. 497.

**Bills and notes made or used for partnership purposes.]**—Where one of two partners, having authority to bind the other by drawing or indorsing bills of exchange, raised money by bills in fictitious names, indorsed by him in the partnership firm, and the money

was afterwards applied to the partnership purposes:—Held, that the other partner was liable to the persons from whom the money was so obtained. *Thicknesse v. Bromilow*, 2 C. & J. 425.

On the 24th June, 1824, C. agreed to become a partner with A. and B., the business to be carried on in the name of A. and B., for the benefit of A., B. and C.; the partnership to be considered as commencing on the 18th of May preceding. Before the 24th of June, A. and B. had opened an account with certain bankers, which was continued in their names till the 22d of September, when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., and the bankers did not know that C. was a partner till the account was closed. B. used the accounts for the purposes of the firm of which C. was a member, as well as for others. On the 21st of May, he indorsed a bill of exchange in the partnership names of A. and B. to the bankers, who discounted it, and placed it to the credit of the account. On the 18th July he indorsed two others in a similar manner:—Held, that, as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted. *Vere v. Ashby*, 10 B. & C. 288.

Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker:—Held, that the latter had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills, though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; though the banker conceived at the time that all the bills were drawn on the partnership account. *Emly v. Lye*, 15 East, 7.

A., B. and C. carried on business in partnership as factors: A. and B. in England, under the firm of A., C. & Co.; and C. in America, in the name of C. only. C. had written instructions from his partners, stating, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." C., having obtained a consignment from D. in America, indorsed bills in his own name for him, to provide for which D. drew other bills on A., C. & Co., in England, which were to be paid out of the proceeds of the consignment. Before the latter bills were presented for acceptance A. and B. became bankrupts:—Held, that the

indorsement of the first bills by C. was the indorsement of the firm, and that all the partners were liable as indorsers of those bills. *Carolina Bank v. Case*, 2 M. & R. 459; 8 B. & C. 427.

Where one of several partners, with the privity of the others, drew bills in his own name in favor of persons who advanced him the amount, which he applied to the use of the partnership:—Held, that although the partners were not jointly liable on the bills, yet that they might be jointly sued by the payees for money lent. *Denton v. Rodie*, 3 Camp. 493—Ellenborough.

The defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt, and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted in the name of the firm a bill drawn by him on them. The partnership deed contained a clause, that if any partner should, for his own use, or for any other purpose than the immediate use of the partnership, draw, accept or indorse any bill of exchange in the name of the firm, the others might determine his interest in the partnership:—Held, that the managing partners had authority to bind the partnership by borrowing the money, and accepting the bill. *Brown v. Kidger*, 3 H. & N. 853; 28 L. J., Exch. 66.

Two partners carried on business as brokers, under an agreement that they were to get orders on commission, and divide the expenses. One of them traveled for orders, and having incurred expenses, drew a bill for the first time in the partnership name, to raise funds to execute an order. The other partner accepted it, but before it was issued countermanded the authority to negotiate it, and it was negotiated without his knowledge:—Held, that the mere partnership did not render him liable upon it. *Yates v. Dalton*, 28 L. J., Exch. 69.

**Bills and notes made by partners for individual or unauthorized purposes.]**—One partner cannot bind the firm by drawing a bill in the name of the firm, for the discharge of his own private debt, without the knowledge of his copartner. *Green v. Deacon*, 2 Stark. 347—Ellenborough. And see *Barber v. Backhouse*, Peake, 61.

Where one partner puts the name of the firm to a bill of exchange, but the party at whose request it is done knows that is not on the partnership account, nor for their benefit, but is the act of the one partner only, he cannot sue the firm on that bill. *Arden v. Sharpe*, 2 Esp. 524—Kenyon.

Where one partner drew and indorsed a bill in blank in the partnership firm, and delivered it to a clerk to be filled up for the use of the firm according to their usual course; and after his death, when the survivors had assumed a new firm, the clerk filled up the bill, inserting

a date prior to his death:—Held, that the survivors were liable as drawers to a bona fide indorsee for value, although no part of the value came to their hands. *Usher v. Drumery*, 4 Camp. 97—Ellenborough.

An indorsee cannot maintain an action on a bill accepted by one partner in a transaction not relating to the partnership, against a secret partner, because the latter had no interest in the bill, and it was not accepted in a partnership transaction, and the bill was not taken on his credit, as he was not known to be a partner. *Lloyd v. Ashby*, 2 C. & P. 138—Abbott.

A., R. and O. carried on business as partners, under the firm of Ashby & Co., from February, 1820, to May, 1824, when O. retired, and the other two partners agreed to liquidate all the debts due from the partnership, and they continued the business as partners, under the firm of Ashby & Rowland. In June, 1824, S. agreed to become a member of the last-mentioned partnership, as from the 18th of May preceding, but his name was not introduced, and the business was still carried on under the names of Ashby & Rowland only. In July, 1824, H., being indebted to L., drew a bill of exchange in his favor upon Ashby & Co., which bill was accepted by the partner R. in the names of Ashby & Rowland. H., the drawer of the bill, had had dealings with the firm of A., R. and O., but whether that firm was indebted to him when the bill was drawn did not appear, nor did it appear that there had been any dealings between H., the drawer, and A., R. and S., after the entrance of S. into the partnership. The name of S. was never used or made known to any person dealing with the firm:—Held, that A., R. and S. were liable upon this bill as acceptors. *Lloyd v. Ashby*, 2 B. & Ad. 23.

A bill, though drawn on a firm and accepted by one of the partners, if for a separate debt of one of them, will not bind the partnership if the party knew the consideration of the bill. *Wells v. Masterman*, 2 Esp. 731—Kenyon.

But it is otherwise in the hands of a bona fide indorsee without notice. *Id.*

If one partner draws or indorses a bill in the partnership firm, it will *prima facie* bind the firm, although passed by the one partner to a separate creditor in discharge of his own debt; unless there is evidence of connivance between such partner and the separate creditor; or at least of the want of authority, either express or implied, in the debtor partner to give the joint security of the firm for his separate debt. *Ridley v. Taylor*, 13 East, 173.

Where a partnership firm is pledged by the acceptance of a bill of exchange by one partner in the name of the firm, the partnership, of whomsoever it may consist, whether they are named or not, and whether the partners are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached. *Windle v. Crowther*, 1 C. & J. 316; 1 Tyr. 210.

A. and B. being in partnership, and A. residing in England, and B. in America, A. may ind B. by a bill of exchange drawn in their joint names, though B. had no notice of the bill, nor is at all interested in the transaction, provided the holder does not know of the fraud. *Sutton v. Gregory*, Peake's Add. Cas. 53—Kenyon.

Although, generally speaking, a partner has full authority to deal with the partnership property for partnership purposes, and, if the business of the partnership is such as ordinarily requires bills, to draw, accept and indorse bills in the name of the partnership, yet, if a person discounting bills drawn and indorsed by a partner in the partnership name, has notice that the partner is dealing with the bills for his private purposes, he is bound to ascertain the extent of the authority of the individual partner, and if the dealing is not authorized, he has, upon the bankruptcy of the firm, no right to prove against the joint estate of the partnership, except to the extent to which the partnership may be indebted to the individual partner. *Darlington District Joint Stock Banking Company, Ex parte, Riches, In re*, 4 De G., J. & S. 581; 11 Jur. N. S. 123; 34 L. J., Bank. 10; 13 W. R. 353; 11 L. T., N. S. 651—C.

One who takes from a member of a trading firm, in satisfaction of his separate debt, a negotiable security in the name of the partnership, is bound to show that it was accepted or indorsed with the concurrence of the other partners. *Levenson v. Lane*, 13 C. B., N. S. 278; 9 Jur., N. S. 670; 32 L. J., C. P. 10.

A bill accepted in the name of a firm, in the hands of a bona fide holder, is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent. *Wiseman v. Easton*, 8 L. T., N. S. 637—C. P.

B. and S. traded in partnership, and were possessed of bills of exchange, which S., in fraud of the partnership, indorsed and delivered to the defendant in satisfaction of a private debt of his own, the defendant being cognizant of the fraud. S. became bankrupt. The defendant having realized the bills, the assignees of S., jointly with B., without having previously done anything to disaffirm the transaction, brought an action against the defendant for the wrongful conversion and for money received to their use.—Held, without deciding whether they could maintain an action for conversion, that they were entitled to recover under the counts for money received to their use. *Heilbut v. Neill*, 5 L. R., C. P. 478; 39 L. J., C. P. 243; 18 W. R. 898; 22 L. T., N. S. 662—Exch. Cham.

The firm of W. & K. being indebted to G., to whom W. was also privately indebted individually, G. gave a receipt in the name of the firm for 1,000*l.*, paid by W. out of the partnership moneys, and subsequently, at the request of W., credited his private account with the amount instead of the account of the firm. W. had no authority to appropriate the partnership moneys in this manner,

but G. believed that he had. On the dissolution of the firm, K. paid to G. partly in cash and partly in bills, the amount which appeared by G.'s books to be due from the firm. Before the last bill became due, which was for an amount over 1,000*l.*, K. discovered how W. had appropriated the 1,000*l.*, but he paid the bill under protest notwithstanding.—Held, that K. was entitled to recover 1,000*l.* from G., as money had and received to his use, seeing that he was not bound by the act of W., done without his authority; and that it was for G. to show that K. had so conducted himself as to induce the belief that he had given W. authority. *Kendal v. Wood*, 39 L. J., Exch. 167; 23 L. T., N. S. 899—Exch. Cham.

Held, also, that the bill was given under circumstances amounting to a mistake of facts, which facts would have constituted a defense, if not at law, in equity, to any supposed claim by G., and that the subsequent payment of the bill (which might be taken to be in the hands of third parties) could not be regarded as a voluntary payment. *Id.*

As to liability upon bills and notes after withdrawal from firm or dissolution,—see this title, V., 2; VI., 2, a.

#### IV. ACTIONS BY OR AGAINST PARTNERS.

##### 1. When Joint or Separate; Parties; and Proceedings, Generally.

**Who may sue upon joint or separate contracts or interests of partners.]**—Where A., in his own name, deposits with his banker, C., the proceeds of a sale of the partnership effects of A. and B.; A. and B. cannot join in an action against C. for the amount, unless it is shown that the deposit was made by A. as agent for the firm. *Sims v. Boud*, 2 N. & M. 608; 5 B. & Ad. 389.

The defendant applied for a loan of money to A. who was a partner with several others in a banking-house. Nothing passed at the time of negotiating for the loan to exclude the firm from making it. The advance was afterwards made out of the partnership funds.—Held, that the other partners were properly joined with A. in suing for money lent. *Alexander v. Barker*, 2 Tyr. 140; 2 C. & J. 133.

A member of a partnership, entering into a contract with another party, may guard against a joint contract by making it expressly an individual transaction. *Id.*

A partner cannot join in suing upon a contract made before he became such, although, by the deed of copartnership, he was to have a share in the prior contracts and transactions of the firm. *Wilsford v. Wood*, 1 Esp. 182—Kenyon.

Where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted the same, upon condition that the drawer should provide for the same when due.—Held, that all the part-

ners in the banking firm could not recover on the bill. *Sparrow v. Chisman*, 9 B. & C. 241; 4 M. & R. 206.

Where a banking trade is carried on in the name of father and son, in whose joint names the accounts with the customers are headed in the banking-books, the father cannot sue alone for the balance of an account overdrawn by a customer, without giving distinct proof that the son, though proved to be a minor, has no property in the banking fund, or share in the business as a partner. *Teed v. Elworthy*, 14 East, 210.

B., a partner in the firm of B., M. & Co., opened an account with bankers in the partnership name. B. was one of the commissioners under an act of parliament for paying a township, who also had an account at the same bank, and were considerably in advance. The commissioners being desirous of a further advance, the manager of the bank wrote to B., offering to make it on condition that he would not withdraw an equal amount of his account. B. wrote in reply that he wished to have 5,000*l.* advanced on those terms, adding, "I undertake not to remove my funds to the extent of this extra advance until the same is repaid by the commissioners." The bank made the advance, and subsequently there was a balance on B.'s account, the extra advance not having been paid:—Held, that assuming that this was a partnership account, B., M. & Co. could not recover the balance as money received for their use, and that this defense was available under the general issue. *Brownrigg v. Rae*, 5 Exch. 489.

If two persons become partners, and hold themselves out to the world as such, and there is a common liability for loss, though by a private agreement, not a complete community of profit, an action for business done by one of them for a third party may be brought in their joint names. *Bond v. Pittard*, 2 Jur. 183; 3 M. & W. 357; 1 H. & H. 81.

In an action by A., as the payee of a note, against B., the maker, it is no defense that the note was given as security for a loan made to B. out of the funds of a copartnership of which A. and B. are members, and A. the treasurer and trustee, and that A. sues on behalf of the copartnership. *Lomas v. Bradshaw*, 9 C. B. 620; 19 L. J., C. P. 273.

The plaintiffs, who were members of a company which dealt in salt, and the defendant, entered into a written agreement, to the effect that the company was to supply the defendant with brine at a certain sum; that the company's make of salt, and the price, were to be fixed according to a certain standard; and that either the company or the defendant was to be at liberty to cease to supply or to take the salt upon giving a notice to that effect. This agreement was signed thus: "For Clay and Newman (the plaintiffs), J. W. Lea." "J. S." (the defendant). The salt was supplied from the premises of the company:—Held, that the plaintiffs had themselves entered into this contract with the de-

fendant; and that they were entitled to sue him for a breach of it in their own names. *Clay v. Southen or Southan*, 7 Exch. 717; 16 Jur. 1074; 21 L. J., Exch., 202.

— upon personal contracts of partners, generally.]—A declaration stated that the plaintiff and A. carried on business in copartnership; and, in consideration that the plaintiff and A. would sell the defendant the business, and would become trustees for him in respect of all debts due to the plaintiff and A. in respect thereof, the defendant promised the plaintiff to pay him all money which he had advanced in respect of the copartnership, and for which it was accountable to the plaintiff. Averment, that the plaintiff and A. sold the business to the defendant, and, at the time of the promise the plaintiff had advanced a certain sum. Breach, non-payment of that money:—Held, on motion in arrest of judgment, that it was not necessary to join A. as a co-plaintiff, and that the declaration was good. *Jones v. Robinson*, 1 Exch. 454; 11 Jur. 933; 17 L. J., Exch. 36.

A., a coach-maker, entered into an agreement to furnish B. with a carriage, for the term of five years, at seventy five guineas a year. At the time of making the contract, C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years, the partnership between A. and C. was dissolved, A. having assigned all his interest in the business and in the contract in question to C., and the business was carried on by C. alone. B. was informed by C. that the partnership was dissolved, and that he (C.) had become the purchaser of the carriage then in his (B.'s) service. The latter answered that he would not continue the contract with C., and that he would return the carriage to him at the end of the then current year, and he did so return it. An action having been brought in the names of A. and C. against B., for the two payments, which, according to the terms of the contract, would become due during the last two years of its continuance:—Held, that the action was not maintainable, the contract being personal, and A. having transferred his interest to C., and having become incapable of performing his part of the agreement. *Robson v. Drummond*, 2 B. & Ad. 303.

A., a member of a firm of A. Brothers, of South America, went to Hong Kong to enforce a debt due by B. & Co., of that place, to his firm. Upon B. & Co. being threatened with proceedings, they applied to C. & Co. for assistance. C. & Co. agreed to advance B. & Co. the money to pay their debt, by remitting the amount to A. & Co., and afterwards, in pursuance of this agreement, and in consideration of A.'s not proceeding to sue B. & Co., gave an undertaking in writing, whereby C. & Co. promised to remit the amount to A.'s agent in London, at the expiration of six months, whereon A. gave B. & Co. a receipt in full for the debt due to the firm of A. &

**Co. C. & Co.** afterwards repudiated their obligation to remit the amount to A. & Co. **A.** brought an action, in his own name, against C. & Co.:—Held, that the contract being entered into with A. personally, upon his undertaking not to sue B. & Co., constituted a personal agreement; and that A. was entitled to sue C. & Co. in his own name, without joining his partners. *Agacio v. Forbes*, 14 Moore P. C. C. 160; 4 L. T., N. S. 155; 9 W. R. 503.

A plaintiff declared against the defendants as accountants, alleging negligence in the making out accounts, in which he and his two partners were interested, in consequence of which the plaintiff sustained damage:—Held, that evidence that the defendants were retained and employed by the firm, sustained an allegation of a retainer and an employment by the plaintiff. *Story v. Richardson*, 8 Scott, 201; 6 Bing. N. C. 123; 4 Jur. 26.

— upon contracts for the sale and purchase of goods.]—Where the parties agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made a contract for the purchase accordingly:—Held, that all might join in suing the vendor for a breach of that contract. *Cothay v. Fennell*, 10 B. & C. 671.

Where a partnership between two persons in trade had been dissolved, and one of them carried on business afterwards solely on his own account, but in the names of himself and former partner:—Held, that he might alone maintain an action for goods sold and delivered to the defendant during the existence of the partnership. *Atkinson v. Laing*, D. & R. N. P. C. 16—Abbott.

The joint owners of a vessel engaged in the whale fishery may sue a purchaser for the price of oil, although the contract of sale was made by one of the part-owners only, and the purchaser was ignorant that other individuals had any interest in the transaction. *Skinner v. Stocks*, 4 B. & A. 437.

Where one person purchases goods, and another is afterwards permitted to share in the adventure, the vendor cannot recover against such other person for the price of the goods. *Young v. Hunter*, 4 Taunt. 582; 16 East, 252; 2 Rose, 120.

— in cases of collusion with partners.]—If a person colludes with one partner in a firm to injure the other partners, those others can maintain a joint action against the person so colluding. *Longman v. Pals*, M. & M. 223—Tenterden.

In an action against one of several partners for not delivering goods, with a count for money had and received, to which defendant pleaded that the promises were made jointly with A. and B., it appeared that the defendant, being partner with A. and B., made the contract individually, though in the name of the partnership, and for the sale of partnership property, and that in fraud of his partners he received the money to his own use, though

the bill drawn by him for the money was in the partnership name:—Held, that the plaintiff might recover the money so received. *Hudson v. Robinson*, 4 M. & S. 475.

**Joint or separate liability to actions on partnership contracts.]—**Actions for partnership debts may be brought against one partner only, and, unless he pleads in abatement, he will be afterwards concluded. *Rice v. Shute*, 2 W. Bl. 695; 5 Burr. 2611. S. P., *Abbott v. Smith*, 2 W. Bl. 947.

A. sued B., C. and D., in a joint action for an attorney's bill; B. pleaded *nunquam indebtedatus*, and C. and D. suffered judgment by default:—Held, that in order to entitle A. to a verdict against B., the jury must be satisfied that there was a joint contract with A. by B., C. and D., jointly, and that it was not sufficient to show that there was a separate contract between A. and B. only, even though the evidence would have been sufficient to have supported an action by A. against B. alone. *Robeson v. Ganderton*, 9 C. & P. 476—Williams.

A contract made by two partners to pay a certain sum of money to a third person equally out of their own private cash, is a joint contract, and they must be jointly sued upon it. *Byers v. Dobey*, 1 H. Bl. 236.

Declaration upon a bill of exchange drawn upon two persons by the name of Saunders, Brothers & Co.: plea, that the promises were made by two other persons named in the plea jointly with the defendants. The defendants proved, that, although they carried on business in London under the firm of Saunders, Brothers & Co., two other persons named in the plea, who resided at the Mauritius, where the bill was drawn, were in fact in partnership with them, and that the plaintiff resided at the Mauritius:—Held, that the jury was properly desired to find for the plaintiff, if they thought the holder of the bill had reason to consider that the defendants alone constituted the house of S., B. & Co., the question being with whom the plaintiff contracted. *De Muutert v. Saunders*, 1 B. & Ad. 398.

Under a count for money had and received by three, the plaintiff cannot give in evidence money had and received by them and by a fourth partner who is dead. *Spahling v. Mure*, 6 T. R. 863.

Several actions will not lie against the different members of a partnership firm for the same identical debt. *Curns v. Legh*, 9 D. & R. 126; 6 B. & C. 124.

Therefore, where a plaintiff brought two actions against two joint contractors for the same debt, the court set aside the proceedings without costs in one action, the debt and costs in the other having been paid. *Id.*

— to actions for trespass, negligence, and other torts.]—A. and B. were partners in business as brewers; and one of them, in the name of the others, wrongfully ejected the tenant of a canton, who held under a lease from the Board of Ordnance, they being sureties for the payment of his rent, and for his

quiet tenantship:—Held, that one partner has no right to involve another, unless in the ordinary course of their business, not, for instance, in a trespass, as above stated. *Petre v. Lumont*, Car. & M. 93—Tindal.

The exception to this doctrine is where the trespass is in the nature of a taking which is available to the partnership; and in such case the jury should find, not only whether the defendants were partners, but also, whether, before the trespass, they all joined in ordering it, or whether, afterwards, they concurred, and received the benefit of it. *Id.*

If one member of a partnership is guilty of an act of negligence, which occasions injury to a servant, in the course of his employment, and it occurs in a matter within the scope of the common undertaking of the partnership, all the partners will be liable for the injury caused to the servant. *Ashworth v. Stanwix*, 7 Jur., N. S. 467; 3 El. & El. 701; 30 L. J., Q. B. 183; 4 L. T., N. S. 85.

A. and S. were joint owners of a ship. A. worked the ship, defraying all the expenses and taking the entire management of her, and he took two-thirds of the gross earnings; S. did nothing, and took the remaining one-third of the gross earnings:—Held, that the result of these facts was, that A. hired the share of S. in the ship, and that he was not the partner or agent of S. so as to render S. liable in an action for damages caused by the negligence of A. *Burnard v. Aaron*, 31 L. J., C. P. 334.

When one partner in a firm has received a sum of money in the ordinary course of the partnership business, and misappropriated it, all the partners are jointly and severally liable to make good the amount; and, therefore, one or more of them may be made defendants to a suit for that purpose, without suing all. *Plumer v. Gregory*, 31 L. T., N. S. 17—V. C. M.

**Rights of set-off.**—Where one member of a firm, with the concurrence of the others, had employed an auctioneer to sell some of the partnership property, in an action by the firm against him for the proceeds, he was not allowed to set off a debt due from the partner who employed him to sell, although, at the time he was employed, he believed such partner was the exclusive owner of the property, and had no notice of the interest of the other partners, unless the other partners had consented to their copartner so appearing to the auctioneer as sole owner, or had otherwise been guilty of some default on their part. *Gordon v. Ellis*, 3 D. & L. 803; 2 C. B. 821; 10 Jur. 359; 15 L. J., C. P. 178.

Spurr, an attorney, practiced under the style or firm of Spurr & Chambers, and did work as an attorney for Cass. Chambers, although an attorney himself, was in fact not a partner in the firm, but a salaried clerk, having an interest in the net profits of the business. Spurr was indebted to Cass upon a bill of exchange for a smaller amount than the bill of costs upon which Cass was indebted to

him. Cross actions were brought, and in one action Cass pleaded never indebted, and set off the amount due upon the bill of exchange, while in the other Spurr likewise pleaded that he did not accept the bill of exchange, and set off the amount due upon the bill of costs. The jury found that Chambers had authorized Spurr to contract on behalf of himself and Chambers with Cass, and that Spurr had so contracted:—Held, that it was competent to Spurr to sue alone, and to maintain the action subject to any set-off which Cass might have against Spurr and Chambers jointly. *Spurr v. Cass*, *Cass v. Spurr*, 39 L. J., Q. B. 249; 5 L. R., Q. B. 656; 23 L. T., N. S. 409.

In order to entitle a defendant in an action brought against him by partners for a breach of contract causing damage to the partnership, to take into account a benefit accruing to any of the plaintiffs from such breach, for the purpose of reducing the damages, such benefit must be a joint benefit accruing to the partnership, and it is immaterial for the assessment of damages whether or not individual plaintiffs have actually benefited in other ways from the very default of the defendants for which as a partnership they are suing. *Jebben v. East and West India Dock Company*, 10 L. R., C. P. 300; 44 J. J., C. P. 181; 23 W. R. 624; 32 L. T., N. S. 321.

When a partnership sues for breach of contract, the damages must be confined to those sustained by the partnership; and part owners of ships are for the purposes of such an action in the same position as partners. *Id.*

The plaintiffs, as owners of an emigrant ship, were unable to carry their destined passengers through the defendants' default, and many of the emigrants so lost to the plaintiffs' ship went consequently by another ship, of which also some of the plaintiffs were part owners:—Held, that the true mode of assessing the damages to which the plaintiffs were entitled was to estimate the actual loss to them as owners of the ship delayed by the breach of contract, and wholly to disregard any gain which those of them who were part owners of the second ship had in consequence made. *Id.*

**Joinder or non-joinder of dormant partners; their rights to sue and liability to be sued.**—A creditor is entitled to sue a dormant partner of his debtor for whatever has been supplied to the firm during the partnership, though unknown to him to be so at the time of furnishing the subject-matter of the debt. *Robinson v. Wilkinson*, 3 Price, 538.

A defendant may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it had he joined the secret partner in the action. *Dubois v. Ludart*, 1 Marsh. 246; 5 Taunt. 609.

Afterwards, held, that the non-joinder of a secret partner could not be pleaded in abatement. *Mullet v. Hook*, M. & M. 88—Tenterden.



Where, in an action for goods sold, the defendant pleaded in abatement that a person who jointly promised with him was not joined as a co-defendant:—Held, that the plea was not supported by evidence of a secret partnership, of which the plaintiff had no knowledge; the goods having been ordered by the defendant in his own name. *Stansfield v. Lovey*, 3 Stark. 8—Abbot.

It is not a ground of nonsuit in an action on a contract, that the name of a dormant partner is not joined. *Lewick v. Shaftoe*, 2 Esp. 468—Kenyon.

Even if he partakes of the benefit of the contract; for he could not maintain the action. *Lloyd v. Archiboule*, 2 Taunt. 824. And see *Bovill v. Wood*, 2 M. & S. 28; 1 Rose, 155.

If the ostensible proprietor of materials enters into a contract for work to be done thereon, it is not necessary that, in an action brought on the contract, another, who has secretly purchased a share from him, but is no party to the contract, should be joined as a co-plaintiff. *Mawman v. Gillett*, 2 Taunt. 325, n.

Nor could such dormant partner sustain an action. *Id.*

A., B. and C., being in partnership together as type-founders (C. as a dormant partner), an agreement was entered into between A. and B. and the plaintiff, by which, after reciting that the plaintiff had been in the employment of A. and B. as foreman, in carrying on the trade of type-founders, the plaintiff agreed with A. and B., and the survivor of them, to serve them and the survivor of them in their trade for the term of seven years, and they agreed to employ him as their foreman for the term of seven years, if they or either of them should so long live, and to pay him three guineas per week; and that if either party should not perform the agreement on their respective parts, the party failing or making default should pay to the other 500*l.* by way of specific damages. At the time the agreement was entered into, it was unknown to the plaintiff that C. was a partner in the business:—Held, that an action was maintainable by the plaintiff against A., B. and C., for a breach of this agreement, although C. neither signed it nor was a party named in it. *Beckham v. Drake*, 9 M. & W. 79; affirmed, nom. *Drake v. Beckham* (in error), 11 M. & W. 315; 7 Jur. 204; 12 L. J., Exch. 486—Exch. Cham.

Where A., B. and C. traded under the firm of A. and B. in the cotton business (C. not being known to the world as a partner), and A. and B. traded as partners alone under the same firm as grocers, and a bill given to them in the cotton business, in which C. was interested, was indorsed in the common firm of A. and B., by A. and B. only, to provide for a dishonored acceptance in the grocery business, but such an indorsement was unknown to C., of whom the indorsee had no knowledge at the time:—Held, that C. was liable to be sued by him, he not knowing of the misapplication of the partnership fund at the

time. *Swan v. Steele*, 7 East, 209; 3 Smith, 199.

A. being partner with B. in one mercantile house, and with C. in another; the house of A. and B. indorsed a bill to the house of A. and C., after which B., acting for the house of A. and B., received securities to a large amount from the drawer of the bill, upon an agreement by B. that the bill should be taken up and liquidated by B.'s house, and, if not paid by the acceptors when due, should be returned to the drawer:—Held, that the securities being paid, and the money received by B. in satisfaction of the bill, A. was bound by this act of his partner B., whether in fact known to him or not at the time; and therefore that he could not, in conjunction with C., his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of and by agreement with B., in discharge of the same. *Jacaud v. French*, 12 East, 317.

In the case of a partner whose name does not appear in the firm, he is liable for goods furnished only during the time he receives a share of the profits, unless he has been known to be a partner; in which case he will be liable, after he has actually ceased to be a partner, unless he has given notice of his quitting the concern. *Evans v. Drummond*, 4 Esp. 89—Kenyon.

Where the plaintiffs had dealt for a long time with two partners, not knowing that they had a third partner during part of the time, and furnished them with goods, and received payments on account generally; and previous to the time when the secret tri-partnership was dissolved, goods had been furnished, to cover which, bills had been paid to the plaintiffs by the two ostensible partners, which were dishonored after the secret dissolution of the tri-partnership, and then other goods were furnished as before: yet, as the dishonored bills were afterwards delivered up by the plaintiffs, upon the receipt of the subsequent good bills, which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover in addition the goods furnished after the dissolution of it:—Held, that such delivering up of the old dishonored bills, upon receipt of the new good bills, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt; of which the secret third partner might avail himself in an action for goods sold and delivered, brought against him jointly with the other two partners. *Newmarch v. Clay*, 14 East, 289.

**Lex loci; right to sue under English or foreign law.**—Persons trading abroad in such a mode as to constitute a partnership in England, may sue in an English court as partners for a consignment sent to England, though they cannot sue at the place of trading by reason of the particular law of that country. *Shaw v. Harvey*, M. & M. 526—Tenterden.

As to effect of change in firm or dissolution upon rights of action,—see this title, V., 2; VI., 2, a.

## 2. Evidence; Effect of Admissions by Partners.

**Proof of existence of partnership, generally.**—In an action against one of several members of a society, established under a deed of copartnership, for goods supplied to the society, he may be proved to be a partner by parol evidence, without producing the deed. *Alderson v. Clay*, 1 Stark. 405—Ellenborough.

Where the question was, whether A., who resided in England, was a partner with B., who lived in Spain, it is not even *prima facie* evidence of the fact, to show that B. had long traded at St. Sebastian, in Spain, under the firm of A. and B., and that A. had resided there for a considerable time, and that there was no other person of that name there. *Burgue v. De Tastet*, 8 Stark. 58—Abbott.

A bill of exchange drawn in this form, "Pay to our order," signed in the name of two persons & Co., and accepted by the defendant, may be declared upon by the indorsees as a bill drawn by an aggregate firm; and if it is proved that the firm consists of only one person, yet it is not a variance. *Bass v. Olive*, 4 M. & S. 13; 4 Camp. 78.

Two, who sue as indorsees of a bill of exchange, indorsed in blank, are not bound to prove any partnership. *Roedanus v. Leuch*, 1 Stark. 446—Ellenborough.

The registered copy of a company's deed of settlement bore the following memorandum, signed by the plaintiff and produced by the defendant:—"We do hereby certify that the within-written deed is the deed of settlement of the Universal Gas-light Company, and that, to the best of our knowledge, the particulars therein contained are correctly set forth."—Held, as against the plaintiff, primary evidence of the contents of the deed. *Boulter v. Peplow*, 9 C. B. 498; 19 L. J., C. P. 190.

The defendant, who had dealings with A. and B., as partners, afterwards made a contract with A. in B.'s presence, and received letters with reference to such contract bearing the signature of the firm. In an action by B., A., who was called as a witness, stated that he had ceased to be a partner prior to the date of the contract, and that he made it as agent for B.:—Held, that the jury was warranted in finding that the contract was with B. alone, although there was no precise evidence of the dissolution of the partnership between A. and B. *Cox v. Hubbard*, 4 C. B. 817.

—by admissions, declarations or acts of partners.]—In an action against four, three of whom have been outlawed; an admission by the fourth that he was in partnership with the other three, is evidence as against that fourth of a joint promise by all four. *Sangster v. Mansardo*, 1 Stark. 161—Ellenborough.

In an action against three as partners, the

office copy of an answer to a bill in chancery, filed by one against the others, is admissible, without producing the original, in order to establish the partnership. *Studdy v. Sanders*, 2 D. & R. 847.

In an action against partners, on a bill accepted by one of them in the name of the firm, the admissions in his answer to a bill in equity against him are not admissible against the rest. *Booth v. Quin*, 7 Price, 193.

In an action against A. B. and C. D. upon a promissory note signed by A. B. in the names of himself and C. D., it appeared, that the business in respect of which the note was given had formerly been carried on by C. D., and that C. D. had admitted that she was a partner:—Held, that a circular issued by A. B., stating that the business would in future be carried on in the name of B. and D., was admissible in evidence, though not distinctly brought home to C. D. *Norton v. Seymour*, 3 C. B. 792; 11 Jur. 312; 16 L. J., C. P. 100.

Held, also, that a signature of the note by the names and surnames of the respective parties was a sufficient signature to charge the partnership. *Id.*

The defendant advanced money to G., who was engaged in getting up a company to work a mine in Cornwall, receiving as a security a deposit of 250 shares in the mine, with an option to take the shares in satisfaction pro tanto, such option to be declared within fourteen days. The defendant never did in terms declare his option to accept the shares; but he went down to the mine, made inquiries and obtained reports as to the condition and prospects of the mine and as to the cost of an engine to be used there, and, on one occasion, assisted in paying the miners' wages; he also permitted the captain of the mine, without contradiction, to represent him as a capitalist from London who had a large interest in the mine, and intended to work it vigorously. In an action by a person who had supplied goods to the mine upon the faith of representations by the captain that the mine was being worked by a person of substance, whose name he was not authorized to give:—Held, that there was evidence from which the jury was warranted in inferring that the defendant was a partner, although his name was never mentioned, personal identification being sufficient. *Martyn v. Gray*, 14 C. B., N. S. 824.

The defendant was a party to the contract in February for procuring an act of incorporation which was obtained in June, and his name appeared in it as a subscriber to the undertaking, and in September he executed a deed of settlement, which recited that the company was in operation. The goods, in respect of which the action was brought, were supplied in July:—Held, that there was sufficient evidence from which the jury might infer that the defendant was a partner at the time the goods were furnished. *Beach v. Byre*, 5 M. & G. 415; 6 Scott, N. R. 327.

Where a defendant had written an accept-

ance on a bill, at the desire of A., his father, in the name of A. and Son, the bill being drawn in that name, and the goods for which it was drawn being also invoiced in the same way, and although they were supplied, in fact, only to the father, who carried on business alone, and in his own name, and there was no partnership, in fact, yet as there was some evidence, though slight, that the defendant, the son, had so conducted himself as to lead the plaintiff to believe that he was a partner:—Held, that the question should have been left to the jury. *Gurney v. Evans*, 3 H. & N. 122; 27 L. J., Exch. 160.

A statement by one of two persons that another is his partner, he not being so in fact, will not be evidence to render the other liable as an ostensible partner, the statements not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of notoriety, and it not being shown that he has acted on the faith of such statements. *Edmundson v. Thompson*, 31 L. J., Exch. 207; 8 Jur., N. S. 235; 10 W. R. 300; 5 L. T., N. S. 428; 2 F. & F. 564.

T. and B. negotiated for a partnership, and pending the negotiations T. wrote to E. that he had got a partner. The negotiations ultimately ended in an agreement for a future partnership between T. and B., B. in the meantime attending at T.'s place of business, and acting apparently as a partner, representing himself to other persons as a partner, and T. introducing him to old customers as a partner. There was no evidence (except that of the letter written by T. to E.) that these representations ever came to E.'s knowledge, or that he was induced to supply goods on the faith of the representations that a partnership existed. In an action by E. against T. and B. for goods sold and delivered, T. having suffered judgment by default:—Held, that the statements made by T. were no evidence against B. *Id.*

**Proof of liability of partnership by declarations, admissions or acts of partners.**—Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone:—Held, that his declaration was evidence against all the partners. *Lucas v. De la Cour*, 1 M. & S. 240.

So, an admission made by one of two partners after the dissolution of the partnership, concerning joint contracts during the partnership, is evidence to charge the other partner. *Wood v. Braddick*, 1 Taunt. 104.

But a declaration of one of two partners is not evidence to charge another with respect to a transaction with him which occurred previously to the partnership, unless a joint responsibility in the subject-matter can be shown. *Cutt v. Howard*, 3 Stark. 3—Abbott.

Goods were supplied to A. and B. (who were partners), after notice by A. that he would not be answerable for any goods subsequently sent:—Held, that it was incumbent on the

plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of A., or that he had derived benefit from the goods. *Willis v. Dyson*, 1 Stark. 104—Ellenborough.

Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to show that the goods were delivered on a partnership account, if it was doubtful at the time of the contract: but, if it clearly appears that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable for the goods, though he will be liable for the bill of exchange. *Saville v. Robertson*, 4 T. R. 720.

In an action against two persons not partners, but having a joint power and authority (as trustees under a deed of assignment in trust for creditors) for work done, or goods supplied on the order of one of them, any acknowledgment of liability on the part of the other, although accompanied by some qualification, or apparently made under some mistake of law or fact, may be left to the jury as evidence of a ratification, or of a precedent authority. *Hinton v. Forester*, 1 F. & F. 150—Williams.

As to effect of declarations and admissions, generally,—see EVIDENCE.

As to effect of acknowledgments by partners to avoid bar of the Statute of Limitations,—see LIMITATION OF ACTIONS AND SUITS.

—by partnership books, accounts, &c.]—Partnership books are evidence against partners on the principle that they are the acts and declarations of such partners, being kept by themselves, or by their authority by their servants, and under their direction and superintendence. *Hill v. Manchester Waterworks Company*, 2 N. & M. 573; 5 B. & Ad. 866.

Where an action was brought against one defendant, who pleaded in abatement the non-joinder of another:—Held, that an account kept by the defendant only in a pass-book between him and the plaintiff at the bankers of the former, was strong evidence to show that the credit was given to the defendant alone. *Roby v. Howard*, 2 Stark. 555—Abbott.

The fact of an account having been opened with a banker by one of two partners in his own name, is not conclusive to show that the account was opened on his own behalf; but it is competent for the banker to prove that he was acting as the agent of the partnership, and that the account was theirs. The mere circumstance, however, of the money deposited being partnership property, is not sufficient for that purpose. *Cooke v. Seeley*, 2 Exch. 740; 17 L. J., Exch. 286.

An action was brought by T. and H., who were in partnership at the period when the

cause of action accrued. At the trial, a letter, written by S., who had subsequently become a partner with T. in the room of H., relating to a transaction which occurred prior to his entry into the firm, was received as evidence against the plaintiffs:—Held, that such letter was inadmissible, unless proof was given of an express or implied authority from T. to S. to make the statement contained in the letter. *Tunley v. Ewens*, 2 D. & L. 747; 9 Jur. 428; 14 L. J. Q. B. 116—B. C.—Wightman.

**Proof that acceptance was in fraud of partnership.]**—Where, to an action upon an acceptance purporting to be in the name of a firm, and given in their ordinary style and description, they deny the acceptance, and prove that the acceptance was given by one partner in fraud of the firm, such proof does not call upon the holder to show that he gave consideration for the bill, unless the evidence affects him with knowledge of the fraud. *Musgrave v. Drake*, D. & M. 347; 5 Q. B. 185; 7 Jur. 1015; 13 L. J. Q. B. 16.

In an action by an indorsee against the members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the holder of the bill, of showing that he gave value. *Hogg v. Skeen*, 18 C. B., N. S. 426; 11 Jur., N. S. 244; 34 L. J. C. P. 153; 13 W. R. 383; 12 L. T., N. S. 709.

#### V. CHANGES OF FIRMS; RETIREMENT, BANKRUPTCY OR DEATH OF PARTNERS

##### 1. Effect, as between Partners, their Assignees, Representatives and Survivors.

**Retiring and continuing partners.]**—On a contract upon the retirement of a partner to pay him a certain sum, by bills due at different periods, two only of them having become due before action, and to execute a deed of dissolution, he is entitled to recover the whole sum (less interest), and a further sum, to be reduced to a shilling on the execution of the deed, but not the expenses of the deed. *Morley v. Baker*, 3 F. & F. 146—Martin.

An agreement between two solicitors in partnership that one of them should continue to carry on the business under their joint names, and should be entitled to all the profits, and should grant to the other partner an annuity of 300*l.*, during the life of his mother, and in the event of his dying in the lifetime of his mother, should pay to his widow an annuity of 100*l.* during the remainder of his mother's life, and should indemnify him against all liability in respect of his name being used, and that the partnership should cease on the death of the mother of the retiring partner:—Held, not to be void as against public policy, but to be a valid and binding agreement. *Aubin v. Holt*, 2 K. & J. 66; 25 L. J., Chanc. 86.

Articles of partnership between London

solicitors provided, that either partner might retire, and that in that case the continuing partner should pay the retiring partner for his share and good-will the fair marketable value, and the retiring partner should not practice within one hundred miles of the General Post Office, but should use his best endeavors to promote the interests of the existing partners:—Held, that the good-will must be taken to mean only the interest which the retiring partner would have had if he had remained in the partnership till the expiration of it by effluxion of time. *Austin v. Boys*, 2 De G. & J. 626; 4 Jur., N. S. 719; 27 L. J., Chanc. 714.

Good-will in general means the chance of being able to keep a business connected with the place where it has been carried on, but it is in this sense inapplicable to the business of solicitors. *Id.*

On borrowing 300*l.* from a mercantile firm, a promissory note, payable on demand for the amount, was given by the borrower. The partnership was subsequently dissolved, and a notice was given in the Gazette that the partnership debts were to be paid to a new firm. The note was afterwards indorsed for a valuable consideration by the old firm to one of the original partners; subsequently to the indorsement, the maker of the note gave a bill for 300*l.* (afterwards paid with interest) to the new firm to which the notice directed the debts to be paid:—Held, that the notice did not give any authority to the new firm to receive the amount of the note, which had at the time of payment ceased to be a partnership debt. *Adams v. Buryley*, 1 Gale, 434.

Where a retiring partner had, during his continuance in the firm, carried the amount of his advances to his private credit without deducting the property tax:—Held, that the continuing partners could not, after a long lapse of time, deduct it, especially where it did not appear that they had ever accounted for it to government. *Parker v. Ramsbottom*, 5 D. & R. 138; 3 B. & C. 257.

**Effect of bankruptcy upon obligations of partners to each other; and rights of solvent partner.]**—On a bankruptcy between partners, they are entitled as against each other to the balance of account. *Smith v. De Siloa*, Cowp. 469.

A solvent partner may issue a writ of summons in the name of his copartners, or, if bankrupt, in the names of his assignees, as well as his own, in order to recover a debt due to the partnership. *Whitehead v. Hughes*, 2 C. & M. 318; 4 Tyr. 92; 2 D. P. C. 258.

But the partners who object have a right to be indemnified against the costs. *Id.*

To an action by several partners, the defendant may plead in bar the bankruptcy of one of them. *Eckhardt v. Wilson*, 8 T. R. 140.

The power of a solvent partner upon the bankruptcy of his copartner to sell the partnership property, is given him in his personal capacity, to enable him to wind up the affairs

of the partnership, and cannot be transferred by him to another, either by assignment of all his share and interest in the partnership, or by exposing himself, although *bonâ fide*, to a judgment under which all such share and interest are taken in execution. *Fraser v. Kershaw*, 2 Kay & J. 496; 2 Jur., N. S. 880; 24 L. J., Chanc. 445.

Where A., carrying on business alone, took B. and C. into partnership, which was covenanted to be carried on for eighteen years, in consideration of a sum of money to be paid to A. by B. and C. by installments; and within six months after the commencement of the partnership, and when one only of the installments had become due, A. became bankrupt:—Held, that, notwithstanding the bankruptcy, B. and C. were liable to pay the remaining installments at the times when they would have become due if the partnership had continued. *Akhurst v. Jackson*, 1 Wils. C. C. 47.

M. lent certain sums to T., a trader, under a written agreement pursuant to 28 & 29 Vict. c. 80, by which he was to receive, in lieu of interest, 40% per cent. on the profits of T.'s business, and after a certain period was to have liberty to determine the agreement at any time, in which event the money was to be repaid by installments secured by bills of exchange. While this agreement was in force M., in conjunction with H., lent T. other sums of money, for which interest at 10% per cent. was to be paid. M. determined the agreement, and T. gave M. bills of exchange for the moneys advanced under it, except certain profits which were carried over to the 10% per cent. account; but M. and H. went on advancing to T. other sums on the 10% per cent. account. After all the trade debts of T. which had been due during the pendency of the agreement had been paid, T. became bankrupt. M. carried in a proof for the moneys advanced under the agreement, and M. and H. carried in another for the balance on the 10% per cent. account:—Held, that M. could not prove for the moneys advanced under the agreement, though all other debts existing during its continuance had been paid. *Mills, Ex parte, Tew, In re*, 8 L. R., Ch. 569; 28 L. T., N. S. 603; 21 W. R. 557.

Held, also, that M. and H. could prove for all moneys lent at interest without any stipulation as to profits, whether such moneys were advanced before or after the determination of the agreement, and that although there could not have been a proof for the whole of the balance if it had in part consisted of profits, yet, as according to the ordinary mode of attributing payments in an account current the profits carried to this account had been discharged by payments made by T. on account, the balance could not be treated as in any measure arising from profits, and the proof must be for its whole amount. *Id.*

**Rights of assignees or trustees of bankrupt partner.**—A partnership deed of a mine provided, that in the event of the bankruptcy of any partner, an account was to be taken of

his share and interest in the mine (other than his share in the lease of the mine, which was not to be valued), and the amount of such account paid to the parties entitled. A partner became bankrupt:—Held, that the clause was void as against his assignees, who were entitled to his share in the lease. *Whitmore v. Mason*, 2 Johns. & H. 204; 8 Jur., N. S. 278; 31 L. J., Chanc. 433; 19 W. R. 168; 5 L. T., N. S. 631.

A solvent partner and the assignees of his bankrupt partner brought an action against B. for certain partnership bills of exchange, which the bankrupt partner had indorsed to B. for a private debt. B. was aware of the fraud at the time. The payment amounted to a fraudulent preference as against the other creditors. The day after the indorsement the bankrupt partner was arrested, and became a bankrupt under 21 & 23 Vict. c. 134, s. 71:—Held, that as the assignees had elected to treat the indorsement as void, they had a joint cause of action with the solvent partner, and were not estopped from denying the validity of the indorsement. *Heilbut v. Nevill*, 17 W. R. 853; 38 L. J., C. P. 273; 20 L. T., N. S. 490; 4 L. R., C. P. 354.

A deed of partnership for life between two solicitors contained a covenant that on the death of either the survivor should, during the joint lives of himself and the widow of the deceased partner, pay such person or persons as the deceased partner should appoint an annuity of 200% per annum, or one-fourth of the annual profits of the survivor, as the survivor should elect, and also provided for the admission, on certain conditions, of a son of the deceased partner into the partnership business. One of the partners, by an antenuptial settlement, made shortly after the execution of the partnership deed, exercised the power of appointment in favor of his wife, and several years afterwards died greatly indebted to the firm. The survivor continued to practice as a solicitor for some years, and realized profits by his business, if estimated without regard to the former business, but they were insufficient to make good the outstanding liabilities of the late partnership, and he became bankrupt without having made any payment to the widow of the deceased partner, or electing between the two modes of payment mentioned in the articles:—Held, that the assignees were entitled to make the election. *Harper, Ex parte*, 1 De G. & J. 180; 8 Jur., N. S. 724; 26 L. J., Bank. 74.

Held, secondly, that on their electing not to pay the annuity, the widow had no provable demand, the business carried on by the survivor being, according to the true construction of the deed, a continuation of the partnership, and the payments made on account of the partnership being properly set off against the profits of the sole business. *Id.*

H. and K. were in partnership as bankers. H. was the managing partner, and K. took no part in the business of the bank. H. from

time to time fraudulently drew large sums out of the bank, and employed them in speculations, making fictitious entries in the books of the bank to conceal what he had done. On the death of H. the bank was found to be insolvent, and K. was adjudicated bankrupt. The trustee under his bankruptcy claimed to prove against the separate estate of H. in respect of the sums so misappropriated by him:—Held, that the case came within the exception to the general rule as to joint and separate estates, there having been a fraudulent conversion of the property of one estate to the purposes of the other, and that the trustee was entitled to prove. *Read v. Bailey*, 37 L. T., N. S. 510—H. L.; affirming the judgment of Court of Appeal, 4 L. R., Ch. Div. 537.

**Effect of death of partner; and powers of survivor, in general.]**—A partnership for a term of years is dissolved by the death of a partner before the term has expired. *Gillespie v. Hamilton*, 3 Madd. 251.

The death of a partner, of itself, works a dissolution of the partnership; and the mere want of notice does not, it seems, make the estate of the deceased partner liable to the continuing partners. Secus, if one of the partners is an executor of the deceased. *Vulliamy v. Noble*, 3 Mer. 614.

The legal maxim, "jus accrescendi inter mercatores locum non habet," applies to prevent a right of survivorship in partnership chattels. *Buckley v. Barber*, 6 Exch. 164; 15 Jur. 63; 20 L. J., Exch. 114.

The rule applies as well to manufacturers as to merchants. *Ib.*

At law, the jus disponendi does not give the surviving partner the power to dispose of such part of the property of the deceased partner as would rightly go to his executor, by way of mortgage, for the payment or in satisfaction of the debts of the partnership. *Ib.*

There is no survivorship as to the property in joint chattels in a partnership, whether existing between merchants or manufacturers, or any other description of traders. *Ib.*

Where money is owing to two partners, and after the death of one it is paid to a third person, the survivor partner may maintain an action for money had and received in his own right, and not as survivor. *Smith v. Barrow*, 2 T. R. 476.

A surviving partner may recover upon a contract entered into with him and his deceased partner. *Richards v. Heather*, 1 B. & A. 29.

In an action by one of two surviving partners, the fact of his being the survivor must be stated in the declaration; therefore, a count for goods sold by him to the defendant is not supported by proof that the goods were sold by him and his deceased partner. *Jell v. Douglas*, 4 B. & A. 374.

**Option of executors or administrators of deceased partner to continue partnership.]**—The option reserved to the executors of a deceased partner to enter into a partnership

with a surviving partner, must be accompanied by the obligation on the part of the surviving partner to admit them; and, unless the option is confined to the representatives of the partner who shall die first, the surviving partner must have the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him. *Downs v. Collins*, 6 Hare, 434.

By a deed of partnership between A., B. and C., it was provided, that in case of the death of either of the parties during the continuance of the partnership, then the executor or administrator of the deceased partner should have the option of succeeding to the share of such deceased partner in the partnership business and effects, if he, she or they should think proper, and should give notice of such his, her or their intention, within three calendar months after the decease of the partner so dying, to the surviving partner or partners. C. died on the 20th of February, 1844, intestate; on the 15th of May, his widow gave the surviving partners notice of her intention to avail herself of the option of succeeding to her husband's share of the business, and on the 10th of December she took out letters of administration, and thereby became his sole legal representative:—Held, that this was not an effectual notice within the meaning of the deed. *Holland v. King*, 6 C. B. 727.

**Respective rights and liabilities of surviving partners and representatives of deceased partners.]**—Whether a surviving partner is to be considered as a trustee for a moiety of the profits for the representative of the deceased partner,—see *Marjoram v. Saundeford*, Romilly's Notes of Cases, 110.

The right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him and the representatives of his deceased partner, but he is liable to account for the partnership assets, and, in taking such account, the Statute of Limitations is applicable. *Taylor v. Taylor*, 28 L. T., N. S. 188—L. J.

In the absence of fraud or collusion, or some other circumstance creating a privity between the parties, the only person who can file a bill against a surviving partner for an account of the partnership assets is the legal personal representative of his deceased partner. *Ib.*

Articles of partnership provided, that an annual account and valuation of the partnership property should be taken in July in every year; that such account should be signed by all the partners, and that when so signed, it should be binding and conclusive upon all the partners; and that on the death of any one of the partners, the surviving partners should pay to his executors the value of his share in the partnership property, as appearing from the last annual account preceding the death of such partner. One of the partners died two months after making the



1st annual account, without having signed it, and without having expressly objected to it. It was signed by all the other partners:—Held, that the account having been made out upon the same principle as all the previous accounts, and the deceased not having objected to it, his estate was bound. *Coventry v. Barclay*, 9 Jur., N. S. 1831; 9 L. T., N. S. 196; 12 W. R. 500; 8 De G., J. & S. 820.

Held, also, that the estate of the deceased was entitled to a share of a fund called a sinking fund, subject to the contingent losses for which it was set apart. *Id.*

Partnership articles provided for a balance-sheet being made out up to the 31st of December in each year, which, after a certain time, was to be binding on the partners, except that manifest errors, when discovered, should be corrected. It was also provided that a like account should be made out on the 31st of December next after the death of a partner, and that his executors should be entitled to receive by six installments from the surviving partners the value of his interest as appearing from such balance-sheet. The uniform practice of the firm in making out their balance-sheets was to treat the loss occasioned by any asset turning out bad as attributable to the year in which it was discovered to be bad. In 1864 one of the partners died; and, after the balance-sheet had been made out, various assets which had been treated as good were ascertained to be irrecoverable, owing to the failure since the 31st of December, 1864, of debtors to the firm, and depreciation of consignments, which, when the balance-sheet was made out, had not been realized:—Held, that the executors of the deceased partner were entitled to receive the value of his share as appearing by the balance-sheet without any deduction for the losses subsequently ascertained. *Barber, Ex parte*, 5 L. R., Ch. 687; 18 W. R. 940; 28 L. T., N. S. 230.

By a clause in a partnership deed it was provided that on the death of a partner his share, as ascertained in manner specified, with interest thereon at the rate of ten per cent. per annum, should be paid to his personal representatives by four annual consecutive legal installments:—Held, that interest was payable at the rate of ten per cent. for one year on the first installment when the same should become due, for two years on the second when due, and so on. *Beater v. Murray*, 19 W. R. 92—Ir. R.

A. and B. carried on the business of carrying mails under a contract entered into by the postmaster-general with B. and not assignable. A. died; B. continued to carry on the business under the contract, and refused to account for the value of the contract to the executors of the deceased partner:—Held, that as the contract was not assignable and its value could not be ascertained in the usual way by sale, it must be referred to chambers to ascertain the value, and the surviving partner must pay the value to the executors of the deceased, with a share of the profits since his death, a fair sum being allowed to the

surviving partner for his services in carrying on the business. *Ambler v. Bolton*, 41 L. J., Chanc. 788; 14 L. R., Eq. 427; 20 W. R. 934—R.

Five contractors jointly contracted to build a harbor, the building of which would take at least five years. Soon afterwards one of the contractors died:—Held, that his estate was entitled to share in the profits of the contract; and that those profits were to be the actual profits ascertained when the contract was completed, and not by valuation or by sale of the contract. *M'Clean v. Kennard*, 9 L. R., Ch. 336; 43 L. J., Chanc. 323; 22 W. R. 889; 30 L. T., N. S. 186.

The deceased contractor named in his will three executors. Before the will was proved, the four other contractors signed an agreement, in which they, and also the executors of the will, were the parties, a blank being left for the names of the executors. The will was afterwards proved by two only of the executors, and those two executors then signed the agreement:—Held, that, though signed by two only of the executors, it was binding on the other contractors. *Id.*

Held, also, that no regard could be paid to evidence that the other contractors expected the concurrence of the third executor, and would not have entered into the agreement if they had been aware that he would renounce. *Id.*

Surviving partners, and executors who are not partners, but have continued their testator's assets in the business, are liable to account for profits made in respect of the value of a deceased partner's share only where there is no absolute contract for vesting in the survivors the share of the deceased partner, or only an option to take his share on certain conditions, and the surviving partners neglect to perform such conditions or to liquidate the affairs of the partnership. *Vyse v. Foster*, 44 L. J., Chanc. 37; 7 L. R., H. L. Cas. 818; 31 L. T., N. S. 177; 28 W. R. 355; affirming decision of Lords Justices, 8 L. R., Ch. 809; 42 L. J., Chanc. 245; which reversed the judgment of Vice Chancellor Bacon, 26 L. T., N. S. 725; 20 W. R. 697. See also *S. C.*, 10 L. R., Ch. 236; 44 L. J., Chanc. 844.

A. was partner in a firm, under articles which provided that the surviving partners should purchase the share of a deceased partner at a valuation. There was nothing to show that time was of the essence of the contract. A. died, having by will given his real and personal estate to three executors in trust for his children on their attaining the age of twenty-five, and with trusts in the meantime for investing in real or government securities. One of his executors was partner at the date of the testator's will, and at his death another of his executors became a partner; the third never was a partner. The value of the testator's share in the firm was ascertained in the mode prescribed, but the executors allowed it to remain in the firm until the children arrived at the prescribed age, and the children were credited in the books of the firm

aware of his being such partner, he will be liable to those persons for debts contracted by the firm after his retirement. *Farrar v. Deffinae*, 1 C. & K. 590—Crosswell.

A., B. and C., who were copartners, engaged D., by an agreement in writing, to serve them for a certain period. Before this period had elapsed, C. retired from the concern, and D., with notice of that fact, continued in the service of A. and B. A. and B. subsequently became bankrupt, whereupon D. was dismissed from their employment:—Held, that D. could still sue A., B. and C. on the original agreement. *Dobbin v. Foster*, 1 C. & K. 323—Coltman.

A., B., C. and D., who carried on business under the firm of G., P. & Co., in 1840 opened an account with a banking company, established under 7 Geo. 4, c. 46, 1 & 2 Vict. c. 90, and 5 & 6 Vict. c. 85. In 1842, A. retired from the firm, but this fact was not advertised in the Gazette, nor was any alteration made in the pass-book:—Held, that the mere fact of D., one of the firm of G., P. & Co., being also a director of the banking company, but having, as such, no share in the management of or interference in the banking accounts, did not amount to notice, actual or constructive, to the bank, of the dissolution, so as to discharge A. in respect of a debt subsequently accruing, a banking company so established differing in this respect from an ordinary trading partnership. *Powles v. Page*, 8 C. B. 16; 10 Jur. 526; 15 L. J., C. P. 217.

A change of partners in a banking-house is sufficiently notified to the customers of the house by a change in the printed checks. *Barfoot v. Goodall*, 3 Camp. 147—Ellenborough.

A party who had been a member of a trading firm, non-resident, and in general not taking any ostensible part in its affairs, retiring, but giving no notice of his retirement, is liable on bills afterwards discounted to the managing partner in the ordinary way, and for the purposes of the firm. *Western Bank of Scotland v. Needell*, 1 F. & F. 404—Campbell.

As to necessity and effect of notice of dissolution,—see this title, VI., 2, b.

**Liability of old firm upon acceptances by new firm.**—A new firm has not authority to bind an old firm without the authority of the retiring members, by acceptances in its name for the debts of the old firm; but when such an acceptance has been given in renewal of a bill given by the old firm, the liability of the retiring members on the old bill remains. *Spenceley v. Greenwood*, 1 F. & F. 297—Crowder.

**Liability of new firm for debts of old firm.**—Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him, without his assent, by accepting a bill drawn by the creditor upon the firm in their joint names; but such security is fraudulent and void as against the third partner, and cannot be recovered in an action against the three, wherein

one only of the original partners pleaded to the action. *Shirreff v. Wilks*, 1 East, 48.

Where a banking firm makes payments professedly on behalf of a customer (who has a banking account with the firm), but without his authority, and the sum so paid is entered to his debit in the books of the firm, and the firm afterwards admits new partners, the new firm is not liable to the customer for such payments, unless there is an agreement between the two firms and the customer that the new firm shall take upon themselves the actual liabilities of the old firm. *Crawford v. Cocks*, 6 Exch. 287.

A firm was newly constituted, but no alteration was made in the mode of carrying on the business; the accounts were continued in the old books as if no change had taken place; and the existing liabilities were discharged or diminished either from the assets of the old firm, or from the funds of the new firm, indiscriminately:—Held, that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm. *Bank of Australasia v. Flower*, 1 L. R., P. C. 27; 12 Jur., N. S. 845; 35 L. J., P. C. 13; 14 W. R. 377; 14 L. T., N. S. 144.

Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debts out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor. *Id.*

For analogous decisions upon dissolution of partnership,—see this title, VI., 2, a.

**Effect of bankruptcy of partner; and liability of solvent partner.**—Counts upon a promise by the defendant and another, since become a bankrupt and certificated, may be joined in an action against the solvent partner alone, with counts on promises by the defendant solely, since the other became a bankrupt. *Hawkins v. Rimsootham*, 6 Taunt. 179.

But the defendant might plead the joint contract in abatement. *Id.*

Where one of two partners has died, and after his death the surviving partner has become bankrupt, and the joint creditors have received a dividend under the bankruptcy out of the joint estate, but have not been paid in full, they will, in the administration in chancery of the estate of the deceased partner, be entitled to come against so much only of his estate as may remain after payment of his separate creditors. *Lodge v. Pritchard*, 33 L. J., Chanc. 775; 1 De G., J. & S. 610.

When one of two partners allows the other bona fide to carry on the business ostensibly as his own, on the bankruptcy of the latter the share of the dormant partner in the partnership stock in trade cannot be dealt with under 12 & 13 Vict. c. 106, s. 125, as in the possession, order or disposition of the bankrupt, as reputed owner, with the consent of the true owner. *Reynolds v. Bowley*, 2 L. R., Q. B. 474; 8 B. & S. 406; 36 L. J., Q. B. 247—Exch. Cham.

**Effect of death of partner, and liability of survivor or of representatives of deceased, generally.]**—Where one partner signed an agreement on behalf of the firm, and died:—Held, that an action on the agreement was well brought against the executors of the survivor. *Caldar v. Rutherford*, 3 B. & B. 102; 7 Moore, 158.

A demand against a surviving partner, as survivor, may be joined with a demand due from him, as if he was solely liable. *Golding v. Vaughan*, 2 Chit. 436.

A partnership composed of three persons, A., B. and C., gave a joint and several bond to a bank, to cover advances to be made to them by the bank on a cash credit; and in that bond, two estates held by A. were specially named as part securities for these advances. A. died:—Held, that by his death the partnership was dissolved, and the security, so far as his estates were concerned, was no further continued; no arrangement between the surviving partners, or between them and the bank, for the purpose of settling the general accounts, being capable of affecting that security. *Bank of Scotland v. Christie*, 8 C. & F. 214.

After the death of A. the bank continued as before its dealings with the partnership, then constituted by B. and C.; and at a certain period, payments made to the bank entirely balanced the debt due to it at the time of A.'s death:—Held, that the separate liability of A.'s estates was thereby discharged. *Id.*

A declaration alleged that by an agreement between B., since deceased, and the defendant, of the one part, and the plaintiff, of the other part, B. and the defendant, who at the date of the agreement were carrying on business as stone merchants in copartnership, appointed the plaintiff their sole London agent for a period of four years and a half, and the plaintiff, in consideration of the premises, agreed to accept the appointment upon the terms that B. and the defendant should pay the plaintiff 2l. 10s. per cent. on all accounts received by them for stone sold by the plaintiff, or supplied by B. and the defendant to any person originally introduced to them by the plaintiff. Breach, that the defendant did not nor would employ the plaintiff as his sole agent for the whole period of four years and a half, and did not nor would execute certain orders for stone procured by the plaintiff in his capacity of agent:—Held, that the parties contracted with reference to the existing partnership business, and that the contract was to employ the plaintiff for a period of four years and a half, subject to the implied condition that all parties so long lived. *Tasker v. Shepherd*, 6 H. & N. 575; 80 L. J., Exch. 207; 9 W. R. 476; 4 L. T., N. S. 19.

T. and two others carried on business in partnership as auctioneers, under a deed providing that in case any one of them should die during the term, the survivors should carry on the partnership till the end of the term,

and should pay to the representatives of the deceased partner the share of the profits to which he would have been entitled if living. T. died during the term, at a time when the firm possessed no capital except office furniture, but had in their hands upwards of 600l., to which he was entitled, though none of it consisted of his capital in the business. His executors claimed his share of profits, but no settlement was ever made between them and the survivors. The executors, however, received from the survivors at various times sums amounting in all to about 625l. They never interfered with the business in any way. The survivors carried on the business, and in course thereof received the proceeds of the sale of property which the plaintiff had employed the firm to sell for him. In an action against the firm to recover the balance of this purchase-money:—Held, that the executors of T. were not liable as partners in the firm. *Holme v. Hammond*, 41 L. J., Exch. 157; 7 L. R., Exch. 218; 20 W. R. 747.

**Remedies of creditors against joint or separate estates, after death of partner.]**—

Four persons carried on a business in partnership under a deed which provided that the death of a partner should not dissolve the partnership, but that the business should be carried on by the survivors or survivor, and the share of the deceased partner ascertained at the next half-yearly stock taking, and paid to his representatives by installments. Two of the partners died, and afterwards the survivors became bankrupt. No steps had then been taken to ascertain the shares of the deceased partners:—Held, that the creditors of the four partners had no right to have the joint assets of the four which remained in specie applied first in payment of their debts. *Simpson, In re*, 9 L. R., Ch. 572; 43 L. J., Bank. 147; 22 W. R. 697; 80 L. T., N. S. 448.

Business was carried on by W. and T., in partnership, under a partnership deed which provided that all the capital in the business should belong to W., and that in case of his death the share of T. in the profits should thenceforth belong to W.'s representatives or nominees, and the business should thenceforth be carried on by his personal representatives or nominees, and that T. should continue in it for six months to assist such representatives or nominees. W. died, having appointed T. his executor. The business, which was greatly in debt at W.'s death, was continued by T. for fourteen months. T. then filed a petition for the liquidation of his affairs. The stock in trade at the time of the liquidation consisted partly of things which had belonged to W. and T. during their partnership and remained in specie, and partly of things acquired by T. after W.'s death:—Held, that the partnership deed meant only that the capital, subject to the payment of the debts, should belong to W., and that the proceeds of such part of the stock in trade as had been in existence during the partnership, formed joint

assets applicable to the payment of the joint debts of the partnership, and that so much of the stock in trade as had been acquired by T. since W.'s death, was separate assets of T., applicable to the payment of his separate debts. *Morley, Ex parte, White, In re*, 43 L. J., Bank. 28; 29 L. T., N. S. 442; affirmed on appeal, 31 L. T., N. S. 491.

D. carried on business in partnership with W. and T., under a deed which provided that D. should be a partner in the profits, but not in the capital of the business, and should not be required to bring in any capital. The deed provided that if D. died during the continuance of the partnership his share in the profits should revert to the other partners, and his representatives should receive nothing more than a proportionate part of his share of the profits of the current half-year, up to the day of his death. D. died, leaving W. and T. him surviving. Afterwards W. died, and then the business was carried on for some months by T. alone, who ultimately filed a liquidation petition. At the date of the petition there were assets existing in specie which belonged to the firm before D.'s death:—Held, that the provisions of the deed did not take away the right of D.'s executors to be indemnified out of the assets of the firm existing at D.'s death; and that, therefore, the assets remaining in specie were primarily applicable to the payment of the joint debts of the three partners, and that the joint creditors could not prove against the separate trade assets of W. or of T., till their separate creditors had been paid in full. *Dear, Ex parte, White, In re*, 84 L. T., N. S. 631; 1 L. R., Ch. Div. 514; 45 L. J., Bank. 22; 24 W. R. 525 —C. A.

Prior to April, 1872, a firm of bankers, consisting of two partners, A. and B., received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April, 1872, C. and D. were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards A. died, and the business was carried on under the same firm by B., C. and D. In 1874 B. died, and the business was carried on by C. and D., still under the same firm, until 1875, when the bank stopped payment, and went into liquidation. The depositors all knew of A.'s death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from C. and D. Others had increased and others had diminished the amount of their deposit after A.'s death, receiving in each case fresh deposit notes; and they had all proved in the bankruptcy of C. and D. for the amount due on their notes as money advanced and lent to the bankrupts:—Held, that in each case there had been a complete

novation, and that none of the depositors were entitled to prove against the estate of A. *Borough v. Holmes*, 5 L. R., Ch. Div. 253; 46 L. J., Chanc. Div. 446; 25 W. R. 297; 35 L. T., N. S. 75—V. C. H.

As to effect of dissolution of partnership upon rights of creditors,—see this title, VI. 2, a.

## VI. DISSOLUTION OR EXPIRATION.

### 1. When and how Partnership may be Dissolved or Determined.

#### (a) By Limitation or Notice.

**Dissolution, where no term is limited.**—A partnership without articles, and for an indefinite period, may be dissolved by any partner at any time, without previous notice subject to the engagements of the partnership; but the existence of engagements with third persons cannot prevent the right of dissolution as among themselves. *Featherstonhaugh v. Fenwick*, 17 Ves. 258. S. P., *Hosk v. Sansom*, 1 N. & M. 104; 4 B. & Ad. 172; *Dolbin v. Foster*, 1 Car. & K. 323.

Where the contract neither expressly nor by reference limits the duration, the partnership may be terminated at a moment's notice by either party. *Crawshaw v. Maule*, 1 Swans 508.

The purchase of a leasehold interest as part of a stock in trade is not evidence of an agreement to contract a partnership commensurate with the duration of the lease. *Id.*

— by parol.—If a partnership is commenced by articles unsealed, in which is contained an agreement for a copartnership deed, such partnership may at any time be dissolved by parol. *Rackett v. Imber*, Holt, 368—Gibbs.

— upon arbitration.—If two partners refer matters in difference between them to arbitration, the arbitrator may dissolve the partnership. *Green v. Warning*, 1 W. Bl. 475.

But he is not necessarily bound to do so. *Simmonds v. Swaine*, 1 Taunt. 549.

— upon notice.—B. and the other defendants, having bought an estate, obtained from the Bishop of Durham a lease for twenty-one years, of land adjoining, called "the Byers Green Coal Royalty," and commenced working the same under the name of "The Byers Green Coal Company." In March, 1839, they signed an agreement that they should be entitled to the land so purchased in equal shares, and also to the Byers Green Royalty in equal shares; and that each party should participate in the advantages or losses to be derived from the purchase and the royalty; and that any money paid for the same estate or royalty, or respecting the winning of any colliery by any of the parties, should carry interest until the repayment. B. having refused to pay up his calls, to sign a partnership deed, and also to concur in borrowing money, the other part-

s. 12 February, 1841, served him with a notice, that they would no longer continue business with him, and that he was to consider the partnership between them entirely dissolved, and they offered to pay him back the sum of 850*l.* previously advanced by him, with interest. This sum was not paid; and negotiations afterwards took place between the parties respecting the payment of the sum and other compensation to B., and as to the terms of the dissolution. A treaty was also entered into by one of the partners for the purchase of B.'s interest in the colliery. An action having been brought against B. and the other partners on a bill of exchange accepted in the name of the firm, to which the defendant B. pleaded non accepit, the judge told the jury, that the partnership contract was for twenty-one years, and could not be dissolved by the notice:—Held, that this was a misdirection, the partnership being indefinite; and that the question for the jury was, whether, after it had been dissolved by the notice, the parties came to a new agreement to carry on the concern together as partners. *Lacock v. Bulmer*, 13 L. J., Exch. 156.

A partnership at will existed between A. and B., the business being carried on on the premises of A.:—Held, that, when such partnership had been put an end to by a notice of dissolution, A. could maintain trespass for a subsequent entry by B. on that part of his premises where the partnership business had been transacted. *Benham v. Gray*, 5 C. B. 138; 17 L. J., C. P. 50.

By articles of partnership between A. and B., the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice:—Held, that it was effectual, notwithstanding B. was insane when it was given. *Robertson v. Lockie*, 15 Sim. 285; 10 Jur. 533; 15 L. J., Chanc. 379.

W. and C. entered into copartnership for a term of twenty-one years in the trade of millstone makers, C. being also cashier of the firm. Disputes of old standing existed between the partners at the commencement of the copartnership, and ill-temper was exhibited on frequent occasions between them afterwards. C. ultimately, and within a year from the commencement of the partnership term, took proceedings to determine the copartnership by notice under the expulsion clause, upon the ground of W.'s alleged violations of the partnership articles in six particular items, which were specified in a notice to him, dated in March, 1871. W. filed a bill to restrain C. from proceeding further with that notice, and to have such notice declared void. C. afterwards took proceedings under the arbitration clause, and W. amended his bill for the purpose of restraining these latter proceedings also. The particular alleged violations were explained away upon the evidence as entire mistakes on C.'s part, attributable to the previous state of feeling existing between the partners:—Held, that W. was entitled to have the notice

of dissolution declared void, and all proceedings upon such notice restrained; also, that C. must be restrained from proceeding under the arbitration clause, and that he must pay to W. his costs of the litigation. *Witt v. Corcoran*, 21 W. R. 47—V. C. B.

As to necessity of giving public notice of dissolution, and its effect,—see this title, VI., 2, *b*.

**Expiration of the term.**—A loan of money by the retiring partner to a partner continuing the business, made at legal interest, with an annuity for a term of years in addition, does not constitute a continuance of the partnership. *Grace v. Smith*, 2 W. Bl. 908.

Articles of partnership for a term were entered into between an active and a sleeping partner under the name of the former, who continued to carry on the business after the expiration of the term in the same name, but without paying off the capital of the sleeping partner:—Held, that the partnership continued, and that the sleeping partner was entitled to a share of the profits after the end of the term. *Parsons v. Hayward*, 4 De G., F. & J. 474.

When three brothers entered into a partnership for seven years, "or for such further time as the partners might agree upon," and at the end of the seven years a general account was taken, but nothing was mentioned about continuing the partnership, and the general account did not include the plaintiff's share of the good-will:—Held, that although he had signed the account he was not bound by it, as it was not according to the terms of the articles, and no mention of the good will was made in the account. *Barrow v. Barrow*, 27 L. T., N. S. 431—R.

Right of a partner under the above circumstances to subsequent profits (i. e., profits made since the dissolution). *Id.*

As to application of partnership articles in cases of continuance beyond the term fixed,—see this title, III., 1, *a*.

As to effect of bankruptcy or death of partner,—see this title, V.; of lunacy of partner,—see this title, VI., 1, *b*.

#### (b) By Suit in Equity.

**Impracticability of carrying on business.**—A court of equity will dissolve a partnership where it appears that the business cannot be carried on according to the true intent and meaning of the articles of copartnership, although one partner objects to the dissolution. *Baring v. Dix*, 1 Cox, 213.

Partnership in an opera house dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated. *Waters v. Taylor*, 2 Ves. & B. 299.

Partnership dissolved, on the ground that the ill-feeling between the partners rendered it impracticable that the business could be successfully or beneficially conducted. *Watney v. Wells*, 30 Beav. 56.

assets applicable to the payment of the joint debts of the partnership, and that so much of the stock in trade as had been acquired by T. since W.'s death, was separate assets of T., applicable to the payment of his separate debts. *Morley, Ex parte, White, In re*, 43 L. J., Bank. 28; 29 L. T., N. S. 442; affirmed on appeal, 31 L. T., N. S. 491.

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By articles of partnership between A. and B., the partnership was to be dissolved on either party giving the other six months' notice. A. gave the required notice:—Held, that it was effectual, notwithstanding B. was insane when it was given. *Robertson v. Lockie*, 15 Sim. 285; 10 Jur. 533; 15 L. J., Chanc. 379.

W. and C. entered into copartnership for a term of twenty-one years in the trade of mill-stone makers, C. being also cashier of the firm. Disputes of old standing existed between the partners at the commencement of the copartnership, and ill-temper was exhibited on frequent occasions between them afterwards. C. ultimately, and within a year from the commencement of the partnership term, took proceedings to determine the copartnership by notice under the expulsion clause, upon the ground of W.'s alleged violations of the partnership articles in six particular items, which were specified in a notice to him, dated in March, 1871. W. filed a bill to restrain C. from proceeding further with that notice, and to have such notice declared void. C. afterwards took proceedings under the arbitration clause, and W. amended his bill for the purpose of restraining these latter proceedings also. The particular alleged violations were explained away upon the evidence as entire mistakes on C.'s part, attributable to the previous state of feeling existing between the partners:—Held, that W. was entitled to have the notice

of dissolution declared void, and all proceedings upon such notice restrained; also, that C. must be restrained from proceeding under the arbitration clause, and that he must pay to W. his costs of the litigation. *Witt v. Corcoran*, 21 W. R. 47—V. C. B.

As to necessity of giving public notice of dissolution, and its effect,—see this title, VI., 2, *b*.

**Expiration of the term.]**—A loan of money by the retiring partner to a partner continuing the business, made at legal interest, with an annuity for a term of years in addition, does not constitute a continuance of the partnership. *Grace v. Smith*, 2 W. Bl. 998.

Articles of partnership for a term were entered into between an active and a sleeping partner under the name of the former, who continued to carry on the business after the expiration of the term in the same name, but without paying off the capital of the sleeping partner:—Held, that the partnership continued, and that the sleeping partner was entitled to a share of the profits after the end of the term. *Parsons v. Luyward*, 4 De G., F. & J. 474.

When three brothers entered into a partnership for seven years, "or for such further time as the partners might agree upon," and at the end of the seven years a general account was taken, but nothing was mentioned about continuing the partnership, and the general account did not include the plaintiff's share of the good-will:—Held, that although he had signed the account he was not bound by it, as it was not according to the terms of the articles, and no mention of the good will was made in the account. *Barrow v. Barrow*, 27 L. T., N. S. 431—R.

Right of a partner under the above circumstances to subsequent profits (i. e., profits made since the dissolution). *Id*.

As to application of partnership articles in cases of continuance beyond the term fixed,—see this title, III., 1, *a*.

As to effect of bankruptcy or death of partner,—see this title, V.; of lunacy of partner,—see this title, VI., 1, *b*.

#### (b) By Suit in Equity.

**Impracticability of carrying on business.]**—A court of equity will dissolve a partnership where it appears that the business cannot be carried on according to the true intent and meaning of the articles of copartnership, although one partner objects to the dissolution. *Baring v. Diz*, 1 Cox, 218.

Partnership in an opera house dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated. *Waters v. Taylor*, 2 Ves. & B. 299.

Partnership dissolved, on the ground that the ill-feeling between the partners rendered it impracticable that the business could be successfully or beneficially conducted. *Watney v. Wells*, 30 Beav. 56.

**Misconduct of partners, breach of articles, &c.]**—Where a partner does acts inconsistent with the duty of a partner, and of a nature to destroy the mutual confidence which ought to subsist between partners, and makes it impossible that the business can be conducted in partnership with benefit to either party, the court will decree a dissolution before the expiration of the term for which the partnership was entered into. *Smith v. Jeyes*, 4 Beav. 508.

A partnership between two solicitors for their joint lives may be dissolved instantaneously, if one of the parties fraudulently sells the trust funds and applies the produce to his own use. *Esell v. Hayward*, 30 Beav. 158.

Articles of partnership provided that each partner (with the exception of one of them), should devote his whole time and attention to the business, and not directly or indirectly engage in any other business; should be just and faithful in all transactions, and give full information respecting his transactions on account of the firm; and that if any partner should fail to observe or perform any of the articles or stipulations therein contained, it should be lawful for the other partners to expel such partner. C., one of the partners, entered into an agreement with Z., a musical instrument maker, whereby he agreed to advance moneys, the interest on which was to consist of half the profits of the business, or at least to amount to 10 per cent. In consequence of this the other partners gave notice to the plaintiff that he had ceased to be a partner, and circulated a letter among their customers to the same effect. By the articles, in case of such expulsion, the expelled partner lost his share in the good-will. The bill prayed that the notice of expulsion was invalid on the ground of mala fides, and because C. had no opportunity of being heard in his defense, and that his arrangement with Z. was not a breach of the articles:—Held, that his transactions with Z., although not amounting to a partnership, were a breach of the articles: that no notice of intention to expel or opportunity of defense was necessary, and the expulsion was valid. *Cooper v. Page*, 34 L. T., N. S. 90—V. C. H.

By the partnership articles the partners were allowed to draw a fixed sum quarterly out of net profits, with a proviso that if at the end of the year the net profits should not have amounted to the sum drawn, each of the partners should be debited in the partnership accounts with, and should at the end of the partnership repay to the copartnership, the difference between the amount of the sums received in respect of such quarterly payment and the sum he would have been entitled to receive as his share of net profits. The partnership for the first two years proved a dead loss, and the drawings, consequently, came out of the capital. The plaintiff wished for an immediate dissolution, but the defendant wished to carry on the partnership a little longer. The plaintiff commenced an action for dissolution, and applied for an interim

injunction to restrain the defendant from drawing out of the capital until the hearing:—Held, that the drawing out of capital was, notwithstanding the proviso for repayment at the end of the partnership, such misconduct, within the meaning of the partnership articles, as justified the court in granting the injunction, but that the plaintiff also must undertake not to draw out of capital. *Lemann v. Berger*, 34 L. T., N. S. 235—V. C. B.

**Lunacy.]**—The lunacy of a partner is not ipso facto a dissolution of the partnership, but is a ground for the dissolution, if the other partner or partners come to the court for a decree of dissolution, on the ground of such lunacy. *Jones v. Noy*, 2 Mylne & K. 125.

A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as partner. *Jones v. Lloyd*, 18 L. R., Eq. 265; 43 L. J., Chanc. 826; 23 W. R. 785; 30 L. T., N. S. 487—R.

Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner. *Id.*

A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against his partner in business, alleging that he had for some time past been suffering from softening of the brain and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the partnership might be dissolved and accounts taken, and his share in the assets secured for his benefit, and for a receiver:—Held, that the suit could be maintained. *Id.*

Articles of partnership provided that either party should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. One partner having become insane, the other served on him notice of his intention to determine the partnership at the end of the first seven years of the term:—Held, that the notice could not be withdrawn without the consent of the insane partner. *Id.*

## 2. Operation and Effect.

### (a) As between the Partners.

**In respect of partnership property, contracts, &c.]**—On a dissolution of partnership by a covenant that the plaintiff shall have the moiety of goods in a warehouse, which is to be the defendant's, the defendant is not bound to deliver the goods. *Stevens v. Carrington*, 1 Dougl. 227.

A deed recited that A. and B., in May, 1813, had contracted with the commissioners for victualing the navy, to supply his majesty's ships with provisions, and that they, in

September, 1813, had mutually agreed to dissolve the partnership entered into by them for carrying on the business of that and all other contracts with the commissioners by B. or A., in which they, or either of them, were in anywise interested, and all other co-partnerships whatsoever subsisting between them; and it was agreed that B. should have 10,000*l.* for his share in the copartnership property, which was to be taken by A. at that surp. It then further recited that it had been agreed that A. should, by his bond, indemnify B. against all damages by reason of his having entered into the recited contract with A., and by reason of all other contracts entered into by B. and A. respectively, and in which they or either of them had any interest. It then witnessed that A. and B., by mutual consent, dissolved the copartnership so entered into under or by virtue of the recited contract, and of all other contracts, in which they or either of them had any interest. The deed then contained a mutual release of all actions, &c., for or by reason of the copartnership so dissolved as aforesaid, upon or by reason of any of the acts, matters and things whatever in anywise relating to the recited contract, and all other contracts in which A. and B., or either of them, had any interest whatsoever. B. then assigned to A. all the share and interest of B., of and in all debts, &c., then due and owing to A. and B. under the recited contract, or otherwise, and all bonds, bills, &c., relating to the contract, debts and sums of money, or any part thereof, and all the goods, stock and effects whatsoever then belonging to them, A. and B., as such copartners respectively, and all the right, title and interest of him (B.), of, in, to, from, out or in respect of the premises. A power was then given to A. to recover and give discharges for the debts. At the time when this deed was executed, B. and A. had been concerned in conducting business together as contractors for the navy. In some contracts B. was solely interested as contractor; in others A. was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in all the contracts, A. having been agent in managing those contracts in which B. was solely interested, and B. having been agent in managing those contracts in which A. was solely interested; and there was money due from the commissioners of the navy in respect of each of these classes of contracts:—Held, that by this deed, the contracts in which B. had been originally separately interested were constituted, as between A. and B., partnership contracts, and consequently that A. was entitled by the deed to receive all sums due to B. in respect of those contracts at the time of the execution of the deed. *Belcher v. Sikes*, 8 B. & C. 185.

In September, 1846, a partnership was entered into between A. and B., the terms of which were never definitely arranged. The business continued to be carried on in their

names, in a shop and counting-house forming part of a house of which A. was lessee, down to the 25th December, when A. caused B. to be served with a notice to dissolve the partnership. On the 2d January, 1847, B. broke and entered the shop and counting-house:—Held, that he was liable in trespass, his right to the occupation of the premises having ceased with the determination of the partnership. *Benham v. Gray*, 5 C. B. 186; 17 L. J., C. P. 50.

As to effect of withdrawal, bankruptcy or death of partner,—see this title, V.

**Return of premium.**—Upon the dissolution of a partnership under notice, as provided in the partnership articles, if there has been no misconduct nor breach of the articles on the part of the partner so giving notice, the price originally paid by the continuing partner for his share in the good-will will not be returned him, although the good-will may have become valueless, and the business may have suffered by the retiring partner setting up a similar business in his own name, and on the adjoining premises. *Bond v. Milbourn*, 20 W. R. 197—V. C. B.

When a partnership is determined prematurely, if the incoming partner has paid a premium, he is in all cases entitled to have a proportionate part of the premium returned, except, first, where there has been actual or implied release or waiver of the right to it; or, secondly, where there has been actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether. *Wilson v. Johnstone*, 10 L. R., Eq. 606; 29 L. T., N. S. 93; 42 L. J., Chanc. 668—V. C. W.

In June, 1869, A. entered into articles of partnership with B. for seven years, and paid a premium of 2,500*l.* The articles were strict in their provisions as to the conduct of the partners, and other matters. In November, 1870, the term of the partnership was varied, and made to cease on 29th of September, 1875. In 1871, B. had reason to be dissatisfied with A., and, acting under a provision in the articles, called on him to sign (and in November, 1871, he did sign) a notice of dissolution, which was duly gazetted. A correspondence ensued, and ultimately B., refusing to return any part of the premium, A. filed a bill to recover it, and to have the partnership accounts taken in the usual way:—Held, that he was entitled to a return of a proportionate part of the premium, but on the footing of the partnership term being one of six years and a quarter, and not seven years. *Id.*

Mere conduct entitling the other partner to a dissolution is not sufficient, inasmuch as the court does not fine for immorality or even dishonesty in the abstract. *Id.*

**Profits and interest.**—Where profits are left by a partner in a business, he will not, in

the absence of a special agreement, be allowed interest on them. *Dinkham v. Bradford*, 5 L. R., Ch. 519.

In ascertaining the profits of a business, the value of the partnership property is to be found, and the original capital, with interest thereon (if necessary), is to be deducted; the residue will represent the profits. *Id.*

In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed; but this rule may be varied by the terms of the articles, as, for example, by a provision treating the capital left in by a partner as an interest-bearing loan. *Barfield v. Loughborough*, 8 L. R., Ch. 1; 43 L. J., Chanc. 179; 27 L. T., N. S. 499; 21 W. R. 86.

Any sums of money received after the dissolution and retained by either partner ought to be debited to him, and applied first in reduction of the interest due to him; and secondly, in reduction of his capital. *Id.*

By articles of partnership between two solicitors, it was agreed that in case either of them should at any time or times, with the consent of the other of them, advance or lend to the copartnership or leave therein at any annual settlement of accounts any sum or sums of money, the partners respectively should be considered as creditors of the partnership in respect of such capital and advances, and should be allowed interest for the same. Upon the special terms of this contract:—Held, that, in taking the accounts after dissolution, interest must be allowed to each partner on his share of the capital from time to time remaining in the business, with annual rests up to the time of the dissolution, but without rests from that time. *Id.*

On the formation of a partnership it was agreed that the business should be carried on at a mill belonging to one of the partners; and he was credited in the books of the partnership with the value of the mill. From time to time sums were expended in making additions to and improvements in the mill; and in the yearly balance-sheets the mill was entered at the original value, increased by the amount so expended, but less a certain amount for depreciation, and the partners were allowed interest on the sums from time to time standing to their capital accounts:—Held, that in the absence of any special agreement the mill was an asset of the partnership, and that on a sale of the business, under which the purchase-money of the mill was largely in excess of its value in the books, the difference was profit divisible in the proportions in which the profits of the business were divisible at the time of the sale. *Robinson v. Ashton*, *Ashton v. Robinson*, 20 L. R., Eq. 25; 44 L. J., Chanc. 543; 38 L. T., N. S. 88; 28 W. R. 674—R.

Continuing partnership business; use of partnership name or style.—If an indenture of partnership for a term of years contains a proviso, that either party may, if he is

desirous of quitting the trade, determine the partnership by giving six months' notice; he cannot dissolve the partnership and then set up a trade elsewhere, but must either continue the partnership or give up such trade altogether. *Cooper v. Watlington*, 2 Chit. 431; 3 Doug. 413.

D., being one of the proprietors and the editor of a weekly periodical, called *Homehold Words*, is not, on a dissolution of the partnership, justified in advertising that the publication will be discontinued; for the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets; but he may advertise the discontinuance of the publication as regards himself. *Bradbury v. Dickens*, 27 Beav. 53; 28 L. J., Chanc. 667.

A partnership was carried on for fourteen years between B. and G. under the style of B. & Co. On the dissolution, the assets were divided, but no arrangement was come to as to the style:—Held, that the name or style of B. & Co. formed an undivided asset of the partnership, which belonged to the partners in common after the dissolution, and that B. was not entitled to prevent G. using the style of B. & Co. in his business. *Banks v. Giles*, 34 Beav. 566; 34 L. J., Chanc. 591.

On a dissolution of partnership between S. and R., all the property of the partnership was bought by R. and paid for on a valuation, but he did not pay for good-will nominatim. S. was living and not a bankrupt:—Held, that R. was not entitled to continue to use the name of S. in the style of the firm. *Scott v. Rowland*, 20 W. R. 508; 26 L. T., N. S. 391—V. C. W.

A person who has been in partnership with a trader of reputation is entitled, on setting up a separate business, to tell the public that he comes from the old firm, and to put an announcement to that effect on his shop front, but he will be restrained from doing this in a manner calculated to lead to the belief that he is carrying on the business of the old firm. *Hookham v. Pottage*, 27 L. T., N. S. 595; 31 W. R. 47—L. J.: affirming *S. C.*, 26 L. T., N. S. 755; 20 W. R. 720.

M. and H. B. C., trading in copartnership under the name of B. C. & Co., manufactured and sold an article known in the market as *Condy's Fluid*. They dissolved partnership. H. B. C. then set up the same business on his own account and in his own name. M. also commenced the same business on his own account, but under the name of the *Condy's Fluid Company*. On a bill filed by H. B. C. to restrain M. from trading under the name of the *Condy's Fluid Company*, and from manufacturing and selling as *Condy's Fluid* an alleged spurious compound:—Held, that as M. had under the partnership articles the right to manufacture and sell *Condy's Fluid*, he could not be restrained from selling a spurious article as *Condy's Fluid*, so long as he did not induce the public to believe that the article sold by him was the article manufactured and sold by H. B. C. *Mitchell*

*v. Condy, Condy v. Mitchell*, 37 L. T., N. S. 268—V. C. B.

(b) As to Creditors and other Third Parties.

**Liability of partners, after dissolution, upon contracts and for obligations of the partnership, generally.**—After a partnership has been dissolved, one of two partners has not power to bind the other in an action brought against both jointly, by giving a cognovit to pay the debt and costs as between attorney and client; and the cognovit having been given without the knowledge or assent of the co-defendant, the court set aside a judgment and execution which had been entered up and sued out thereon. *Rithbone v. Drakeford*, 4 M. & P. 57; 6 Bing. 375.

Where a party issued on a liability as partner, and he is shown to have been once a partner, then, even although it appears that the partnership has been dissolved, and if there has been no notice of the dissolution, any evidence that he has continued to give orders and bills in the name of the firm, and to act as if he was a partner with the same person, though in a different business, and notwithstanding that it is proved that he was in fact only a paid servant, will be sufficient to render him liable for goods ordered by him in the name of the supposed firm. *Mulford v. Griffin*, 1 F. & F. 145—Erle.

A person depositing money with bankers, and taking their accountable receipts, does not, by continuing to leave his money in the bank after a dissolution of the original firm, and a constitution of a new one, which consists of some of the members of the old bank and of other persons, discharge the former partners who have gone out, although he receives interest regularly from the new firm, gives them no notice, and continues to transact business with them in the common course, and that for a period of four years, and until they become insolvent. *Gough v. Davies*, 4 Price, 200.

Where C. kept a general account with A. as his banker and army agent, and B. became a partner with A. for a limited period, and retired on its expiration, without the knowledge of C., and A. afterwards became bankrupt, until which period the account continued between C. and A.:—Held, that payments made by the latter to C. after the expiration of the partnership, not having been appropriated by him at the time to any particular debt, B. might consider such payments as being made in reduction of the balance due at the expiration of the partnership; and that he was not accountable to C. for any sum received by A. on account of the latter, subsequently to such expiration. *Brooks v. Enderby*, 4 Moore, 501; 2 B. & B. 70. And see *Bosanquet v. Wray*, 6 Taunt. 597; 2 Marsh. 319.

A., B. and C. carried on trade in partnership, and A. was also partner with D. A., being indebted to the firm of A., B. and C. before the dissolution of that partnership,

unknown to D. indorsed a bill in discharge of the private debt due from A. to A., B. and C., and immediately afterwards indorsed the same bill to a creditor of the firm of A., B. and C. The partnership of A., B. and C. having been dissolved:—Held, that A. and D. could not maintain trover against B. and C. for the bill; nor an action for the money paid by A. out of the funds of A. and D. to A., B. and C. in discharge of his private debt. A. and D. afterwards having become bankrupt:—Held, that their assignees could not maintain such actions. *Jones v. Yates*, 4 M. & R. 618; 9 B. & C. 532.

It is questionable whether a dissolution of partnership is, per se, a breach of a contract by the firm to employ a person in their service, though a dismissal by a partner remaining would be so; but even assuming that the dissolution would be a breach, yet if the person they have retained accepts upon the dissolution an agreement with a new firm, comprising members of the old partnership, and also new partners, that will be evidence to support a plea of exoneration in an action against the members of the old firm on the original agreement, even apart from any express agreement to cancel it, because there cannot be two co-existent agreements by the same person to serve different firms, composed of different parties, and the second agreement is thus an implied surrender of the first. *Hobson v. Cowley*, 27 L. J., Exch. 205.

An agreement for the dissolution of a partnership of two persons provided that the outgoing partner should assign his share in the partnership property to the continuing partner, and that out of the share a sum which had been withdrawn from the capital by the outgoing partner should be replaced, and that the assets should be realized for the benefit of both the partners according to their respective interests. An assignment was afterwards executed, whereby the outgoing partner assigned his share of all the partnership property to the continuing partner, and in less than two months afterwards both became bankrupts:—Held, that the assignment was a complete and effectual conversion of the joint into separate assets as against the joint creditors. *Walker, his parts*, 4 De G., F. & J. 509.

By a decree made in a suit the partnership between the plaintiff and defendant was dissolved, and a sale of the partnership property ordered. In 1869 an order was made for the sale of the partnership property to the plaintiff for a certain sum, the plaintiff to be entitled to possession, and to pay interest on his purchase-money from the date of the order. The plaintiff entered into possession under this order, but never paid the purchase-money, nor took any assignment of the partnership property. The plaintiff afterwards became bankrupt, the property was again sold, and part of the purchase-money had been paid into court:—Held, that, as under the order of 1869 the plaintiff was in possession as sole owner at the time of his bankruptcy, the fund

in court belonged to his trustee in bankruptcy, and did not form part of the partnership assets. *Graham v. McCulloch*, 32 L. T., N. S. 748; 23 W. R. 786—V. C. M.

W. and A. were appointed receivers on the dissolution of the partnership of R. and L. W. was a creditor of L., and L., in consideration of some further advances, gave him a charge on the moneys which should come to his hands as receiver. Subsequently L. signed an order authorizing W. to pay over "the balance due to him" to G. and B. W. accepted notice of the order, but did not tell G. and B. of his own prior charge. On the bankruptcy of L., G. and B. claimed priority over W. :—Held, that there was no obligation on W.'s part to disclose his charge, and that he was entitled to priority. *Lewer, In re, Garrard, Ex parte, Wilkes, Ex parte*, 5 L. R., Ch. Div. 61; 25 W. R. 64, 364—C. A.

Held, that W., when he accepted the order, only undertook to pay over to G. and B. the ultimate balance after he had satisfied his own claim. *Id.*

—upon bills and notes.]—A party is liable on a promissory note made in the name of the firm in which he had been a partner, though it was drawn after the dissolution of the partnership, he having suffered his name to continue in the firm, and although the plaintiff knew that fact at the time he took the note. *Brown v. Leonard*, 2 Chit. 120.

But a bill drawn and accepted after the dissolution of a partnership, though dated before, does not bind the other partners. *Wright v. Pulham*, 2 Chit. 121.

An indorsee cannot recover against the acceptors of a bill accepted by one who was formerly a partner, if such person had ceased to be a partner at the time of the accepting of the bill, even though the bill was accepted for a partnership debt, unless the person still held himself out to the world as a partner; as if he allowed his name to remain on the door of the house of business, or the like. *Dolman v. Orchard*, 2 C. & P. 104—Abbott.

Notwithstanding a dissolution of partnership, one partner has authority to indorse, in the name of the partnership, bills drawn by the firm and accepted before the dissolution, and the partnership will be liable to a bona fide indorsee on such an indorsement, though he had notice of the dissolution. *Lewis v. Reilly*, 4 P. & D. 639; 1 Q. B. 349; 5 Jur. 98.

A retired partner may give authority by parol to a continuing partner, to indorse bills in the partnership name after a dissolution of partnership. *Smith v. Winter*, 4 M. & W. 454.

In an action against two, subsequently to the dissolution of a partnership which had existed between them, on a bill of exchange drawn by one of them, in the name of himself and his partner, and dated prior to the dissolution:—Held, that, in the absence of evidence to the contrary, the bill must be taken as having been drawn on the day it bore date,

and that both were liable. *Anderson v. Weston*, 6 Bing. N. C. 296; 8 Scott, 533; 4 Jur. 105.

Necessity and effect of giving notice of dissolution; and what is sufficient notice and proof of notice.]—Where partners dissolve their partnership, it is incumbent on them to publish the dissolution in the Gazette, or they will be liable to an action at the suit of a creditor, who did not know of the dissolution, and delivered goods to one, thinking he was dealing with all. *Gorham v. Thompson, Peake*, 42—Kenyon.

Where partners dissolve their partnership, they should send notice to all persons who have trusted them as partners; a notice in the Gazette is not sufficient to discharge them as against those persons who have not seen it. *Graham v. Hope, Peake*, 154—Kenyon.

If partners dissolve their partnership, persons who deal with either, without notice of such dissolution, have a right of action against both. *Fox v. Hanbury, Cowp.* 449.

Notice of the dissolution of a partnership in the Gazette is notice to all strangers. *Wright v. Pulham*, 2 Chit. 121.

A notice in the Gazette of the dissolution of a partnership, is sufficient notice to the world, at least as against those who have had no previous dealings with the firm, so that they cannot sue both parties on a security given by one in the name of both, after notice in the Gazette, in the partnership name, of the dissolution. *Godfrey v. Turnbull*, 1 Esp. 371—Kenyon.

A dissolution of a general partnership need not be published or communicated, to exempt a retiring dormant partner from liability to subsequent engagements, as the making of a promissory note in the name of the ex-firm. *Heath v. Sansom*, 1 N. & M. 104; 4 B. & Ad. 172.

To prove the dissolution of a partnership, the copy of the advertisement inserted in the Gazette, by which the parties agreed to dissolve the partnership, is not evidence unless it is stamped; for it is offered in evidence as an agreement, and so should have an agreement stamp. *May v. Smith*, 1 Esp. 283—Kenyon.

Proof of the insertion of a notice of dissolution of partnership, although but once, in a newspaper taken in by the party sought to be affected by the notice, and left at his house in the usual course, is evidence to be left to a jury, without direct proof that the paper ever reached the party; but the usual and prudent course in such cases is to give such notice by a circular letter. *Jenkins v. Blizard*, 1 Stark. 418—Ellenborough.

The fact that the dissolution of a partnership was advertised in a newspaper may be given in evidence, although it cannot be proved that the other party saw that paper. So, evidence may be given that it was the usage of a firm to send circulars to their customers, on any change of partners; but an entry by a deceased clerk in India, written



under a copy of a circular, "Capt. H., original per Asia," is no evidence that Captain H. received the letter, or that the original was sent by the ship Asia. *Hart v. Alexander*, 2 M. & W. 484; M. & H. 63; 7 C. & P. 746.

Where A. knows that an intention between B. and C. to dissolve partnership is in the course of execution; if A. afterwards insists upon the continuance of the partnership, it lies upon him to show that the intention has been abandoned. *Paterson v. Zachariah*, 1 Stark. 71—Ellenborough.

Notice by a copartner, that the partnership has been dissolved, is evidence against him, that it has been dissolved by competent means, and therefore is evidence of a dissolution by deed, if a deed is essential to such dissolution. *Doe d. Waithman v. Miles*, 1 Stark. 181; 4 Camp. 873—Ellenborough.

**Holding out or acting as partner, after notice of dissolution.**—After the dissolution of a partnership between A. and B., and the advertisement of it in the Gazette, A. accepted a bill bearing date previously to the dissolution, for the accommodation of a third person, who indorsed it for value:—Held, that another partner, who permitted his name to remain over the place of business as a member of the firm, after the dissolution, notice and indorsement, was liable as a partner to a bona fide holder. *Williams v. Keats*, 2 Stark. 290—Ellenborough.

But if, after a dissolution of a partnership, and notice of it published in the Gazette and sent round to the customers of the house, one of the partners carries on the business under the old firm, and draws and accepts bills in that firm, the other partners are not bound to apply for an injunction against his doing so, and are not liable upon such bills to a person ignorant of the dissolution of partnership. *Newsome v. Coles*, 2 Camp. 617—Ellenborough. See *Booth v. Quin*, 7 Price, 193, n.

As to what constitutes holding out or acting as partner, and the effect, in general,—see this title, II., 2, b.

**Arrangements as to assignment and payment of partnership debts; when binding on creditors; and when a discharge to partner.**—On the dissolution of a partnership, it was agreed, that the joint debts should be received by an agent appointed by both partners, for the discharge of their joint debts. A joint debtor acceded to this arrangement, but afterwards one of the partners countermanded the authority given to the agent, and demanded the debt from the debtor, which he paid:—Held, that no action for the recovery of the debt was maintainable in the name of the partners. *Bristow v. Taylor*, 2 Stark. 50—Ellenborough.

Where, on the dissolution of a partnership, it was agreed between two partners, that one should take upon himself to discharge a debt due to a creditor, who was informed of it, and expressly agreed to exonerate the other partner from all responsibility:—Held, that this arrangement did not constitute any de-

fense to an action brought by the creditor against both partners, the debt not being satisfied by the one, nor any new security having been given. *Lodge v. Dias*, 3 B. & A. 611.

Where A. was indebted to B. & Co. for goods sold, and, upon being released from his liability assigned to them a debt which was due to him from C. & Co.; and notice of the assignment was given to a partner in the house of the latter, who verbally promised, in the name of the firm, to pay the debt to B. & Co. out of the partnership funds:—Held, in an action brought by B. & Co. against C. & Co., that the promise by such partner was sufficient to bind all, although, as to some of the members, the partnership had been dissolved before the promise was given. *Lacy v. M'Neale*, 4 D. & R. 7.

A., B. and C. ordered goods from abroad, and then dissolved partnership, and made over their property to trustees for their creditors, leaving A. and B. as agents, to settle the affairs of the firm. The goods arrived, and were delivered to A. and B. In an action against A., B. and C., for the freight:—Held, that C. was not liable. *Pinder v. Wilks*, 1 Marsh. 248; 5 Taunt. 613.

Goods were consigned to two for sale by commission; upon a dissolution of partnership, the commission to sell was assumed by one:—Held, that he, having sold, was rightly sued for money had and received, which action could not have been maintained against both, although an action for not accounting would have lain against both. *Wells v. Ross*, 7 Taunt. 403.

On the dissolution of a partnership between A., B. and C., a power given to A. to receive all debts owing to, and pay those owing from, the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name, and accepted by a debtor of the partnership after the dissolution, so that the indorsee cannot maintain an action on the bill against A., B. and C., as partners. *Kilgour v. Finlyson*, 1 H. Bl. 155. S. P., *Abel v. Sutton*, 3 Esp. 108.

A. and B., on the 26th of August, 1809, agreed to dissolve partnership, as from the 1st of January, 1810, and that neither of them should, after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase should be on his private account. On the 27th of October, 1810, A. assigned his property to his creditors, who covenanted not to sue him; and that if they did, the deed of assignment should be a release to him; which deed was signed by B. A., after signing the deed of dissolution, having contracted debts in the name of the firm, B. paid them:—Held, 1st, that B. was liable for those debts, the covenant not to sue A. not operating as a release to B.; 2dly, that supposing it had, the creditors would have had an equitable claim on B., which would have justified his paying the money; and, therefore, that B. was en-

titled to recover it from A. as money paid to his use. *Hutton v. Eyre*, 1 Marsh 603; 6 Taunt. 259.

One of two partners applied trust money in the trade with the privy of the other partner; afterwards they separated, and the partnership effects were assigned over to the first, who took on him the debts; this was held to be no payment in discharge of the other partner, but both were liable to make good the trust money. *Smith v. Jameson*, 5 T. R. 601; Peake, 213.

Where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills:—Held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Dedford v. Deakin*, 2 B. & A. 210; 2 Stark 178.

F. sold goods to H., S. and P., who were partners in trade, and received a bill of exchange for the amount, payable to his own order, drawn by S. and P. upon H., which was not accepted. H., S. and P. dissolved partnership before the bill became due, and at the time of the dissolution had sufficient assets to pay all partnership debts; S. and P. then entered into a fresh partnership with two other persons, and carried on trade at Newfoundland, where the old firm had an establishment, and were there possessed of considerable property, which was sold to the new firm. F., the holder of the bill, delivered it to P., to procure payment of it out of the assets of the old firm at Newfoundland; and P., in the adjustment of partnership accounts, with H., expressly debited the latter with the amount of the bill, as having been paid out of the funds of the old firm; but the bill, which was never canceled, was returned again to F., who sued H., S. and P. upon it. S. and P., who had in the meantime become bankrupts, suffered judgment by default:—Held, that F. had not so dealt with his debt as to discharge the liability of H. *Featherstone v. Hunt*, 2 D. & R. 233; 1 B. & C. 113.

Where, on dissolution of a partnership, two of the partners agree, in consideration of a sum of money secured by the bond of a third partner, to pay all the debts, and to release him from all liability as to the joint concern, the third partner becomes, as between the other two partners and himself, a surety only in respect of those debts. *Rodgers v. Maw*, 4 D. & L. 66; 15 M. & W. 444; 16 L. J., Exch. 187.

A count stated that the defendant and L., copartners, by deed jointly and severally granted, sold, assigned and transferred to the

plaintiff all the copartnership stock, debts, sums of money, and all other the personal estate and effects of the defendant and L. as such copartners. That at the time of executing the deed, the defendant was indebted to the copartnership in 240*l.* Breach, non-payment to the plaintiff of that sum:—Held, that there was no implied covenant on the part of the defendant or L. to pay to the plaintiff a debt due from either to the copartnership. *Auton v. Atkins*, 18 C. B. 249; 2 Jur., N. S. 812; 25 L. J., C. P. 229.

A second count stated that, at the time of executing the deed, the defendant had in his possession a bill of exchange for 120*l.*, payable to his order, the property of the defendant and L. as such copartners. Breach, that he made default in transferring the bill to the plaintiff, and after executing the deed, incapacitated himself from so doing:—Held, that there was an implied covenant on the part of the defendant not to do anything in derogation of his deed, and that he had acted in derogation of his deed by incapacitating himself from transferring the bill to the plaintiff. *Id.*

In the course of trade, bills drawn by a firm against consignments and duly accepted, were renewed from time to time to prevent the acceptors from being under cash advances. The firm being dissolved, and one of the partners, to the knowledge of the acceptors, continuing the business and taking over the stock and liabilities, bills running at the date of the dissolution were renewed by means of bills drawn in the sole name of the partner continuing the business, and were duly accepted:—Held, that the other partner was not thereby discharged from his original liability to the acceptors for any deficiency in the produce of the consignments to meet the bills, joint debtors not being able, without the express concurrence of the creditor, to assume the character of principal and surety against him, and the doctrine of giving time not being applicable to the case of two principal debtors. *Swire v. Redman*, 24 W. R. 1069; 1 L. R., Q. B. Div. 536; 35 L. T., N. S. 470.

As to rights and remedies of creditors upon withdrawal, bankruptcy or death of partner,—see this title, VI., 2.

## Party Walls.

What is a party wall; right of mutual support by adjoining buildings, generally.—The external parts of premises demised are those which form the inclosure of them, and beyond which no part of them extends. *Green v. Gales*, 2 Q. B. 225; 1 G. & D. 468; 6 Jur. 436.

Where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighboring house, and the owner parts with one of the houses, the right to such mutual support is not there-

by lost, the legal presumption being that the owner reserves to himself such right, and at the same time grants to the new owner an equal right, and consequently, if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles. *Richards v. Rose*, 9 Exch. 219.

A declaration stated that a message was in the occupation of one as tenant to the plaintiff, the reversion belonging to the plaintiff; that the defendant was the owner and proprietor of another message adjoining, and by reason thereof, as such owner and proprietor, ought to have repaired, and kept repaired in a substantial manner, the message secondly mentioned. Breach, non-repair. Plea, that the messages were contiguous to and abutting on each other, and were divided by a party wall, whereof the plaintiff was seized of an undivided moiety; that the party wall was in a ruinous state, and being parcel of the message in the declaration secondly mentioned, had fallen on the first-mentioned message. Replication, that the wall was not a party wall, nor was it a wall whereof and wherein the plaintiff was seized:—Held, first, that the replication was good. *Chandler v. Robinson*, 4 Exch. 163; 19 L. J., Exch. 170.

Held, secondly, that the declaration was bad, inasmuch as there is no obligation towards a neighbor cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner, his only duty being to prevent it from being a nuisance. *Id.*

A wall may be a party wall to such height as it belongs in common to two buildings, and cease to be a party wall for the rest of its height. *Weston v. Arnold*, 8 L. R., Ch. 1084; 43 L. J., Chanc. 123; 23 W. R. 234.

**Erection.**—The builder of a house on a new foundation may not erect half his flank or side wall on his neighbor's vacant ground. *Burrow v. Norman*, 2 W. Bl. 959.

If a person, bona fide intending to pursue the authority given by 14 Geo. 3, c. 78, erected a party wall, without, in fact, pursuing the directions of the statute, and thereby injured his neighbor, he was liable to an action; but the action must have been brought after twenty-one days' notice, and within three months after the injury done. *Pratt v. Hillman*, 6 D. & R. 360; 4 B. & C. 269.

A statement of claim in substance alleged that the plaintiff purchased a building site of J., and covenanted to erect thereon houses according to a specification. The specification, in providing for the erection of a party wall, declared that the purchaser first building the party wall was to be repaid by the purchaser of the adjoining site one-half of the cost of such party wall, the value of the same to be determined by the vendor's architect. The statement further alleged that the plaintiff erected a party wall, and that the defendant afterwards became possessed of an adjoining site on the terms that he should build in ac-

cordance with a similar specification, and should observe, perform, and abide by all the terms of the specification relating to the party wall; that the defendant built a house on the adjoining site, and made use of a moiety of the party wall erected by the plaintiff, and promised to pay the plaintiff one-half of the value of the same (which had been ascertained by the vendor's architect), and one-half of the architect's fee; but had not paid the same:—Held, that the statement of claim was good, the defendant having made use of the party wall, knowing that money was to be paid to some one for its use, and having afterwards promised to pay the plaintiff. *Christie v. Mitchison*, 36 L. T., N. S. 621—Pollock, B.

**Raising, injuring, pulling down, and rebuilding.**—Where a party had pulled down a party wall, thereby destroying the internal decorations of his next neighbor's house, and rebuilt the wall without replacing the decorations:—Held, that it was not competent for the person so injured to compel by mandamus the reinstatement of his apartments under 14 Geo. 3, c. 78, s. 41, but his remedy was by action. *Reg. v. Ponsford*, 1 D. & L. 116; 7 Jur. 767; 12 L. J., Q. B. 313—Wightman.

A plaintiff, in his declaration, complained that he, being possessed of a dwelling house, and the defendant being possessed of a dwelling-house next adjoining that of the plaintiff, the defendant proceeded to pull down his house for the purpose of rebuilding another house on the site; and that the defendant, by his workmen, conducted himself so carelessly, negligently and improperly, in and about digging and clearing the ground for the foundation of the house, on the site of his first-mentioned house, and in and about under-pinning the party wall between that house and the house of the plaintiff, and by and through the carelessness of the defendant and his agents, the party wall, and all the walls, floors, beams, &c., of the house of the plaintiff were greatly sunk, cracked, weakened and injured:—Held, that the declaration disclosed a good cause of action, for that the defendant had no right to under-pin the party wall, either partially or wholly, unless that could be done without injury to the plaintiff's house, even though it might be doubtful whether the interests of the parties were several, or whether they stood in the relation of tenants in common. *Bradley v. Christ's Hospital (Governors)*, 2 D., N. S. 164; 5 Scott, N. R. 791; 4 M. & G. 714.

The 14 Geo. 3, c. 78, s. 43, which authorized the building or raising of a party wall, did not protect a party from liability for any collateral damage resulting from the building so erected; and an action was maintainable by the occupier of an adjoining house, for heightening and building on a party fence wall, whereby his windows were darkened. *Wells v. Oly*, 1 M. & W. 452; 7 C. & P. 410; 5 D. P. C. 95; 2 Gale, 12.

In an action for such an injury, no notice of action was necessary, nor was it necessary

to bring it within three months from the time of the building of the wall. *Id.*

The 18 & 19 Vict. c. 122, does not enable the owner to rebuild a party structure so as to obstruct the ancient lights of the adjoining owner. *Crofts v. Haldane*, 86 L. J., Q. B. 85; 16 L. T., N. S. 110; 2 L. R., Q. B. 194; 8 B. & S. 194.

A landlord is justified under 18 & 19 Vict. c. 122, s. 83, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party wall between it and other premises belonging to him, without giving the notice required by s. 85; such tenant not being an owner within the interpretation clause, s. 8; and it is no objection that he has neglected to give the notice to the district surveyor required by s. 38. *Wheeler v. Gray*, 4 C. B., N. S. 584; 27 L. J., C. P. 267; affirmed on appeal, 5 Jur., N. S. 916; 6 C. B., N. S. 606; 28 L. J., C. P. 200; 7 W. R. 325—Exch. Cham.

The defendants gave notice, under 18 & 19 Vict. c. 122, s. 85, to the plaintiffs, that they intended to pull down and rebuild a wall of the plaintiffs, which they described in the notice as a party wall. The wall was not a party wall, but an external wall, and the notice was therefore invalid. The defendants were frequently applied to by the plaintiffs to withdraw the notice, but they refused to do so, though they said they did not intend to act upon it:—Held, that the plaintiffs were justified in filing a bill in equity to restrain the defendants from proceeding on the notice. *Sims v. Estate Company*, 14 W. R. 419; 14 L. T., N. S. 55—V. C. W.

A wall may be a party wall, within the meaning of the Bristol Improvement Acts, 1840 and 1847, for part of its length or height, and an external wall for the remainder of its length or height. *Weston v. Arnold*, 22 W. R. 284; 43 L. J., Chanc. 123; 8 L. R., Ch. 1084.

A wall in Bristol separating buildings, but having in it, above the buildings, windows enjoying rights of light, was condemned as a party wall under the local acts, on proceedings taken by the owner of the lights, and ordered to be rebuilt. The acts contain provisions that there shall be no openings in party walls of new or re-erected buildings, except iron doors for communication between the separate buildings:—Held, that the acts did not apply to these windows, and that the owner of the lights could maintain a suit to restrain the erection of a building that would interfere with them. *Id.*

A building owner who pulls down a party wall under the authority of the Metropolitan Building Act, 1855, 18 & 19 Vict. c. 122, is not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which are left exposed to the weather during the time that the wall is being pulled down and rebuilt. *Thompson v. Hill*, 5 L. R., C. P. 564; 30 L. J., C. P. 204; 18 W. R. 1070; 22 L. T., N. S. 820.

Where surveyors had been nominated under the Metropolitan Building Act, 1855, s. 81, to settle differences in dispute between a building owner and an adjoining owner as to the erection of a party wall, and such surveyors had refused to appoint an umpire, the court appointed an umpire, under the Common Law Procedure Act, 1854, notwithstanding that an action was pending to settle the right of one of the parties to an ancient light in the party wall. *M'Bryde, Ex parte*, 4 L. R., Ch. Div. 200; 46 L. J., Chanc. Div. 153; 35 L. T., N. S. 543—V. C. M.

**Recovery of expenses of rebuilding, under Metropolitan Building Act.**—A tenant who has been compelled by the building owner to pay the proportion of the expenses of a party wall or structure which was payable, under 18 & 19 Vict. c. 122, by his landlord, the adjoining owner, may maintain an action against the latter to recover the sum so paid, and is not bound (though entitled) to deduct it from rent due or accruing due. *Earle v. Maughan*, 14 C. B., N. S. 626; 11 W. R. 911; 8 L. T., N. S. 637; 10 Jur., N. S. 208.

Where expenses had been incurred by a tenant for life, under a will, in reinstating structures on a portion of the demised property, in conformity with the requirements of the 18 & 19 Vict. c. 122, which authorizes the commissioners to sell the structures if an owner refuses or neglects to pay the expenses of reinstatement:—Held, that these expenses constituted a charge on the property, and that their repayment was a proper application of the proceeds of other lands devised to the same uses, and taken under the Lands Clauses Act. *Davis, Ex parte*, 3 De G. & J. 144; 4 Jur., N. S. 1029.

By 18 & 19 Vict. c. 122, s. 88, sub-sect. 2, if a party structure is pulled down and rebuilt by reason of its being so defective as to make it necessary to pull down the same, the expenses of pulling down and rebuilding shall be borne by the building and adjoining owners in due proportion:—Held, that the building owner was not liable to make good damage caused to the adjoining owner's premises by such pulling down and rebuilding. *Bryer v. Willis*, 19 W. R. 102; 23 L. T., N. S. 463—C. P.

A building owner, in pulling down and rebuilding a defective party wall, caused considerable damage to the adjoining owner's house:—Held, that, as the damage was not caused in executing works for the sole benefit of the building owner, there was no statutory liability imposed on him to repair. *Id.*

—before that statute.]—The owner of the improved rent, not of the ground rent, was liable to pay the expenses of a party wall, under 14 Geo. 3, c. 78. *Peck v. Wood*, 5 T. R. 130.

An executor or an administrator might be liable as the owner of the improved rent, for the expenses of pulling down and re-

building a party wall under 14 Geo. 3, c. 78, s. 41, even though he had no other assets than the improved rent. *Thacker v. Wilson*, 4 N. & M. 659; 3 A. & E. 142; 1 H. & W. 181.

A lessee for twenty-one years, at a pepper-corn rent for the first half-year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax, and all other taxes, rates, assessments, and impositions, having assigned his term for a small sum in gross, was not liable to pay the expense of a party-wall, either by the 14 Geo. 3, c. 78, or by the covenant; but that charge must in such case be borne by the original landlord. *Southall v. Ledbetter*, 3 T. R. 458.

The lessor of a house at rack-rent (there being no other person entitled to any kind of rent) was liable to contribute to the expenses of a party-wall, under 14 Geo. 3, c. 78, though the lessee had improved the house demised. *Beardmore v. Foz*, 8 T. R. 214.

The assignee of the lessee of premises, at a fixed rent, which he considerably improved, and thereby rendered of greater annual value, was not the owner of the improved rent within that statute. *Lamb v. Hemans*, 2 B. & A. 487.

If the lessee of a house at a rack-rent underlet it at an advanced rent, he was liable to contribute to the expenses of a party wall built under the statute; nor was the operation of the statute at all varied by any covenants to repair, entered into between the landlord and his tenant. *Sangster v. Birkhead*, 1 B. & P. 303.

A tenant who rebuilt a house in London, without a lease or an agreement for a lease, and therein made use of the party wall of the adjoining house, could not be sued for half the cost as owner of the improved rent, though he afterwards obtained, in consideration of the rebuilding, a beneficial lease at a low ground rent, habendum from a day before the rebuilding. *Taylor v. Reed*, 6 Taunt. 249.

A lessee of land from N. entered into an agreement with G., who was to build houses and pay him 20l. a year, and G. then employed the lessee to build the houses:—Held, that he was liable to contribute to a party wall to which the houses were attached. *Collins v. Wilson*, 4 Bing. 551; 1 M. & P. 454.

The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing, and amending all party walls, and to pay all taxes, duties, assessments, and impositions, parliamentary and parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of 60l. in net money without any deduction whatever." During the lease, the proprietor of the adjoining house built a party wall between that house and the house demised, under the statute:—Held, that the tenant (not the landlord) was bound to pay the moiety of the expense of the party wall. *Burrett v. Bedford*, 8 T. R. 602.

A, a builder, proposed to B., the occupier

of the adjoining house, to build a party wall, and stated the expense: B. answered, "Very well, I expect to pay what is right and fair," and the wall was built:—Held, that A. was entitled to recover from B. his share of the expense, without reference to the statute. *Stuart v. Smith*, 2 Marsh. 435; 7 Taunt. 158; Holt, 321.

A tenant under covenant to repair could not maintain an action under the statute, against his landlord, for a moiety of the expense of rebuilding a party wall, which, being out of repair, the tenant pulled down and rebuilt at the joint expense of himself and the occupier of the adjoining house, to whom he had given the notice required by the statute, in his landlord's name, but without his authority. *Piezy v. Rogers*, R. & M. 357—Abbott.

A tenant of premises having built a party wall thereon, let a portion of them upon a building agreement for 50l. a year. The sub-tenant built a house on his part of the ground, and in so doing made use of the party wall; the agreement contained no stipulation in case of this being done. The sub-tenant underlet the house, when finished, at a rent exceeding 50l.:—Held, that the original tenant was not entitled to compensation from his lessee, under the statute, for the use of the party wall, since he himself, and not the sub-tenant, was the owner of the improved rent within that clause. *Williams v. Pocklington*, 2 B. & Ad. 886.

Where notice of pulling down and rebuilding a party wall was given under 14 Geo. 3, c. 78, and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house, giving notice in the manner prescribed by the act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same:—Held, that he could not recover over against his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the act in respect to any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the act to reimburse his tenant money paid by him to the other owner, for such works as were authorized to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis*, 10 East, 227.

If a landlord declared on a general covenant to repair a messuage, and assigned a breach, per quod he was put to expense, it was sufficient for the tenant to plead performance of all, except as to the repairs of a party wall, and that those repairs were rendered necessary and were done under 14 Geo. 3, c. 78. *Moore v. Clark*, 5 Taunt. 90.

Where a statute authorized a company to remove and erect buildings, and provided a specific remedy for parties injured by such removal and erection, the occupier of a house adjoining one which had been pulled down and rebuilt by the company was not entitled to such remedy in respect of an injury sustained by reason of the removal of a party wall between the two houses, after a notice given under the 14 Geo. 3, c. 78, although the company might not have strictly complied with the requisitions of the act in respect of such party wall. *Rez v. Hungerford Market Company*, 2 N. & M. 340.

**Ownership of party walls; rights of action for trespass or other injury.**—If two persons have a party wall, one-half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall, or of the land on which it stands, although the wall was erected at their joint expense. *Matts v. Hawkins*, 5 Taunt. 20.

The 14 Geo. 3, c. 78, did not make party walls common property; and if one proprietor added to the height of such a party wall, and the other pulled down the addition, the first might maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil; the property in a wall, erected at a joint expense, follows the property of the land whereon it stands. *Id.*

Trespass does not lie by one part owner or tenant in common of a party wall against the other. *Cubitt v. Porter*, 2 M. & R. 267; 8 B. & C. 237. *S. P.*, *Wiltshire v. Sidford*, 1 M. & R. 403.

The common user of a wall separating adjoining lands belonging to different owners is *prima facie* evidence that the wall, and the land on which it stands, belong to the owners of those adjoining lands, in equal moieties, as tenants in common. *Id.*

Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one:—Held, that this was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain trespass against the other. *Id.*

Seemingly, that if one tenant in common has, upon that which is the subject matter of the tenancy in common, laid bricks and built a higher wall than the previous one, the only remedy of the other party is to remove it. *Id.*

In an action for prostrating a wall, running half on the land of the plaintiff and half on that of the defendant, and therefore belonging half to one and half to another, the one half wall is the abuttal of the other half wall, because they are, in law, two walls; and if the half wall, in respect of which the plaintiff seeks to recover, is described by abutments, which are appropriate only to the entire wall, his action must fail. *Murphy v. M'Dermott*, 8 N. & P. 356; 8 A. & E. 188; 1 W., W. & H. 326; 2 Jur. 806.

The plaintiff and the defendant occupied adjoining plots of ground, divided by a wall, of which they were tenants in common. There was a shed in the defendant's ground contiguous to the wall, the roof of which rested on the top of the wall across its whole width. The defendant took the coping-stones off the top of the wall, heightened the wall, replaced the coping stones on the top and built a washhouse contiguous to the wall, where the shed had stood; the roof of the washhouse occupying the whole width of the top of the wall, and he let a stone into the wall with an inscription on it, stating that the wall and the land on which it stood belonged to him:—Held, that on these facts a jury might find an actual ouster by the defendant of the plaintiff from the possession of the wall, which would constitute a trespass, upon which the plaintiff might maintain an action against the defendant. *Stedman v. Smith*, 6 El. & Bl. 1.

In an action by one tenant in common of a party-wall against a builder employed by the other tenant, for pulling it down carelessly and rebuilding it with unreasonable delay, special damage being laid in injury to fixtures, and loss to business; one count being in trespass, the other being grounded on a want of due care and diligence:—Held, that the lack of assent of the plaintiff to the work being commenced would support a plea of leave and license as to the count for trespass, but that the plea was not applicable to the second count, alleging delay and negligence in rebuilding the wall; even supposing that the action was sustainable. *Fluyter v. Hocken*, 1 F. & F. 142—Williams.

In an action for trespass to a wall of the plaintiff, the defendant pleaded a traverse of the property and of doing of the acts; evidence was given of a number of facts, some of which, *per se*, afforded evidence of the possession of the entire wall being in the plaintiff, and others of the possession of the entire wall being in the defendant; the act of trespass was the taking down of a portion of the wall and the building on it, so lowered, of the roof of the defendant's store: damages were assessed by the jury rather for the taking down of the wall than for the building of the new roof on it when taken down:—Held, first, that there was evidence of a possession in common, and, therefore, of a tenancy in common of the wall, by the plaintiff and the defendant. *Jones v. Reid*, 10 Ir. R., C. L. 315—Exch.

Held, secondly, that, though one of two tenants in common of a ruinous wall may take it down with the intention of rebuilding it, yet, as it was shown the defendant did not intend to rebuild the wall as it had originally stood, there was evidence of ouster by the defendant of his co-tenant. *Id.*

Held, thirdly, that the taking down of the wall without an intention to rebuild, being itself an act of trespass, the injury done by that act was an element for the consideration



f the jury in determining the amount of damages. *Id.*

## Passage Court.

See SHIPPING.

## Passenger.

See CARRIER.

## Passport.

**Duty.**—[The duty on a passport is reduced from 5s. to 6d. by 21 Vict. c. 24.]

**Effect as evidence.**—The mere production of a passport found on a prisoner, which is proved to be granted by the authorities of a foreign state to natural-born subjects only, is not evidence of his being an alien. *Reg. v. Burke*, 11 Cox C. C. 138—*Brumwell*.

## Patent.

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#### I. SUBJECT-MATTER.

1. *For what Inventions and Discoveries Patents may be Granted, Generally*.

**Statutes.**—[By 21 Jac. 1, c. 3, s. 6, patents for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor of such manufactures, which others at the time of making such patents shall not use, are good; so also as they be not contrary to the law nor mischievous to the state, by raising prices of commodities at home, or the hurt of trade, or generally inconvenient; the fourteen years to be accounted from the date of the first letters patent.

The crown has always exercised a control over the trade of the country; and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3), within reasonable limits the crown might grant the exclusive right to trade with a new invention for a reasonable period. The 21 Jac. 1, c. 3, did not create but controlled the power of the crown in granting to the first inventors the privilege of the sole working and making of new manufactures. *Caldwell v. Vanlissengen*, 9 Hare, 428; 10 Jur. 115; 21 L. J., Chanc. 97.

5 & 6 Will. 4, c. 83, amends the law touching letters patent for inventions.

By 2 & 3 Vict. c. 67, and 7 & 8 Vict. c. 69, the term of letters patent may be extended and new letters patent granted after the expiration of the original term, by application to the judicial committee of the privy council.

By 14 & 15 Vict. c. 82, s. 7, the lord chancellor and secretary of state are to make rules for passing letters patent.

15 & 16 Vict. c. 83 (the Patent Law Amendment Act, 1852), is amended by 16 & 17 Vict. c. 115.

By 16 & 17 Vict. c. 5, stamp duties are substituted for fees on passing patents.

By 22 Vict. c. 18, provisions are made for protecting inventions for improvements in instruments and munitions of war by assignment to the secretary of state for war.

By 33 & 34 Vict. c. 27, the exhibition of new inventions at international exhibitions in the United Kingdom is not to prejudice patent rights.]

**Novelty and utility of invention, generally.]**

—An invention must be both new and useful, and not confined to the knowledge of the party making it, to be the subject of a patent. *Hill v. Thompson*, 2 Moore, 424; 8 Taunt. 375; Holt, 636; 3 Mer. 629.

An addition to an old invention may be the subject of a patent. *Hornblower v. Boulton*, 8 T. R. 95.

But the application of a known article to a new use, the mode of application not being new, cannot be the subject of a patent. *Reg. v. Cutter*, 3 C. & K. 215; 14 Q. B. 372, n.—Denman.

An invention, consisting in no more than the use of things already known, and acting with them in a way already known, and producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public, is properly the subject-matter of a patent. *Crane v. Price*, 5 Scott, N. R. 338; 4 M. & G. 586; 12 L. J., C. P. 81.

A patent may be taken out for what includes the subject-matter of a patent still in force, if the specification properly distinguishes that which is new from that which is old. *Ib.*

The degree of labor and expense of experiments does not properly enter into the consideration of whether or not an invention is the subject-matter of a patent. *Ib.*

The adoption by an inventor of a suggestion made in the course of experiments of something calculated more easily to carry his conceptions into effect, does not affect the validity of the patent. *Allen v. Rawson*, 1 C. B. 551.

The discovery that a particular advantage may be attained by the use of a machine known before, in a manner known before, is not an invention which can be made the subject of a patent. *Tetley v. Easton*, 2 C. B., N. S. 706; 26 L. J., C. P. 269.

The new application of any means or contrivance may be the subject of a patent, if it lies so much out of the tract of the former use as not naturally to suggest itself, but to require some application of thought and study. *Penn v. Bibby*, 2 L. R.; Chanc. 127; 36 L. J., Chanc. 453—C.

A patent cannot be taken out for one particular use of a known machine, though the patentee may have discovered how to use the machine more beneficially than the owner. *Ralston v. Smith*, 11 H. L. Cas. 223; 20 C. B., N. S. 28; 13 L. T., N. S. 1; 35 L. J., C. P. 49.

Where A. has in a specification described a result, but has not added such a statement of means as to make that result practically attainable, and B. afterwards takes out a patent for the same result, but fully explains the means to be employed to attain it, the patent of B. is sustainable. *Betts v. Menzies*, 31 L. J., Q. B. 238; 11 W. R. 1; 7 L. T., N. S. 110; 10 H. L. Cas. 117.

Where something remains to be ascertained which is necessary for the useful application

of the discovery, that affords sufficient room for another valid patent. *Hills v. Evans*, 1 De G., F. & J. 288; 8 Jur., N. S. 525; 31 L. J., Chanc. 457; 6 L. T., N. S. 90—C.

A patent cannot be upheld for the mere application of a well-known mechanical contrivance to a purpose which is analogous to the manner or to the purpose in or to which it has been hitherto notoriously used or applied. *Harwood v. Great Northern Railway Company*, 35 L. J., Q. B. 27; 11 H. L. Cas. 654; 12 L. T., N. S. 771.

Where there are two things similar in form used for a similar object, and capable of the same application, one of them having been known to mechanics, the introduction of the other into use will not constitute a good ground for a patent. *Ib.*

A slight difference in the mode of application is not sufficient for such a purpose, nor will it be sufficient to take a well-known mechanical contrivance and apply it to a subject to which it has not been hitherto applied. *Ib.*

The antecedent existence of an invention, not shown to have been brought to any successful result, and which was so far similar, that if subsequent in date to a patent, it would have been held a colorable and clumsy imitation, for the purpose of effecting the same result, does not invalidate the patent by anticipation. *Daw v. Eley*, 3 L. R., Eq. 496; 36 L. J., Chanc. 482; 15 L. T., N. S. 559—V. C. W.

It is not every useful discovery that can be made the subject of a patent, but the words "new manufacture" in 21 Jac. 1, c. 3, will comprehend not only a production, but the means of producing it. *Ralston v. Smith*, 11 H. L. Cas. 223; 13 L. T., N. S. 1; 35 L. J., C. P. 49; 20 C. B., N. S. 28.

When a thing has once been used for a certain purpose, no patent is valid for applying that thing to a similar but not an identical purpose. *Jordan v. Moore*, 1 L. R., C. P. 624; 12 Jur., N. S. 766; 35 L. J., C. P. 268; 14 W. R. 769.

A patent granted for constructing vessels of an iron frame covered with a wooden planking, before its date vessels having been built of iron, or of iron and wood combined, is invalid. *Ib.*

A patent for a new material is not anticipated by a former patent from which a skilled workman never had made, and even with the aid of subsequent knowledge and improved machinery could not make, a similar material. And the material being new, a claim for its application to a purpose not new does not affect the validity of the specification. *Neilson v. Betts*, 40 L. J., Chanc. 317; 5 L. R., H. L. Cas. 1; 10 W. R. 1121.

It is no objection to the grant of a patent that another person has been making experiments and working towards a similar invention. *Henry, Ex parte*, 8 L. R., Ch. 167; 43 L. J., Chanc. 363; 21 W. R. 233.

The discovery of a more skillful and efficient mode of working a process already

own and in use is not the proper subject of patent. *Patterson v. Gaslight and Coke Company*, 45 L. J., Chanc. Div. 843; 2 L. R., Div. 812; 85 L. T., N. S. 11—C. A.

As to effect of want of novelty to invalidate patent,—see this title, II., 2.

As to novelty and utility of invention, as grounds for extension or renewal of patents, see this title, V.

**Scotch.]**—It is essential to the validity of a Scotch patent that the machinery or improvement for which it is granted should be new as well in England as in Scotland. *Brown v. Annandale*, 8 C. & F. 487. S. P., *Robinson's Patent, In re*, 5 Moore P. C. C. 65.

**Foreign.]**—The 15 & 16 Vict. c. 89, s. 25, applies where a foreign patent is de facto granted, though it is afterward canceled ab initio. *Daw v. Eley*, 30 L. J., Chanc. 482; 3 L. R., Eq. 496; 15 L. T., N. S. 559—V. C. W.

**Importations from abroad.]**—A party availing himself of information from abroad is an inventor within 21 Jac. 1, c. 3, s. 6. *Nickels v. Ross*, 8 C. B. 679.

So, an importer of an invention from abroad is an inventor within 5 & 6 Will. 4, c. 83. *Claridge's Patent, In re*, 7 Moore P. C. C. 394.

Scmble, that an agent in England of an inventor abroad receiving a confidential communication of an invention, not in a practically useful state, may take out a patent for his own benefit, if he, pursuing the idea thus thrown out, discovers a practical way of carrying it into effect. *Milligan v. Marsh*, 2 Jur., N. S. 1083. See *Steedman v. Marsh*, 2 Jur., N. S. 391—V. C. W.

When a patent is taken out as for an original invention, the subject of the patent being in fact a communication from a British subject resident abroad, the patent is void. *Id.*

As to grants of patents to foreigners or for foreign inventions or discoveries,—see this title, II., 1; extensions or renewals of such patents,—see this title, V., 1.

**Combinations of old and new matters or processes.]**—When a patent is granted for a combination of several things, some of which are old and some new, the question is, whether, taking the specification altogether, that which is claimed as a whole is new, and the imitation by a chemical or a mechanical equivalent of a part of the combination, which is both material and new, is an infringement. *Newton v. Grand Junction Railway Company*, 5 Exch. 331; 20 L. J., Exch. 427, n.

There may be a patent for a combination of old and new mechanism, and such patent will be infringed by using so much of the combination as is material, and it will not be less an infringement because the result is attained by the substitution of a mechanical

equivalent. *Sellers v. Dickinson*, 5 Exch. 312; 20 L. J., Exch. 417.

An old mode of operation, more extensively than hitherto applied, to a well-known article, does not afford a ground on which to grant a patent. *Ormon v. Clark*, 13 C. B., N. S. 337; 9 Jur., N. S. 749; 32 L. J., C. P. 8; 11 W. R. 118; 7 L. T., N. S. 361; affirmed on appeal, 14 C. B., N. S. 475; 33 L. J., C. P. 201; 10 Jur., N. S. 128; 11 W. R. 787—Exch. Cham.

Casting in iron an article which has never been cast before, if no new method of casting is adopted in the process, is not the subject of a patent. *Id.*

A claim for a patent for improvements in the mode of doing anything by a known process is sufficient to entitle the claimant to a patent for his improvements when applied either to the process as known at the time of the claim, or to the same process altered and improved by discoveries subsequently published, so long as it remains the same with regard to the improvements claimed and their application. *Electric Telegraph Company v. Brett*, 10 C. B. 838; 15 Jur. 579; 20 L. J., C. P. 123.

A patent cannot be supported for the application of a process already known, producing a known result, unless the object to which the process is applied is different from the object to which it was formerly applied; and the question whether the object is different is one of fact for the jury. *Steiner v. Heald*, (*in error*), 6 Exch. 607; 17 Jur. 875; 20 L. J., Exch. 410—Exch. Cham.

The application of a known process to a new article, the mode of application not being new, cannot be the subject of a patent. *Brook v. Aston*, 8 El. & Bl. 478; 4 Jur., N. S. 279; 27 L. J., Q. B. 145; affirmed on appeal, 5 Jur., N. S. 1025; 28 L. J., Q. B. 175—Exch. Cham.

But this principle does not apply where the process is chemical. *Young v. Fernie*, 10 Jur., N. S. 926; 12 W. R. 901; 10 L. T., N. S. 361; 4 Giff. 577.

The application of a well-known tool to work previously untried materials, or to produce new forms, is not the subject of a patent. *Bottle Envelope Company v. Seymour*, 5 C. B., N. S. 104; 5 Jur., N. S. 174; 28 L. J., C. P. 22.

A patent for a combination does not import a claim that each of its parts is new, and the patent may be valid, though each part is old: but the use of a subordinate part only of a combination may be an infringement of a patent for the combination if the part so used is new and material. *Lister v. Leather*, 8 El. & Bl. 1004; 4 Jur., N. S. 947; 27 L. J., Q. B. 295—Exch. Cham.

If, having a particular purpose in view, a person takes the general principles of mechanics, and applies one or other of them to a manufacture to which it has not before been applied, this is sufficient ground to warrant an application for a patent; assuming such manufacture to be new, desirable and of pub-



If at the time a patent is granted for an invention such invention has already been made public in England by a description contained in a work, whether written or printed, which has been publicly circulated, in such case the patentee is not the first and true inventor, whether he has himself borrowed his invention from such publication or not. *Stead v. Williams*, 7 M. & G. 818; 8 Scott, N. R. 440; 8 Jur. 930; 13 L. J., C. P. 215.

If the inventor of a machine lends it to another in order to have its qualities tested, and that person uses it for some weeks in a public work room, this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters patent for it. *Bentley v. Fleming*, 1 C. & K. 587—Crosswell.

A machine does not cease to be the subject of a patent, merely because of the length of time during which the inventor may keep it by him, after it has been made a complete workable machine. *1b*.

The prior use of an invention which invalidates a patent is a use by persons in carrying on their trade, and without concealment. *Heath v. Smith*, 2 C. L. R. 1584; 3 El. & Bl. 250; 18 Jur. 601; 23 L. J., Q. B. 167.

B. applied for a patent for improvements in making capsules. Some delay occurred in the office, and between the time of the application for and the issuing of the letters patent, B. manufactured a quantity of the articles, in the making of which he had discovered improvements. They were made by his own workmen, and were not intended for sale before the patent was granted, nor were they sold:—Held, that this did not invalidate the patent. *Betts v. Menzies*, 5 Jur., N. S. 1104; 28 L. J., Q. B. 361.

The public use and exercise of an invention which prevents it from being considered a novelty, is a use in public, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in private, and does not mean a use by the public generally. *Carpenter v. Smith*, 9 W. & M. 300.

The prior deposit of articles of novel manufacture in a warehouse, for sale, is a sufficient publication to defeat a patentee's claim to novelty in the invention of similar articles. *Mullins v. Hart*, 3 C. & K. 297—Jervis.

Although a party may believe himself to be the first and original inventor, yet he cannot shelter himself under willful ignorance, but will be fixed not only with what he knew, but with that which he might have known had he made the inquiries which it was incumbent upon him to make. *Hoinball's Patent*, *In re*, 9 Moore P. C. C. 378.

A first and original inventor means a person who could claim the merit of the first invention without reference to the user. *1b*.

Where a man, having conjectured a new method of effecting a desired object, takes out a patent for it, but never puts it in practical operation, that will not invalidate letters

patent taken out for the same process by a subsequent inventor, who shall of himself discover the same method. *Betts v. Menzies*, 8 Jur., N. S. 357—V. C. W.

A contractor for harbor works had in the progress of his undertaking invented an apparatus which greatly facilitated the works, but which could only be tested in a place accessible to the public. After having used the apparatus for four months in the progress of the work, he applied for a patent:—Held, that such user amounted to a dedication to the public, and that he was not entitled to a patent. *Adamson's Patent*, *In re*, 6 De G., M. & G. 420; 25 L. J., Chanc. 450.

An invention was described in a book published in France, copies of which were sent to England to a bookseller for sale:—Held, that this was a publication of the invention, and that no valid patent could afterwards be taken out in England for the same invention. *Laing v. Gisborne*, 31 Beav. 133; 8 Jur., N. S. 786; 31 L. J., Chanc. 769; 10 W. R. 368; 6 L. T., N. S. 771.

The circumstance of a patentee having previously filed (but abandoned) a provisional specification describing in part the same invention, does not render a subsequent patent void, the filing of the previous provisional specification not being a publication within the statute. *Ozley v. Holden*, 8 C. B., N. S. 666; 30 L. J., C. P. 68.

A necessary and unavoidable disclosure of an invention to others, if made in the course of mere experiments, is not such a publication as will avoid the subsequent grant of a patent, though the same disclosure, if made in the course of a profitable use of an invention previously ascertained to be useful, would be a publication; but an experiment performed in the presence of others, which not only turns out to be successful, but actually beneficial in the particular instance, is not necessarily a publication, so as to constitute a gift of the invention to the world. *Newall*, *In re*, 4 C. B., N. S. 269; 4 Jur., N. S. 562; 27 L. J., C. P. 337.

A specification of a patent does not differ from any other publication of an invention for the purpose of invalidating a subsequent patent for the want of novelty. *Hills v. Evans*, 4 De G., F. & J. 288; 8 Jur., N. S. 525; 31 L. J., Chanc. 457; 6 L. T., N. S. 90.

A prior publication, to have that effect, must be one from which a person with ordinary knowledge would be able practically to apply the discovery without further experiment. If something remains to be ascertained there is room for a valid patent. *1b*.

The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine. *Murray v. Clayton*, 7 L. R., Ch. 570; 20 W. R. 649.

In order to invalidate a patent by prior book-publication, it is not enough to show

that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the public. *Plimpton v. Spiller*, 6 L. R., Ch. Div. 412; 37 L. T., N. S. 56—C. A.; affirming *S. C.*, 3 L. R., Ch. Div. 531; 45 L. J., Chanc. Div. 505; 34 L. T., N. S. 340—R.

In 1865 a patent for improvement in the construction of skates was granted to the agent of the inventor, who was a resident in America, and to whom the patent was afterwards assigned. Two years previously an American book containing a brief description of the invention (but not sufficiently particular to enable persons to manufacture the skates), and five weeks previously an American book of illustrations containing a drawing of the invention, were sent to the library of the Patent Office in London. This book of illustrations was not entered in the book of donations or in the catalogue, but it was placed on a bookshelf in a room open to the public, and was seen there by a librarian before the plaintiff's patent was taken out:—Held, that there was no prior publication of the patent in England. *Id.*

*Semble*, that in an action on a patent, where such an issue has been raised, evidence of the existence of foreign specifications of an earlier date, preserved in and obtained from the Patent Office, might be admissible. *Id.*

Where a provisional specification contained a description of an invention, part of which was omitted from the final specification:—Held, that the part omitted did not amount to prior publication of the invention so as to avoid for want of novelty a subsequent patent taken out for such omitted part. *Stone v. Todd*, 46 L. J., Chanc. Div. 32; 4 L. R., Ch. Div. 58—R.

For analogous decisions, as to what amounts to an infringement of a patent,—see this title, IV., 1.

As to invalidity of patent as a defense to action for infringement,—see this title, IV., 2, a.

## 2. Particular Instances of Inventions, Discoveries and Manufactures.

**What may be patented.]**—A method of lessening the consumption of steam and fuel in fire-engines is a subject of a patent. *Hornblower v. Boulton*, 8 T. R. 95. And see *Boulton v. Bull*, 2 H. Bl. 463, 500.

If the shearing of cloth from list to list by shears is known, and the shearing it from end to end by means of rotatory cutters is also known, and a person constructs a machine to shear from list to list by means of rotatory cutters, this is a new invention. *Lewis v. Davis*, 3 C. & P. 502—Tenterden.

In an action for invading a patent right to machinery for drying calicoes, where the specification, after setting forth the mode in which the cloth was to be extended for the purpose of drying, proceeded to state that it might be taken up again by the same

machinery: a jury having found that the invention was new and useful on the whole, but that the machine was not useful in some cases for taking up goods, the court refused to set aside the verdict for the plaintiff and enter a nonsuit. *Haworth v. Hardcastle*, 4 M. & Scott, 720; 1 Bing. N. C. 182.

A patent for an improvement or improvements in the making or manufacturing of elastic goods or fabrics, and the production of cloth from cotton, flax or other suitable material, not capable of felting, in which are interwoven elastic cords or strands of India rubber, coated or wound round with filamentous material, is properly the subject-matter of a patent. *Cornish v. Keene*, 4 Scott, 337; 3 Bing. N. C. 570; 2 Hodges, 281.

A patent was obtained for a new and improved process or manufacture of silk, and silk in combination with certain other fibrous substances. By the specification, the invention is declared the nature of the invention to consist of eight several and distinct parts or heads, the sixth being "the application of an improved process to the throstle machine, on the principle of the long-ratch, for the new and useful purpose of spinning silk waste;" and the seventh, "certain improvements effected by them in the throstle machine, by which the utility in spinning silk waste was greatly augmented." After describing the old process of converting silk waste into yarn, the specification proceeded to describe the novel process by which the plaintiffs produced their new or improved manufacture; and, referring to drawings, continued: "the annexed drawings, for the most part, represent the well known spinning frame, called 'a throstle,' on the principle of the long-ratch, as implied in the spinning of flax; which machine, combined with the improvements we have applied to it, we apply to the new and useful purpose of spinning silk waste of long fibers in combination with flax or wool." And the specification concluded thus:—"We desire it to be understood that we disclaim those parts of the process, or mechanism, which were or may have been, previous to the granting of our patent, well known or in use for the same purposes; but we restrict our claims to the eight several heads of invention mentioned in the early part of the specification, all of which we believe to be new, and of great public utility."—Held, that this was a claim either of a new invention, or a new combination of parts of the throstle machine: and the jury having found "that the invention was not new, but an improved process, not a new combination," that the defendant was entitled to the verdict upon these issues. *Gibson v. Brand*, 4 Scott, N. R. 844; 4 M. & G. 170.

A patent for an improvement in the manufacture of iron by the application of anthracite or stone, coal and culm, combined with the using of the hot air blast in the smelting and manufacture of iron from iron stone mine or ore, is a new invention. *Craw*



*v. Price*, 5 Scott, N. R. 338; 4 M. & G. 586; 13 L. J., O. P. 81.

V. obtained a patent for an improvement in packing hydraulic and other machines by means of a lining of soft metal, the effect of which was to make certain parts of the machines air and fluid tight. Subsequently to this, N. discovered that soft metal had the effect of diminishing friction, and of preventing the evolution of heat when applied to the surfaces in contact with machines in rapid motion, and subject to pressure; and he embodied the application of that discovery to machines in a patent:—Held, that N.'s application of the soft metal differed essentially from that of V., and that N.'s patent was new. *Newton v. Vaucher*, 6 Exch. 859; 21 L. J., Exch. 305.

A patent for certain improvements on, or additions to, the apparatus or parts constituting what are called braiding or plaiting machines, whereby the inventor was enabled to produce by such machines elastic and non-elastic braids and other fabrics, with elastic or non-elastic strands, yarns or threads introduced lengthwise of the fabric, and four or more in the same surface or plane, or mixtures of elastic or non-elastic fibers in combination in the same fabric, is a novel invention. *Nickels v. Ross*, 8 C. B. 679.

A patent for an invention of improvements in cards for carding wool, cotton, silk and other fibrous substances, and for raising the pile of woollen and other cloths by the application and adaptation of caoutchouc or India rubber, as a substitute for the fillets or sheets of leather, is a new invention. *Wallon v. Potter*, 4 Scott, N. R. 91; 3 M. & G. 411.

A patent for improvements in looms for weaving by means of the clutch box is novel. *Sellers v. Dickinson*, 5 Exch. 312; 20 L. J., Exch. 417.

Previously to a patent being granted, gelatine was obtained by submitting large pieces of hides to the action of caustic alkali, or by reducing them to pulp in a paper machine, and employing blood to purify the product. The invention claimed consisted in cutting the hides into shavings, thin slices or films, whereby the use of blood in the process of purification became unnecessary. The specification did not state whether they were to be cut wet or dry, or to what degree of thinness, or what was the minimum of heat they ought to be subjected to in the subsequent processes. It was proved that they might be cut either wet or dry, and that the thinner they were cut the better if the fibrine texture was preserved, and that the most satisfactory result would be obtained if no more heat was used than would dissolve the gelatine in the shortest period. The defendant cut the hides wet, and about twelve to the inch:—Held, that the invention was the subject of a patent, and that the defendant had infringed it. *Wallington v. Dale*, 7 Exch. 888; 23 L. J., Exch. 49.

In 1844, G. obtained a patent for improvements in grinding wheat and other grain.

He described as his invention "the forcing and distributing of atmospheric air from the eye or center of mill-stones, for the purpose of cooling the grain during the process of grinding." This was effected by an air box placed below the mill-stones, into which the air was forced by the rapid rotation of a fan or a blower, which caused a current of air perpendicular to the axis of the fan, and the air was conducted by a pipe through the eye of the lower stone to the center of the two stones, and there distributed between them by an apparatus provided with fans or arms. In 1846, B. obtained a patent "for improvements in manufacturing wheat and other grain into meal and flour." His invention consisted of the application of ventilating vanes or screws at the center of the stones for supplying the air between the grinding surfaces; a portable ventilating machine, blowing by a screw vane, which caused a current of air parallel to the axis of the vane, was attached externally to the eye of the upper mill-stone; the screw vane being set in rapid motion, the air was compelled to pass through the eye into the center of the two stones, and so find its way out between them. In 1851, C. obtained a patent for improvements in grinding wheat, and his plan was to remove from the center of both stones a large circular portion of each, and in this space, opposite to the separation of the two stones, to place a fan or blower, by the rapid rotation of which a centrifugal motion was given to the air, and it was driven between the stones:—Held, that C.'s invention was no infringement of B.'s, but that each was a new method of accomplishing a well-known object, viz., the cooling grinding substances by the common principle of obtaining a current of air by a rotating vane. *Bovill v. Pimm*, 11 Exch. 718. See *Bovill v. Keyworth*, 7 El. & Bl. 725; 8 Jur., N. S. 817.

Vegetable gas had been obtained from oils which were separated from seeds and other oleaginous substances by pressure. It was discovered that gas might be distilled at once from the seeds and other oleaginous substances, without first separating the oil:—Held, that assuming the invention to be new, it was such as might be the subject of a patent. *Booth v. Kennard (in error)*, 1 H. & N. 527; 8 Jur., N. S. 21; 26 L. J., Exch. 23 —Exch. Cham.

The employment of hydrate of lime for the purpose of precipitating the animal and vegetable matter contained in sewage water, and so producing an agricultural manure, is a good subject-matter for a patent. *Higgs v. Goodwin*, 5 Jur., N. S. 97; 27 L. J., Q. B. 421; El., Bl. & El. 529.

A person using the same process, and obtaining a product, not for the purposes of commercial profit, but for purifying sewage water merely, is not guilty of an infringement of the patent. *Id.*

The plaintiff, on applying for a patent, prior to the 15 & 16 Vict. c. 83, delivered to the attorney-general a deposit paper stating

that his invention was "for absorbing sulphuretted hydrogen and other gases into porous bodies and renovating them again, either by heat or by taking off the atmospheric pressure." In 1849 he obtained a patent for "an improved mode of compressing peat for making fuel or gas, and of manufacturing gas, and of obtaining certain substances applicable for purifying the same." The invention, described in the specification, was, passing the gas through a mixture consisting of the subsulphates, the oxychlorides, or the hydrated or precipitated oxides of iron, either by themselves or mixed with sulphate of lime and sawdust, or peat charcoal, "so as to make a porous material, whereby the gas will be deprived of its sulphuretted hydrogen, which will be absorbed into the porous material, water being formed by the union of the oxygen of the oxide with the hydrogen of the sulphuretted hydrogen. As soon as the material ceases to purify the gas from sulphuretted hydrogen, the gas is to be shut off from the purifier, and a communication opened with the external air, which is to be admitted to the purifying material, and by the agency of which it will be renovated, and the uncombined gases which have been absorbed driven off. The best way to effect this is partially to take off the atmospheric pressure at the top or bottom of the purifier in which the purifying material is contained, by connecting it with a pipe to a hot and powerful chimney, so as to cause a current of air to pass through the purifier. The current of air will drive off the volatile gases, and re-oxidize the iron of the sulphuret of iron. As soon as the iron is re-oxidized, the gas is to be passed through it again." He claimed, first, purifying gas by passing it through precipitated or hydrated oxides of iron; and secondly, renovating the purifying material by exposing it to the action of the air. The jury found that the invention, in respect of which the plaintiff applied for a patent, and in respect of which his patent was granted, whether aptly described in the deposit paper or not, was the plaintiff's invention:—Held, first, that, assuming the deposit paper delivered to the attorney general did not correctly describe the matter in respect of which the plaintiff applied for a patent, the defendant was not entitled to have a verdict, on a plea that the invention described in the specification was another and a different invention from that for which the letters patent were granted. *Hills v. London Gaslight Company*, 5 H. & N. 312; 29 L. J., Exch. 409.

In the specification of a prior patent by C. for purifying gas, dated in 1840, after speaking of the use of black oxide of manganese for purifying gas, he went on to say, "the same effect may be produced by the application of the oxide of zinc, and the oxides of iron treated precisely in the way above described."—Held, that, assuming that C. meant to claim all oxides of iron for purifying gas, inasmuch as some would not answer, the court could not say, as a matter of law, that

a patent could not be had by a person who afterwards discovered that precipitated hydrated oxides were those which it was proper to use. *Ib.*

The jury having found that C.'s specification did not disclose the use of hydrated oxides of iron, the court refused to grant a new trial. *Ib.*

In working for the purpose of completing the specification of his patent, C. had used oxides of iron for the purification of gas, and the gas purified by him, to the extent of 20,000 feet a day, had for many days been mixed with the ordinary gas, and supplied to the public from the mains of a gas company. He had renovated the material by exposing it to heat on the top of some retort beds. The oxides were originally in a hydrated state, and the heat used by him while so working was not sufficient to render them anhydrous; but not knowing the difference between hydrated and anhydrous oxides, and supposing that a better result would thereby be obtained, he directed in his specification that the material should be raised to a red heat, which would render the oxides anhydrous. The jury having found that what C. did was in the nature of an experiment, and not a publication to the world, the court refused to disturb the verdict on that point. *Ib.*

In 1847, F., having obtained a patent for the purification of gas by chloride of calcium, specified a mode of making the chloride of calcium by decomposing muriate of manganese, iron or zinc, and said, "The oxides or carbonates which result are useful for the said purification of gas, and need not be removed." The oxides so prepared would be hydrates:—Held, that the court, on a comparison of F.'s specification with that of the plaintiff, could not say, as a matter of law, that F. had anticipated the plaintiff's invention. *Ib.*

Before the date of the plaintiff's patent, it was known that hydrated oxides of iron would absorb sulphuretted hydrogen; but it was not known that they could be practically used in the purification of coal gas from sulphuretted hydrogen:—Held, that a patent might be had for applying hydrated oxides to absorb sulphuretted hydrogen from coal gas. *Ib.*

It was also known that sulphuret of iron produced by the action of sulphuretted hydrogen upon hydrated oxide of iron, would be re-oxidized by being exposed to the action of atmospheric air. But it was not known that when the sulphuret was produced by exposure of hydrated oxide of iron to the action of sulphuretted hydrogen mixed with coal gas, the re-oxidation of the iron might not be prevented by the cyanogen, compounds of ammonia, and tarry matter which would be mixed with it:—Held, that a patent might be had for re-oxidizing the iron by exposure to the air after it had been used in the purification of coal gas. *Ib.*

Held, also, that the invention came within

he title of his patent as an improved mode of manufacturing gas. *Id.*

A patentee claimed, first, a mode of applying rollers and runners to the footstand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as above described:—Held, that, assuming that there was nothing novel in the mode of securing the runners to the footstand, yet that the want of novelty in the second claim did not invalidate the patent, because the second claim must be read as claiming a subsidiary invention to be used only in connection with the principal invention. *Plimpton v. Spiller*, 6 L. R., Ch. Div. 412; 37 L. T., N. S. 56—C. A.

**What are not patentable.**—A patent was taken out for improvements in making buttons. The specification stated the improvement to consist in the substitution of a flexible material for metal shanks, and it described the mode in which this material might be fixed to the intended button, and made to project from it in the necessary condition for use, by the help of a metal collet or ring with teeth. Neither the construction of the button, nor the application of the flexible shank, was new; the use of the toothed ring, as described in the specification, was so, but this was not stated to be the subject-matter of the invention; and it appeared by the specification, that the effect produced by it might be brought about in other modes, which the patentee had also used:—Held, that the patent was not maintainable, since the invention consisted only in combining two things which were not new, and the use of the toothed ring in forming the flexible shank, though new, was not the object of the invention, but only a mode, among others, which was already known, of carrying it into effect. *Saunders v. Aston*, 3 B. & Ad. 881.

When a patent has been obtained for strengthening and polishing linen and cotton yarns by means of friction brushes, another patent cannot be taken out for applying the same process to yarns of wool or hair, or to fabrics made of cotton, linen, silk, wool or hair. *Brook v. Aston*, 5 Jur., N. S. 1025; 28 L. J., Q. B. 175; 8 El. & Bl. 478—Exch. Cham.

Hoops of whalebone, cane, and other substances, suspended from the waist and forming a petticoat, had long since been used by ladies. A person took out a patent for using, for the same purpose, hoops made of steel watch-springs:—Held, that this was not an invention which could properly be made the subject of a patent. *Thompson v. James*, 32 Beav. 570.

A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen and woolen fabrics." The specification, and a disclaimer, set forth that the patentees claimed "the mode hereinbefore described of producing or preparing stripes of silk, cotton,

woolen or linen, or of a mixture of two or more of these materials, in such a manner that the weft, or lateral fibers of both cut edges of each stripe are all brought up on one side, and into close contact with each other, and the re-weaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets, &c." One of these processes was old. The judge directed the jury, that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent:—Held, that this direction was erroneous, and that the patent was void. *Templeton v. Macfarlane*, 1 H. L. Cas. 595.

Ladies' mourning bonnet and hat falls having previously been made with the ornamental folds on the outside only, so that when turned up a "wrong side" was exposed to view, the plaintiff introduced and patented an improved mode of making them with the folds on the inner side also, so as to form both sides alike, but there was no novelty in the process of manufacture:—Held, that this was not a subject for a patent. *White v. Toms*, 37 L. J., Chanc. 204; 17 L. T., N. S. 848—V. C. M.

A valid patent for an entire combination for a process gives protection to each part that is new and material for that process; but a part which in itself could not have been the subject of a patent, or the advantages of which are merely collateral to the objects of the invention, is not protected. *Parkes v. Stevens*, 18 W. R. 233; 22 L. T., N. S. 635; 5 L. R., Ch. 30.

The application to a globular lamp of a sliding door instead of a hinged one cannot be the subject of a patent. *Id.*

The adaptation of a sliding door to a spherical lamp, sliding doors having previously been applied to cylindrical lamps and to other glazed surfaces, cannot of itself be the subject of a patent. *Id.*

P. was one of three referees appointed under an act of parliament to inspect the works of gas companies and investigate the processes of manufacture carried on therein, with the view of ascertaining the means adopted therein for purifying gas, and to ascertain with what degree of purity each company could reasonably be required to make and supply gas, and to prescribe the maximum amount of impurity with which gas should be allowed to be charged, and by the act the gas companies were directed to give to the referees all facilities for the performance of their duties. In the performance of their duties, the referees came to the conclusion that the best results would be obtained by adopting a new system of working the lime purifiers, so as to absorb a larger amount of carbonic acid gas than before:—Held, that this was not the proper subject of a patent. *Patterson v. Gaslight and Coke Company*, 2 L. R., Ch. Div. 812; 45 L. J., Chanc. Div. 812; 35 L. T., N. S. 11—C. A.

Patentees of lamp-burners claimed by their

specification as their invention the construction of burners, "in the manner described and illustrated in the figures; that is to say, the employment in the same burner of two or more flat or curved wick-cases or holders in which two or more flat wicks are placed so as to produce thereby one or more flat flames, or elliptical or nearly circular flames." The figures referred to showed burners with two wicks passing through a double-slotted cone. The use of two wicks with a single-slotted cone was old:—Held, that the claim could not be read as limited to burners with a double-slotted cone, and that the patent was bad for want of novelty. *Hinks v. Safety Lighting Company*, 4 L. R., Ch. Div. 607; 36 L. T., N. S. 391; 46 L. J., Chanc. Div. 185—R.

A description in the specification of a lamp-burner, omitted to state where the hole for the admission of air was to be:—Held, that the specification was insufficient. *Ib.*

The following inventions were held void for want of novelty:—

Turning-tables for railway purposes. *Holmes v. London and North Western Railway Company*, 12 C. B. 831; 23 L. J., C. P. 58; 17 Jur. 804.

Manufacture of gas direct from seeds, leaves, flowers, branches, nuts, fruit and other substances containing oil, or oily, or resinous matter, similar to K.'s previous patent. *Booth v. Kennard*, 2 H. & N. 84; 26 L. J., Exch. 805—Exch. Cham.

Though a valid subject of a patent if novel. *S. O. in Exch.*, 1 H. & N. 527; 3 Jur., N. S. 21; 26 L. J., Exch. 23.

Agricultural reaping machines. *McCormick v. Gray*, 7 H. & N. 25; 31 L. J., Exch. 42; 9 W. R. 809; 4 L. T., N. S. 832.

Fishes and fish-joint for connecting the ends of rails on railways. *Harwood v. Great Northern Railway Company*, 11 H. L. Cas. 654; 35 L. J., Q. B. 27; 12 L. T., N. S. 771; though a good subject-matter for a patent; *S. O. in Q. B.*, 6 Jur., N. S. 993; 29 L. J., Q. B. 193.

Betts' manufacture of capsules, in the Exchequer Chamber, held void on the ground of D.'s previous patent of Albion metal for facings of cisterns, &c. *Betts v. Menzies*, 30 L. J., Q. B. 81; 6 Jur., N. S. 1290; but on appeal to Dom. Proc., Betts' Patent, held to be valid. *Betts v. Menzies*, 10 H. L. Cas. 117; 9 Jur., N. S. 29.

## II. LETTERS PATENT; SPECIFICATIONS; DISCLAIMERS.

### 1. Grant, Sealing, and Registration.

Grants to subjects or foreigners.]—A patent granted to a British subject in his own name for an invention communicated to him by a foreigner, the subject of a state in amity with Great Britain, is not void, although such patent is in truth taken out and held by the grantee in trust for such foreigner. *Beard v.*

*Egerton*, 3 C. B. 97; 10 Jur. 643; 13 L. J., C. P. 270.

In such case, the grantee is the true and first inventor within the realm, within 21 Jac. 1, c. 8. *Ib.*

As to extensions or renewals to residents abroad or to foreigners,—see this title, V., 1

— to masters or servants.]—If a servant, while in the employ of his master, makes an invention, that invention belongs to the servant, and not to the master. *Bloxam v. Bloxam*, 1 C. & P. 558; R. & M. 187—Abbott.

Where a master and his foreman both invented certain improvements for which the master sought letters patent:—Held, that they ought only to be granted on the terms of their being vested in trustees for the master and the foreman. *Russell, In re*, 3 De G., M. & G. 130.

When a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, and subsequently filed a complete specification and obtained letters patent:—Held, that the great seal might be affixed to the letters patent for the servant's invention, and that the letters patent might bear the date of his provisional specification. *Scott and Young, Ex parte*, 6 L. R., Ch. 274; 19 W. R. 425.

Duty of patent agents.]—A patent agent is expected to know the law relating to the practice of obtaining patents. *Lee v. Walker*, 41 L. J., C. P. 91; 7 L. R., C. P. 121; 26 L. T., N. S. 70.

When, therefore, such an agent who was employed to procure a patent, being not aware of the decision (which makes it necessary, notwithstanding a provisional specification has been filed, to take care that the patent is sealed before another patent for the same invention is obtained by a later applicant), delayed four months between filing the provisional specification and applying to have the patent sealed, whereby a subsequent applicant for a patent for the same invention was able to get his patent sealed first, and so prevent such agent from procuring a patent for his employer:—Held, evidence of negligence, for which such patent agent might be liable in an action at the suit of his employer. *Ib.*

Provisional specifications.]—A provisional specification, if allowed by the law officer of the crown, cannot be impeached as being too general. *Penn v. Bibby*, 2 L. R., Chanc. 127; 36 L. J., Chanc. 455; 15 W. R. 208; 15 L. T., N. S. 399—C.

The office of the provisional specification is only to describe, generally and fairly, the nature of the invention, and not to enter into all the minute details as to the manner in which the invention is to be carried out, as in the complete specification. *Newall, In re*, 4 C. B., N. S. 269; 4 Jur., N. S. 562; 27 L. J., C. P. 237.

Where a provisional specification was filed

on the 17th of March, and afterwards abandoned by the inventor, who delivered another specification for the same invention on the 10th of April, in respect of which a patent was granted to him on the 12th of October, but dated as of the 10th of April:—Held, that there had not been a dedication of the invention to the public by the abandonment of the first provisional specification, but that the patent was valid by 15 & 16 Vict. c. 83, s. 24. *Ozley v. Hoblen*, 8 C. B., N. S. 606; 30 L. J., C. P. 68; 8 W. R. 626; 2 L. T., N. S. 464.

The existence of a prior provisional specification is not a ground on which the attorney-general ought to refuse to allow a second provisional specification by another inventor to be filed; and in the event of the latter applicant for provisional protection being the first to obtain a grant of letters patent, his patent is a bar to the grant of letters patent for the same invention to the earlier applicant for such provisional protection. *Bates and Redgate, In re*, 38 L. J., Chanc. 501; 4 L. R., Ch. 577; 17 W. R. 900; 21 L. T., N. S. 410—C.

A provisional specification is not, in general, intended to give a complete description of an invention to the public, but only to protect the inventor until the description is perfected in the final specification. *Stoner v. Todd*, 4 L. R., Ch. Div. 58; 40 L. J., Chanc. Div. 32; 35 L. T., N. S. 601—R.

When a provisional specification contained an incomplete description, part of which was omitted in the final specification:—Held, that there was no prior publication of the part omitted so as to vitiate a subsequent patent of a similar invention on the ground of want of novelty. *Id.*

As to requisites of specifications, generally, and effect of variance from provisional specifications,—see this title, II., 2.

**Copies and inspection of provisional specifications.**—[By 16 & 17 Vict. c. 115, s. 2, the commissioners of patents shall cause true copies of all provisional specifications left at the office of the commissioners to be open to the inspection of the public at such times after the date of the record thereof respectively, as the commissioners shall by their order from time to time direct.]

An application under this provision for the inspection of the provisional specification of letters patent, on the ground that the subject-matter was the same as that for which the applicant had obtained letters patent, was refused. *Tolson's Patent*, 6 De G., M. & G. 422.

**Opposing grant.**—Leave was given to oppose the granting of letters patent, notwithstanding the time for entering an opposition had expired, the reason for the delay in entering such opposition being accounted for. *Brennan's Patent, In re*, 7 Jur., N. S. 690; 4 L. T., N. S. 456—C.

A party who has not opposed the sealing of a patent before the law officer of the crown, will not be allowed to oppose before the lord

chancellor. *Mitchell's Patent, In re*, 2 L. R., Chanc. 343—C.

A person may give notice of objection, and oppose the sealing of a patent before the lord chancellor, without previously applying to the court for leave to enter opposition. *Vincent's Patent, In re*, 2 L. R., Chanc. 341; 15 W. R. 524—C.

In opposing the grant of letters patent, the burden is on the opponent to show that the grant would be clearly wrong. *Sheffield, Ex parte*, 8 L. R., Ch. 237; 42 L. J., Chanc. 356; 21 W. R. 233.

When the facts on which the opponent relies were within his knowledge when he opposed before the law officer, he cannot when before the lord chancellor raise a new legal argument on these facts; nor can he then bring forward evidence which he might have brought before the law officer. *Id.*

Notice of objections was filed to sealing of letters patent, and afterwards withdrawn. On petition, the costs occasioned by such objections were ordered to be paid by the person who had filed them. *Cobley's Patent, In re*, 8 Jur., N. S. 106; 31 L. J., Chanc. 333; 5 L. T., N. S. 387—C.

**Entering caveats.**—A party who had lodged an unsuccessful caveat against the granting of a patent, ordered to pay to the patentee the taxed costs occasioned by the caveat. *Cutler's Patent, In re*, 4 Mylne & C. 510.

The effect of a caveat lodged at the chambers of the attorney-general is merely to entitle the party lodging it to notice. *Reg. v. Cutler*, 3 C. & K. 215—Denman.

Where a caveat was lodged before the great seal was affixed to a patent, the lord chancellor declined to enter into the merits of the opposition, but referred the matter back to the attorney-general. *Fawcett's Patent, In re*, 2 De G., M. & G. 430.

No caveat against the sealing of letters patent will be entered without the express leave of the lord chancellor. *Heathorn's Patent, In re*, 10 Jur., N. S. 810; 13 W. R. 1068; 10 L. T., N. S. 802.

As to caveats against extension or renewal of patents,—see this title, V., 2.

**Sealing; priority of claim.**—Letters patent were sealed in a case where the evidence shewed great similarity between the alleged invention and one for which a patent was already in force. *Tolson's Patent*, 6 De G., M. & G. 422.

Sealing letters patent after time for provisional protection had expired under 15 & 16 Vict. c. 83, ss. 19, 20. *Muckintosh's Patent, In re*, 2 Jur., N. S. 1242—C.

The crown can at any time before the great seal is affixed, upon a proper case being made out, countermand the warrant. *Schlumberger, In re*, 9 Moore P. C. C. 1.

Unless a patent is clearly bad, the lord chancellor will not refuse to seal it, as the effect of such refusal, if erroneous, would be

irremediable, whereas the sealing of a bad patent leaves every one at liberty to dispute it. *Spence, In re*, 3 De G. & J. 523.

Where there was but one affidavit distinctly swearing to the public use and sale of an alleged invention prior to the date of the application for a patent, the great seal was ordered to be affixed to the patent. *Tolhausen's Patent, In re*, 14 W. R. 551—C.

The time within which the application for the warrant and for the letters patent ought to be made under the rules of the patent commissioners may be extended, where the delay is small and accidental. *Hersee, In re*, 1 L. R., Chanc. 518; 14 L. T., N. S. 842.

The lord chancellor, on an application for sealing a patent, will not interfere with the decision of the law officer of the crown, unless in a case of fraud, or of surprise, or of some material fact having come to the knowledge of the party since the case was before the law officer. *Vincent's Patent, In re*, 2 L. R., Chanc. 341; 15 W. R. 524.

Where the granting of a patent was opposed by the owner of a similar patent on the ground that the application was, under the circumstances, a breach of good faith on the part of the applicant, the lord chancellor directed the patent to issue upon certain terms. *Daine's Patent, In re*, 26 L. J., Chanc. 298—C.

Where a petition to have the great seal affixed to a patent had been filed, and the respondents served with notice two months before the first day of Michaelmas term, for which day the petition was answered, and the respondents only filed affidavits on the morning of that day:—Held, that they could not be read, and the patent was ordered to be sealed. *M'Kean's Patent, In re*, 1 De G., F. & J. 2; 8 W. R. 1; 1 L. T., N. S. 19.

L. and W. were joint patentees of an invention for propelling vessels, and while engaged in making experiments with regard to it, an accident happened, which appeared to have suggested to each an improvement upon the method previously adopted. They communicated their ideas to each other, but neither took any steps to secure the benefit of the invention for two years, when L. applied for a patent, against the sealing of which W. entered a caveat, on the ground that he (W.) was the first inventor. The evidence on this point being conflicting:—Held, that L. having first applied, was entitled to have his patent sealed, though possibly W. might be able to get it repealed upon scire facias. *Lowe's Patent, In re*, 25 L. J., Chanc. 454—C.

When the sealing of a patent is objected to, on the ground that the invention is a colorable imitation of one which is the subject of an existing patent, a reference will be made to the law officer whether, having regard to the prior patent, the seal ought to be affixed to the patent as applied for. *Yates, Ex parte*, 5 L. R., Ch. 1; 18 W. R. 1—C. S. P., *Manceaux, Ex parte*, 5 L. R., Ch. 518; 18 W. R. 854; S. C., 6 L. R., Ch. 272; 18 W. R. 1184.

And the law officer having certified against the patent, the petition was dismissed with costs, notwithstanding no opposition had been made to the petitioner's application for a patent until he had applied to have it sealed, and he had given all the requisite notices. *Yates, Ex parte*, 18 W. R. 153.

Two patents for the same invention were applied for on the 20th and 23d of July, 1867, respectively. The patent applied for on the 23d of July was actually sealed before that applied for on the 20th of July, but each patent was dated as of the day of application:—Held, that under 15 & 16 Vict. c. 83, s. 24, the patents took effect as upon the days on which they were applied for respectively, and therefore acts done by virtue of the patent applied for on the 23d of July were infringements of the patent applied for on the 20th of July. *Sastry v. Hennett, or Bennett, or Kennet*, 8 L. R., Exch. 210; 42 L. J., Exch. 137; 22 W. R. 16; 28 L. T., N. S. 639.

An applicant for a patent two months after the date of his provisional protection applied for the great seal to be affixed. A week afterwards a caveat was entered, but the applicant did not, until six months from his original application had nearly elapsed, present a petition for the great seal:—Held, that his delay was not an objection to the sealing of his patent. *Bailey, Ex parte*, 5 L. R., Ch. 60; 43 L. J., Chanc. 264; 27 L. T., N. S. 430; 21 W. R. 31.

B. applied for a patent, and obtained provisional protection on the 30th of March; C. on the 3d of April. B. applied for the great seal on the 21st of May; C. obtained letters patent on the 22d of May, antedated, according to the usual practice, to the 3d of April. The patents appearing to be partially for the same matter:—Held, that, whether the conduct of C. had or had not been fraudulent, the letters patent granted to B. must bear date on the 21st of May, and not on the 30th of March. *Id.*

When, upon the hearing of several applications for letters patent by rival inventors before the law officer of the crown, the evidence is conflicting, it is the duty of the law officer himself to decide upon it, and not by issuing his warrant for the sealing of both patents, to leave the matter to be contested before the lord chancellor. *Henry, In re*, and *Farguharson, In re*, 42 L. J., Chanc. 363; 8 L. R., Ch. 167; 21 W. R. 233.

The 15 & 16 Vict. c. 83, s. 9, giving to an applicant for a patent, who has filed his complete specification in the first instance, protection for six months, with the like powers, rights and privileges as might have been conferred upon him by letters patent duly sealed, has not the effect of giving him priority over a rival inventor who has made earlier application, so as to prevent the latter from having his patent sealed during that period. *Id.*

When rival applicants had applied on the same day for patents, and had afterwards



mutually agreed to withdraw opposition, letters patent bearing date the day of application were granted to one applicant, although letters patent bearing that date had already been granted to the other. *Gething, In re, 9 L. R., Ch. 638.*

On the hearing before the lord chancellor of a petition for the great seal to be affixed to letters patent, witnesses may be examined *viva voce. Ib.*

Applications were made for two patents for inventions alleged to be similar. The second applicant obtained a patent. The first applicant then presented a petition to have the great seal affixed to letters patent for his invention, alleging that his delay had been caused by the representations of the second applicant, and also that the inventions were not similar. The lord chancellor examined the provisional specification of the first applicant, and the complete specification of the second applicant, and finding no substantial similarity between the inventions, directed the letters patent of the first applicant to be sealed. *Harrison, In re, 9 L. R., Ch. 631.*

**Register of patent proprietors; expunging entries.**—[By 15 & 16 Vict. c. 83, s. 38, if any person shall deem himself aggrieved by any entry made in the register of proprietors, it shall be lawful for such person to apply, by motion to the master of the rolls, or to any of the courts of common law at Westminster in term time, by summons to a judge of any of the said courts in vacation, for an order that such entry may be expunged, vacated or varied; and upon any such application, the master of the rolls, or such court or judge, may make such order for expunging, vacating or varying such entry, and as to the costs of such application, as to the master of the rolls, or to the court or judge, may seem fit, and the officer having the care and custody of the register, on the production to him of any such order, shall expunge, vacate or vary the same according to the requisitions of such order.]

Under this provision the court can expunge an entry fraudulently made; it can direct any facts relating to the proprietorship to be inserted on the register, but not the legal inferences to be drawn from them. *Morey, In re, 25 Beav. 581.*

A patentee assigned half a patent to A., and afterwards he assigned the whole to B. by a deed, reciting that he had already granted a license to work and use it to A. B.'s assignment was first registered:—Held, that B. had constructive notice of A.'s rights, and an entry was ordered to be made in the register that the license referred to in B.'s assignment was the deed of assignment to A. subsequently entered. *Ib.*

A patentee, in 1853, assigned his patent, but the assignees omitted to register it. Afterwards, in August, 1855, the patentee assigned the patent to another person, who registered it on the same day. The first assignees registered their assignment a week afterward. The court, in 1857, on the motion of the first assignees, ordered the register of the second

assignment to be expunged, and with costs. *Green's Patent, In re, 24 Beav. 145.*

Neither of two joint patentees is entitled to cause to be made in the register of proprietors, kept at the Great Seal Patent Office, any entry which purports to affect or prejudice the rights of the other. *Horsley and Knighton's Patent, In re, 8 L. R., Eq. 475; 17 W. R. 1054; 21 L. T., N. S. 345.*

Where, therefore, H. and K. were joint patentees, and K., by deed, assigned to O. all his share and interest in the patent, and by the same deed purported to release O. from all claims by H. and K., or either of them, in respect of the patent, and this deed was entered verbatim on the register:—Held, that H. was entitled to have the whole entry expunged. *Ib.*

And there is no right of appeal to the Court of Appeal in Chancery against an order made by the master of the rolls to expunge an entry in the register. *S. C., 4 L. R., Ch. 784; 17 W. R. 1000—Giffard, L. J.*

The jurisdiction over the register of patent proprietors which was conferred on the master of the rolls by 15 & 16 Vict. c. 83, s. 38, is assigned to the High Court of Justice by s. 16, sub-s. 1, and is not retained by the master of the rolls under s. 17, sub-s. 6, of the Judicature Act, 1873. *Morgan's Patent, In re, 24 W. R. 245—R.*

As to registration of assignments,—see this title, III., 1.

**Filing specifications.**—[By 15 & 16 Vict. c. 83, s. 27, all letters patent granted under that act, save only letters patent granted after the filing of a complete registration, shall require the specification thereunder to be filed in the High Court of Chancery, instead of requiring the same to be enrolled, and no enrollment shall be requisite.

By 16 & 17 Vict. c. 115, s. 3, a true copy, under the hand of the patentee or applicant, or agent of the patentee or applicant, of every specification and of every complete specification, with the drawings accompanying the same, if any, shall be left at the office of the commissioners of patents on filing such specification or complete specification.]

One having obtained a patent for a manufacturing machine, of which he duly enrolled a specification, afterwards obtained another patent for improvements in the machine, in which the grant of the former patent was recited; and the latter patent contained the usual condition that it should be void, if the patentee did not within one month enroll a specification, particularly describing and ascertaining the nature of the invention, and in what manner the same was to be performed:—Held, that a specification containing a full description of the whole machine so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition. *Harmer v. Playne, 11 East, 101; 14 Ves. 133*

A clerical error in the enrollment of the specification of a patent will be amended. *Redmund, In re*, 5 Russ. 44.

A patent, dated 10th May, contained a proviso that a specification should be enrolled within one calendar month next and immediately after the date thereof, and it was enrolled on the 10th of June following:—Held, that the month did not begin to run until the day after the date of the patent, and that the enrollment was in time. *Watson v. Pears*, 2 Camp. 294—Ellenborough.

A patent was granted "for improvements in the manufacture of gelatinous substances, and in the apparatus to be used therein," with a proviso as to the enrollment of the specification within six months. Before the expiration of the six months, the grantee assigned all his interest in the patent. He then, by leave of the solicitor-general, disclaimed that part of the title contained in the words "and in the apparatus to be used therein," a copy of which disclaimer was filed by the clerk of the patents of England, the original having been duly certified. In an action by the assignee of the grantee for an infringement, the declaration stated a patent to have been granted for "certain improvements in the manufacture of gelatinous substances, and the apparatus to be used therein," and also stated the specification, the disclaimer, and the assignment:—Held, upon an issue as to the specification of the invention being enrolled, that no objection could be taken that the apparatus specified was not new. *Wallington v. Dale*, 7 Exch. 888; 23 L. J., Exch. 49.

Held, also, that the disclaimer by the grantee after the assignment was valid as soon as it was entered of record. *Id.*

Held, also, that the filing of a copy of the disclaimer was a sufficient compliance with the 5 & 6 Will. 4, c. 83, s. 1. *Id.*

## 2. Requisites and Validity.

**Novelty of invention.]**—Where one part of an invention is not new, the patent is void as to the whole. *Kay v. Marshall*, 1 West, 682; 5 Jur. 1028; 8 C. & F. 245.

When a specification contains separate claims of two inventions, of which the second is to be used only in connection with and as subsidiary to the first, want of novelty in the second claim does not invalidate the patent. *Plimpton v. Spiller*, 6 L. R., Ch. Div. 412; 37 L. T., N. S. 56—C. A.

A patent granted to A. for improvements in the construction of racks and pulleys for window-blinds and other useful purposes, besides claiming a mode of making the frames by constructing them in a particular manner of drawn open metal tubes, claimed a mode of fixing the pulley in the frame by turning the knob of the spindle upon which the pulley revolved, and thereby of screwing a piece of metal, made to slide within the frame, tight to the edge of the frame, by which means the pulley spindle became firmly fixed to the

frame. By a patent previously granted to B., the same object was effected by a similar method, but with the addition merely of a piece of thin metal called an escutcheon, which worked outside the frame; but the specification stated that the pulleys might be made without the escutcheon:—Held, that the two patents were substantially the same as to one of the things claimed, and, therefore, that A.'s patent was void. *Dobbs v. Penn*, 3 Exch. 427.

As to what constitutes the requisite novelty and utility of invention,—see this title, I.

**Variance from provisional specification.]**—If it appears that the patent was granted for a different thing from that mentioned in the specification, it is void. *Rea v. Wheeler*, 3 B. & C. 345.

A patent being granted upon a specification that the machine was capable of performing all the operations necessary to the perfection of the proposed invention; and it appearing that a second patent was taken out for improvements necessary to the efficient operation of the original machine:—Held, that the consideration of the first patent having failed, both patents were void. *Blazam v. Elze*, 9 D. & R. 215; 6 B. & C. 169; 1 C. & P. 558; R. & M. 187.

The complete specification must not claim anything different from that which is included in the provisional specification, but it need not extend to everything so included. *Pear v. Bibby*, 2 L. R., Chanc. 127; 36 L. J., Chanc. 455; 15 W. R. 208; 15 L. T., N. S. 399—C.

The provisional specification of a patent for an improvement in the bearings and bushes for the shafts of screw and submerged propellers described the invention as consisting in employing wood in the construction of such bearings and bushes. The complete specification, after describing the mode in which the wood was to be used, claimed the employing of wood in the construction of bearings and bushes "as therein described:—Held, this was no such variation between the provisional and complete specification as invalidated the patent. *Id.*

The provisional specification of a patent for sewing machines, claimed, among other improvements, that a certain instrument which moved the work, "or another acting therewith," acted to hold the work during the insertion of the needle, while the complete specification appeared to describe only one instrument as moving and holding the work:—Held, that such a variance would not invalidate the patent. *Thomas v. Welch*, 1 L. R., C. P. 192; 13 Jur., N. S. 316; 35 L. J., C. P. 200.

The omission from a final specification of part of the provisional specification is notice that the omitted part has been abandoned by the inventor, and any one is at liberty to work up, and may obtain a valid patent for, an invention sketched out in the abandoned part. *Stones v. Todd*, 25 W. R. 38—R.

As to the provisional specifications,—see this title, II., 1.

**Title of invention; and variance from specifications.]**—A title describing a patent to be for a certain invention of "a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera-obscura," is sufficiently precise and certain. *Beard v. Egerton*, 8 C. B. 97; 10 Jur. 648; 15 L. J., C. P. 270.

The title of a patent must (though not as minutely as the specification) describe the nature of the invention; and the patent is void if the title is so generally worded as to be capable of comprising, not only the particular invention, but improvements not contemplated in it: as where the patent was taken out for improvements in carriages, and the invention was, in fact, an improvement in German shutters, which were used only in some kinds of carriages. *Cook v. Pearce*, 8 Q. B. 1044; 8 Jur. 499; 18 L. J., Q. B. 189.—Exch. Cham.

Where the title is not inconsistent with the specification, and no fraud is practiced on the crown or the subject, it is not a fatal objection that the title is so general as to be capable of comprising a different invention from that for which the patent is claimed. *Id.*

The title need not give any idea of the invention; it is sufficient if the specification is consistent with it. *Neilson v. Harford*, 8 M. & W. 806.

A declaration in scire facias to repeal a patent for "improvements in instruments used for writing and marking, and in the construction of inkstands," contained suggestions that a certain part of the invention was not new, a part useless, and that no sufficient specification had been enrolled. The prosecutor filed with his declaration a notice of objections, pointing out claim 6 in the specification as old and useless. The specification contained eleven claims: 1-7, for improvements in pencil-cases, penholders, and pens; 7 and 8, instruments for marking; 9-11, inkstands. After issue joined the defendant enrolled a disclaimer of claims 5-8:—Held, that (notwithstanding the defendant had disclaimed the claims 7 and 8, which specifically related to instruments for marking) the specification was still as comprehensive as the title, inasmuch as penholders and pencil-cases may be well described as instruments used for marking as well as writing. *Reg. v. Mill*, 10 C. B. 379; 1 L. M. & P. 695; 15 Jur. 59; 20 L. J., C. P. 16.

On the trial of an action for infringement of a patent for "improvements in the manufacture of gas for the purpose of illumination, and in the apparatus used when transmitting and measuring gas," the plaintiff put in a specification, the title of which described the invention to be of "improvements in the manufacture of gas for illumination, and in the apparatus used therein, and when transmitting and measuring gas;" and which stated

it to relate, "first, to a mode of manufacturing gas for the purpose of illumination; secondly, to improvements in setting and heating clay retorts for making coal gas; thirdly, to a mode of manufacturing clay retorts; and fourthly, to improvements in apparatus for measuring gas when it is being transmitted to the consumer:"—Held, that there was a material variance between the invention specified and that described in the title of the letters patent: and consequently, that the letters patent were void. *Croll v. Edge*, 9 C. B. 479; 14 Jur. 558; 19 L. J., C. P. 261.

N. obtained letters patent for "improvements in the manufacture of plaited fabrics." The specification described that which together amounted to but a single improvement in the mode of manufacture:—Held, that this was not such an inconsistency between the title of the patent and the description in the specification as to invalidate the patent. *Nickels v. Haslam*, 8 Scott, N. R. 97; 7 M. & G. 837; 8 Jur. 470; 18 L. J., C. P. 146.

**Sufficiency of specifications; as to certainty of description of the invention, in general.]**—A patent is void if the specification is ambiguous, or gives directions which tend to mislead the public. *Turner v. Winter*, 1 T. R. 602.

The specification must be sufficient to enable others to make the invention; as the object is, that, after the term, the public may have the benefit of the discovery. *Liardet v. Johnson*, Bull. N. P. 70. S. P., *Newberry v. James*, 2 Mer. 440.

A patent is void, if the specification omits any ingredient which, though not necessary to the composition of the thing for which the patent is claimed, is a more expeditious and beneficial mode of producing the manufacture. *Wood v. Zimmer*, Holt, 58—Gibbs.

But where in the specification of an improved gas apparatus, no direction is given respecting a condenser, which is a necessary part of every gas apparatus, this will not invalidate the patent, if it appears that every one capable of constructing a gas apparatus must know that a condenser must form a part of it. *Crossley v. Beverley*, 9 B. & C. 68; M. & M. 283; 3 C. & P. 513; 1 Russ. & Mylne, 160.

Where a patentee of certain apparatus, between the time of taking out the patent and enrolling the specification, made certain improvements in his apparatus, and in the specification claimed the machine so improved as a new invention:—Held, that this did not affect the validity of the patent, as the public ought to have the advantage of all improvements down to the time of the specification. *Id.*

Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct in setting out the whole as the invention of the patentee; but, if a combination of a certain number of those parts has previously existed up to a certain

point in former machines, the patentee merely adding other combinations, the specification should only state such improvements, though the effect produced is different throughout. *Bevill v. Moore*, 2 Marsh. 311.

An invention for giving paper, by the application of a certain composition, such a surface as renders the lines of copper and other plate printing more clear and distinct, may properly be described in a patent, as an improvement in copper and other plate printing. *Sturs v. De la Rue*, 5 Russ. 322.

If a specification contains an untrue statement in a material circumstance, of such a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification is therefore bad, and the patent invalidated, although the jury finds that a competent workman, acquainted with the subject, would not be misled by the error, but would correct it in practice. *Neilson v. Harford*, 8 M. & W. 806.

The omission to mention in a specification anything which may be necessary for the beneficial enjoyment of the invention, is a fatal defect. *Id.*

But aliter if such omission goes only to the degree of the benefit. *Id.*

If the apparatus described can be used beneficially in its simplest form, it is no objection that great improvements may have been made. *Id.*

If experiments are necessary for the production of any beneficial effect, the patent is void. *Id.*

If a substance, as generally known, contains a foreign matter, it must be shown either that such foreign matter is not detrimental, or that it can be easily removed. *Derosne v. Fairie*, 2 C., M. & R. 476; 3 Tyr. 393; 1 Gale, 109.

A specification must state at least one method which will succeed. *Id.*

The specification of an invention, which consists in the use of known materials in new proportions, is not necessarily bad for uncertainty, though the patentee does not limit himself to the proportions recommended. *Patent Type Founding Company v. Richard*, 1 Johnson, 381; 6 Jur., N. S. 39.

In a patent for an improved arrangement or for a new combination of machinery, the specification must describe the improvement and define the novelty otherwise and in a more specific form than by the general description of the entire machine, it being part of the condition of a patent that the specification shall particularly describe and ascertain the invention. *Forwell v. Bostock*, 12 W. R. 723; 10 L. T., N. S. 144—C.

A patent, when the specification is insufficient, is void. *Id.*

A specification, when construed grammatically, claimed to effect a particular object by two processes, one of which would not effect the object, but evidence showed that no skilled practical workman would be misled, as such a one would know that the one proc-

ess would be ineffectual, and would adopt the other:—Held, that the specification was defective, and the patent void. *Simpson v. Holliday*, 1 L. R., H. L. 315; 35 L. J., Chanc. 811. See *S. C.*, 12 L. T., N. S. 99; 12 W. R. 577—C.

The specification was as follows:—"I mix aniline with dry arsenic acid, and allow the mixture to stand for some time. or I accelerate the operation by heating it to or near to its boiling point:"—Held, that the word "or" could not be read as "and." *Id.*

After a patent has stood inquiry and the test of time, the courts do not encourage verbal objections to the form of the specification. *Neilson v. Batts*, 5 L. R., H. L. Cas. 1; 40 L. J., Chanc. 317; 19 W. R. 1131.

In a patent for an improved arrangement or a new combination of machinery, the specification must describe the improvement and define the novelty, otherwise, and in a more specific form, than by the general description of the whole machine: it must assign the differentia of the new combination. *Jema v. James*, 13 L. R., Eq. 421; 41 L. J., Chanc. 353; 26 L. T., N. S. 568—R.

The test of a sufficient specification is whether it would enable an ordinary workman, exercising the actual knowledge common to the trade, to make the machine. It need not give information of every detail, but it must not tax invention. *Plimpton v. Melcolmsen*, 45 L. J., Chanc. Div. 505; 3 L. R., Ch. Div. 531; 34 L. T., N. S. 340—R.

A patent may be granted not only in respect of a whole and complete thing described, but in respect, also, of a subordinate integer of that whole. *Clarke v. Adie*, 2 L. R., App. Cas. 315; 46 L. J., Chanc. Div. 583; 36 L. T., N. S. 923—H. L.

But then the invention must be so described as to make it clear in respect of what (the whole, or the integer,) the patent has been asked for and granted. *Id.*

— in particular instances. ]—A brush differing from a common one in no other respect than the hairs or bristles being of unequal lengths, is improperly described in a patent for a new invention as a tapering brush. *Be v. Metcalfe*, 2 Stark. 249—Ellenborough.

One of the ingredients in a composition was a white substance imported from Germany, and which could be purchased at one or two color-shops in London; the only description or denomination given to it in the specification was "the purest and finest chemical white lead;" but there was no article known by that denomination in the trade, or in the shops where white lead is usually sold; and the finest white lead which could be obtained would not answer the purpose:—Held, that the specification was insufficient. *Sturs v. De la Rue*, 5 Russ. 322.

A patent was granted for a machine to sharpen knives and scissars, and in the specification this was directed to be done by passing their edges backward and forward in an angle formed by the intersection of two

circular files; and it was also stated that other materials might be used, according to the delicacy of the edges. It was proved, that for scissors there ought to be one circular file and a smooth surface, but that two Turkey stones might also succeed:—Held, that the specification was bad, as it neither directed the machines for scissors to be made with Turkey stones, nor to be made with one circular file and a smooth surface. *Felton v. Greaves*, 3 C. & P. 611—Tenterden.

A patent was taken out for improvements in evaporating sugar. The specification was as follows:—"My invention consists in a method or apparatus by which I am enabled to evaporate liquids and solutions at a low temperature. And my invention and improvement consist in forcing, by means of bellows, or any other blowing apparatus, atmospheric or any other air, either in a hot or cold state, through the liquid or solution subjected to evaporation; and this I do by means of pipes, whose extremities reach nearly (or within such distance as may be found most suitable under peculiar circumstances) to the upper or interior area of the bottom of the pan or boiler containing such liquid or solution, the other extremities of such pipes being connected with larger pipes, which communicate with the bellows or other blowing apparatus, which forces the air into them." The lesser pipes were to be equally distributed, and their lower ends on a level with each other. It was further declared, that the form of the apparatus might be varied, provided the essential properties were maintained:—Held, that, taking the whole of the specification together, it appeared that the invention consisted of the particular method or process of forcing, by means of bellows, &c., air through the liquid subjected to evaporation, viz., by pipes connected with larger pipes, and placed as mentioned in the specification; and, therefore, that it was not void because another patent had been before granted to other persons for effecting the same object by a coil of pipes (lying at the bottom of a vessel), perforated with small holes, or by a shallow colander placed at the bottom of the vessel. *Hullet v. Hague*, 2 B. & Ad. 371.

The specification of a patent instrument, called the Miner's Safety Fuse, after describing the manner in which the case of the instrument was to be made, proceeded thus:—"by means whereof I embrace in the center of my fuse, in a continuous line throughout its whole length, a small portion or compressed cylinder or rod of gunpowder, or other proper combustible matter, prepared in the usual pyrotechnical manner of the firework for the discharge of ordnance." In an action for infringing the patent, at the trial, it was objected that the patentee had not shown that any other material but common gunpowder had ever been used in the fuse, or, if introduced, would answer the purpose:—Held, first, that the question as to the sufficiency of the specification was for the jury.

*Bickford v. Skewes*, 1 G. & D. 736; 1 Q. B. 988; 6 Jur. 167.

Held, secondly, that the language of the specification was not to be astutely construed so as to overthrow the patent, and that it was for the defendant to make out his objection clearly. *Id.*

Held, thirdly, that the former part of the objection, that any other material but common gunpowder had ever been used in the fuse, was immaterial; because, although other materials not specified, but still within the description given, would answer the purpose, no ambiguity was occasioned, nor was the difficulty of hereafter making the instrument increased by the introduction of the terms which imported that the patentee himself had ever used other materials than gunpowder in the construction of the instrument. *Id.*

A specification of a patent for "improvements in the process of hosiery and other goods manufactured from lambs' wool," stated the invention to consist in submitting the hosiery, and other similar goods, "to the finishing process of a press heated by steam, &c., in the manner hereinafter mentioned." A description was given, by letters, of a drawing, which represented a press, which consisted of a box heated by steam, up to which another box, similarly heated, was to be pressed by means of hydraulic pressure, or by screws or other well-known means. After describing the method of pressing the goods between these hot boxes, the specification concluded by confining the inventor's process as above described:—Held, that a method of finishing hosiery goods, by passing them through heated rollers, was not included in his patent, and, therefore, was no infringement of it. *Barber v. Grace*, 1 Exch. 339; 17 L. J., Exch. 122.

Patent for the invention of a nipping lever for causing the rotation of wheels, shafts or cylinders, under certain circumstances. The specification claimed as the invention "the nipping lever, with its tusk and sliding-box, applied to a rimmed wheel, or to a rimmed flange, for the purpose of causing the same to rotate or move together with any shaft, cylinder or other suitable machinery which may be attached thereto." The nipping lever was not new; but the application of it by means of the sliding-box was new:—Held, that it must also appear that the use of sliding-boxes was essential to the invention. *Hoo v. Taunton*, 9 Jur. 1056—Q. B.

Patent for a new or improved method of drying and preparing malt. In the specification it was stated, that the invention consisted in exposing malt previously made to a very high degree of heat; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process

was accomplished:—Held, that the patent was void, inasmuch as, first, the specification was not sufficiently precise; and as, secondly, the patent appeared to be for a different thing from that mentioned in the specification. *Ree v. Wheeler*, 2 B. & A. 845.

Held, also, as the word "malt" was here not to be taken in its usual sense, viz., of an article used in the brewing, but only in the coloring of beer, that in the patent it was necessary to have stated the purpose to which the prepared malt was to be applied, and to have said that it was obtained for a new method of drying and preparing malt to be used in the coloring of beer. *Ib.*

A patent was granted for an invention of certain improvements in extracting sugar or syrups from cane juice and other substances containing sugar. The specification stated the invention to consist "in a means of discolored syrups of every description by means of charcoal produced by the distillation of bituminous schistus, or mixed with animal charcoal, and even of animal charcoal alone." The discoloration was to be produced by means of a filter made of the charcoal, and there was nothing particular in the carbonization of the bituminous schistus, "only it is convenient before the carbonization to separate the sulphurets of iron which are mixed with it." The specification said nothing as to any previous operation on the syrup before it was submitted to the filter, but it did state that syrup, in a proper state, might be obtained by a mixture of sugar and water:—Held, that the patentee sufficiently specified his invention, upon proof that it was applicable with advantage to the syrup after it had undergone a certain degree of heat, though it failed when applied to the first drawings of the syrup, and that a discoloration of such syrup and of syrup of sugar and water, warranted the title or improvements "in extracting sugar or syrup from cane juice." *Deroane v. Fairie*, 2 C., M. & R. 476; 3 Tyr. 393; 1 Gale, 109.

In an action for the infringement of a patent for the daguerreotype invention, it appeared that the invention was for the reproduction of images of nature by the action of light on prepared iodized plates, through the lens of a camera-obscura. The specification divided the process into five distinct operations, the first of which was the cleaning the plates with acid, the second the coating them with iodine, and the third the submitting them to the camera-obscura. At the end of the description of the first operation it was said, "When the plate is not intended for immediate use or operation, the acid may be used only twice upon its surface, after being exposed to heat. . . It is, however, considered indispensable that just before the moment of using the plates in the camera, or the reproducing the design, to put at least once more some acid on the plate, and to rub it lightly with pounce, as before stated." The evidence was, that using the acid after the plates had been coated with iodine, would render the

whole operation abortive:—Held, that the specification was not calculated to mislead an operator of fair intelligence, it being sufficiently clear to be understood by such operator, that the direction to use the acid was, that the acid should be used before and not after the plates had been iodized. *Beard v. Egerton*, 8 C. B. 465; 13 Jur. 1004; 19 L. J., C. P. 86.

The specification of a patent for "a process or method of combining various materials, so as to form stuccoes, plasters and cements, and for the manufacture of artificial stones, marbles, &c., used in buildings," after stating the invention to consist in producing certain hard cements of the combination of the powder of gypsum, powder of limestone and chalk, with other materials, such combination being (subsequent to their mixing) submitted to heat, described the method or process of making a cement from gypsum, to consist in mixing with powdered gypsum strong alkali (ex. gr. best American pearlsh) dissolved in a certain proportion of water, this solution to be neutralized with acid (sulphuric acid being the best), the mass to be kept in agitation, and the acid to be added gradually till the effervescence should cease; and then a certain proportion of water to be added (if other alkali were used, the quantity to be varied in proportion to its strength); and the mixture having been brought to a proper consistence by the further addition of powdered gypsum, to be dried in molds, and finally subjected to a furnace capable of producing a red heat. The description of making the cement differed little from that of the preceding process. The specification, after proceeding to state the mode of using the cement so made, concluded by stating, that other alkalies and acids besides those before mentioned would answer the purposes of the invention, though not so well, and that the inventor claimed the method or process thereinbefore described:—Held, that the specification was bad, for that either the inventor claimed all acids and alkalies, or only those which would answer the purpose; in the former of which cases, as some acids and alkalies would not answer the purposes of the invention, the specification was therefore bad; and in the latter it was bad, for not specifying those acids and alkalies which would be found to succeed. *Stearns v. Keating*, 2 Exch. 772; 19 L. J., Exch. 57.

The specification of a patent granted for improved arrangements for raising ships' anchors, and other purposes, claimed, as the invention of the patentee, a cable-holder, which was described thus:—"The scalloped shell in which the iron chain cable appears in the drawing is upon a new plan, to hold without slipping a chain cable of any size, as shown by the opening form of the scallops at the top and bottom of figure 2." It also claimed "the new form of a scalloped shell (as shown in figure 2), in conjunction with the arrangements hereinbefore described." A drawing attached to the specification showed that the inner sides of the cable-holder, on



which the scallops were shown, were not to be parallel, but should converge towards the center of the cable-holder; but the angle formed by the sides of the cable-holder, as shown in the drawing, was not the precise angle which practically would be used. The specification and drawings would enable a competent workman to make a cable-holder which would hold chain cables of different sizes. At the date of the patent a cable-holder which would hold one chain cable of any size was known:—Held, that the specification was ambiguous in describing the nature of the invention, whether it was an invention of a cable-holder to hold a chain cable of any one size, or to hold chain cables of different sizes, and was therefore bad. *Hastings v. Brown*, 1 El. & Bl. 450; 17 Jur. 647; 22 L. J., Q. B. 161.

The description, "a roller of hard metal or other suitable material," is not too uncertain, on account of the use of the words "or other suitable material;" such words would mean any material equally sufficient for the purpose with hard metal. *Ralston v. Smith*, 11 H. L. Cas. 223; 35 L. J., C. P. 49; 20 C. B., N. S. 28; 13 L. T., N. S. 1.

In a drawing of a machine attached to a specification, there was shown an intervening space, or opening, between two parts of the machine, the object of the patent; it was intended as the arching of a cutter plate, but this was not referred to and explained in the specification. In the specification there was the statement of an evil in existing machines, and upon careful examination, by a skillful person, he might suppose that the space exhibited in the drawing was intended to obviate this evil, but there was no statement to that effect, nor was the form of the opening described, and described as a necessary quality of improvement in the machine. This form was afterwards relied on as one of the great improvements in the combination of the patented apparatus:—Held, that as it had not been properly explained, described and claimed, the specification was defective. *Clarke v. Adie*, 2 L. R., App. Cas. 815; 46 L. J., Chanc. Div. 585; 36 L. T., N. S. 923—H. L.

**Extent of specification or claim; and invalidity of specification or claim larger than invention.**—In order to establish the validity of a patent for an improvement or a discovery, it should be stated in substance what is set out in detail in the specification; and if it is taken out for more than is strictly the inventor's own addition or improvement, or for discovery, when it is merely an addition or an improvement, it is bad. *Hill v. Thompson*, 2 Moore, 424; 8 Taunt. 375; Holt, 636; 3 Mer. 629.

A patent "for an improved mode of lighting cities, towns and villages," is not supported by a specification describing an improved lamp. *Cochrans v. Smethurst*, 1 Stark. 205—Le Blanc.

So, a patent for an improvement in the

construction of ship's anchors, windlasses and chain cables, cannot be supported, unless there is novelty in each invention. *Brunton v. Hawkes*, 4 B. & A. 541.

Where a patent was obtained for "a new and improved method of making and manufacturing double canvas and sail cloth with hemp and flax, without any starch whatever," and the specification described the invention to consist in an improved texture, or mode of twisting the threads, to be applied to the making of unstarched cloth; on its being proved that the exclusion of starch had been before adopted:—Held, that such patent was void, as being taken out for more than the patentee had really discovered. *Campion v. Benyon*, 6 Moore, 71; 8 B. & A. 5.

But a patent is not avoided by the specification claiming as part, but not as an essential part, of the invention, something which proves useless. *Lewis v. Marling*, 5 M. & R. 66; 10 B. & C. 22; 4 C. & P. 52.

If a patentee sums up the principle of his invention in the specification, and that principle is not new, the patent cannot be supported, though it appears that the application of the principle as described in the specification is new. *Rex v. Cutler*, 1 Stark. 354—Ellenborough.

If a patent taken out for an invention, consisting of two distinct parts, one of which is not new, the whole is void. *Kay v. Marshall*, 5 Bing. N. C. 402; 7 Scott, 548; 2 Arn. 78. S. C., 1 Beav. 535; in Dom. Proc., 5 Jur. 1038; 8 C. & F. 245; West, 693.

So, if a patent is taken out for several inventions, which are claimed as improvements, and one of them is not an improvement, the patent is altogether void. *Morgan v. Seward*, 2 M. & W. 544; M. & H. 55; 1 Jur. 527.

A patent was for a machine for making paper in single sheets, without seam or joining, from one to twelve feet or upwards wide, and from one to forty-five feet and upwards in length:—Held, that this imported that paper varying in width between those extremes could be made by the same machine; and that the patentee, at the time of taking out the patent, not having any machine capable of producing paper of different widths, the patent was void. *Blaxam v. Elsee*, 6 B. & C. 109; 9 D. & R. 215; 1 C. & P. 558; R. & M. 187.

A specification is defective if the patentee professes to effect his object in one of two specified modes, or else in the other, representing each as available, and it appears that one of them will effect the purpose, but the other will not. *Reg. v. Cutler*, 14 Q. B. 372, n.; 3 C. & K. 215.

Where a specification claimed as an invention the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acted as a counter-balance to the pressure against the back; and it appeared that A., previously to the letters patent, had made and sold chairs in which the same principle was applied, but which

could not be called into action without the use of additional machinery:—Held, that the patent could not be supported, as it claimed too much, and would have prevented A. from making the chairs which he had made formerly. *Winter v. Mower*, 1 N. & P. 595; 6 A. & E. 735; W., W. & D. 262.

A specification is to be understood according to the acceptance of practical men at the time of its enrollment. Therefore, where a specification stated that the apparatus mentioned would extract gas "from any substance from which gas capable of being employed for illumination can be extracted by heat," and the apparatus was not suited to extract gas from oil:—Held, that this did not avoid the patent, oil not then being considered fit for the manufacture of gas for lighting towns, though it was then known as a chemical fact that gas might be produced from oil by heat, and this property has since been applied to the purposes of illumination. *Cronmley v. Baverly*, 9 B. & C. 63; M. & M. 283; 3 C. & P. 513; 1 Russ. & Mylne, 166.

A patent claimed the invention of manufacturing tubes by drawing them through rollers, using a mandrel in the course of the operation. A later patent claimed the invention of manufacturing tubes by drawing them through fixed dies or holes, but the specification was silent as to the use of the mandrel:—Held, that the court, taking the whole of the latter specification together, would infer that the mandrel was not to be used, and that the latter patent was good. *Russell v. Cowley*, 1 C., M. & R. 864.

In summing up his invention, a patentee stated it thus:—"My invention is the application of a self-adjusting leverage to the back and seat of a chair, whereby the weight on the seat acts as a counterbalance to the pressure against the back of such chair as above described."—Held, that this was not a claim to the principle of the lever, but to an application of that principle to a certain purpose by certain means, and that the patent was good. *Winter v. Wells*, 1 C., M. & R. 505; 5 Tyr. 163.

In a patent for blocks for payment, the patentee claimed as his invention, that his block was beveled both inwards and outwards on the same side of the block; but the specification did not state at what angle the bevel should be made; and one witness stated that the angle was material, but another witness stated that any angle would be of some benefit:—Held, that if the jury thought that a bevel at any angle would be beneficial, the specification would be good, although it omitted to state any particular angle at which the bevels should be made. *Macnamara v. Uluse*, Car. & M. 471—Abinger.

A patentee describing his invention in the specification, is to be taken to claim as part of his invention all which he describes as the means by which it is to be carried into effect, unless he clearly expresses a contrary intention. *Tetley v. Easton*, 2 El. & Bl. 956; 18

Jur. 350; 23 L. J., Q. B. 77; S. C., 3 C. B., N. S. 706; 26 L. J., C. P. 269.

A patent is a patent for a combination, if a combination is expressly stated in the specification to be a part of the invention, although the combination is not expressly claimed: for a claim is not an essential part of the specification, or necessary for the protection of the invention, nor is it necessary to disclaim those matters which manifestly form no part of the invention. *Luster v. Leather*, 27 L. J., Q. B. 295; 4 Jur., N. S. 947; 8 El. & Bl. 1004—Exch. Cham.

A patent for the combination and arrangement of the various parts of machinery for sewing or stitching with the use of a needle or shuttle would be void from the unlimited extent of the words used, unless they could be cut down by the context so as to apply to a specified combination and arrangement of specified parts of machinery. *Forsell v. Eastock*, 4 De G., J. & S. 298; 12 W. R. 723.

A patent was granted for "improvements in the manufacture of cases or envelopes for covering bottles." The specification, after describing the apparatus, in the arrangement of which the invention was stated to consist, claimed the combination of mechanism and the making of envelopes for bottles as described:—Held, that the specification was for the mode of making, and not for the envelope; and that it was, therefore, not larger than the grant. *Patent Bottle Envelope Company v. Seymer*, 28 L. J., C. P. 22; 5 C. B., N. S. 164; 5 Jur. 174.

A patent was taken out for "certain improvements in the doors and sashes of carriages." In the specification the patentee said, "I have shown my invention as applied to railway carriage doors and window fittings, although they are equally applicable to the doors and windows of any other description of carriage, or in any position where windows and doors are subject to jar and vibration."—Held, that the claim in the specification was not larger than the title of the patent. *Oxley v. Holden*, 8 C. B., N. S. 666; 30 L. J., C. P. 68; 8 W. R. 626; 2 L. T., N. S. 464.

One part of an invention was described as a novel arrangement and mode of fitting and working sliding sashes, glass frames, blinds and shutters for railway and other carriages, "which consisted of a metal plate with a slot and a stud or pin working in a groove on each side of the sash or frame, and the patentee claimed the metal fittings, and the mode of applying the same described herein as the second part of my invention."—Held, that this was a claim not for the metal fittings themselves, but for the mode of applying them, and consequently that the patent was sustained by proof that the application was new, though the stud and plate themselves were old. *Id.*

R. obtained a patent for the use of animal fiber, by preference Russian wool, or wool of a coarse texture, in the manufacture of artificial hair to be made up as ladies' head dresses, and for upholstery, and other like

purposes. Upon a bill filed to restrain an infringement of the patent:—Held, that the specification was too extensive; that even the use of a new material to produce a known article could not be the subject of a patent unless some invention and ingenuity were displayed in the adaptation; that in this case a prior user of wool for the same purpose was proved, and that the bill must be dismissed with costs. *Rushton v. Crawley*, 10 L. R., Eq. 522—V. C. M.

When a patentee, in his specification, professes to do by machinery what has never been done before by machinery, and describes the machinery by which he does it, his claim is not too large on the face of it, because it claims generally to perform the operation "by machinery." *Arnold v. Bradbury*, 6 L. R., Ch. 706.

A patentee described an improved ruffle or frill, and the machinery by which he proposed to make such improved ruffle, and to fasten it to a plain fabric by a single series of stitches. By his claim he claimed "the production by machinery of ruffles, and the simultaneous attachment of them to a plain fabric by a single series of stitches:"—Held, that the claim was not, on the face of it, too large. *Id.*

When a person has invented an improvement in the form of a particular apparatus or machine, but combines that individual improvement with other things which are not his inventions, his specification must claim that particular individual thing, and not leave it doubtful whether the claim is made for the whole combination, of which that thing really only forms a part. *Clarke v. Adie*, 2 L. R., App. Cas. 315; 36 L. T., N. S. 923; 46 L. J., Chanc. Div. 585.

**Explanation of specifications or claim by reference to drawings.**—In the specification of an improved instrument, it is essential to point out precisely what is new and what is old; and it is not sufficient to give a general description of the construction of the instrument without making such distinction, although a plate is annexed, containing a detached and a separate representation of the parts in which the improvement consists. *Macfarlane v. Price*, 1 Stark. 109—Ellenborough.

An inventor of a machine is not tied down to make such a specification as by words only would enable a skillful mechanic to make the machine, but he is allowed to call in aid the drawings which he may annex to the specification; and if, by a comparison of the words and the drawings, the one will explain the other sufficiently to enable a skillful workman to perform the work, such a specification is sufficient. *Bloxam v. Elsee*, 1 C. & P. 558; R. & M. 187; 9 D. & R. 215; 6 B. & C. 169.

When a specification in the first instance describes the invention in too general terms, but afterwards, in describing the method of performing the invention, refers to figures in drawings annexed thereto, and the claim

made is for the manufacture of the invention described with reference to those figures, the specification is sufficient. *Duo v. Eley*, 14 W. R. 120; 13 L. T., N. S. 399—V. C. W.

Any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation may, after the death of the original discoverer, make and sell the compound, describing it by the name of the discoverer, provided he does not lead the public to suppose that his preparation is the manufacture of the successors in business of the original discoverer; but he must not assert that his is the only genuine article, or suggest that the article manufactured by the successors of the original discoverer is spurious. *James v. James*, 13 L. R., Eq. 421; 41 L. J., Chanc. 353; 26 L. T., N. S. 563—R.

And where, the combination being claimed as the invention, it was only so far ascertained by the specification that the latter referred to certain drawings and their description, which did but describe an entire machine and the composition and working of its several constituent parts, without in any manner indicating where the improvement lay, or in what it consisted:—Held, that the patent was void at law. *Id.*

The office of the claim at the end of a specification is to tell the public exactly what the invention is, and when, according to the natural construction of the claim, a patent would be void for want of novelty, the patentee is not at liberty to refer to the descriptive part of and drawings accompanying the specification, for the purpose of validating the patent by showing that some other is the true construction. *Hinks v. Safely Lighting Company*, 46 L. J., Chanc. Div. 185; 4 L. R., Ch. Div. 607; 36 L. T., N. S. 891—R.

**Reference to previous patent.**—A person having a patent for improvements in gas lamps, made further improvements in such lamps, and obtained a patent for the subsequent improvements. The specification to the second patent stated that the invention related to the construction of lamps of a class forming the subject of the former patent, and then described the mode of making the improved parts of the lamp:—Held, that the specification was sufficient. *Parkes v. Stevens*, 18 W. R. 233; 23 L. T., N. S. 635; 5 L. R., Ch. 80. And see *S. O.*, 8 L. R., Eq. 358; 38 L. J., Chanc. 627; 17 W. R. 840—V. C. J.

As to filing specifications,—see this title, II., 1.

As to comparison with other patents or specifications for purposes of interpretation,—see this title, II., 3.

As to correction by disclaimer,—see this title, II., 4.

**Stamp duty.**—[The 16 & 17 Vict. c. 5, which substituted stamp duties on patents for fees, by s. 2, made patents, granted under 15 & 16 Vict. c. 83, subject to avoidance on non-

payment of certain stamp duties within certain periods, and its effect is to give the patents by installments, first for three years, on the payment of 25l. stamp duty, then for three years more on payment of 50l. within the three years, and then for the full period, on payment of 100l. within seven years from the date of the grant.]

By a deed an inventor agreed with the defendant that he should do all acts necessary, except the payment of money, for procuring and perfecting letters patent, and should immediately after the same were procured execute an assignment to the defendant of one-third share in the patent, and the defendant agreed to pay all fees and disbursements which might be necessary for procuring the letters patent, enrolling the specification, and otherwise perfecting the same:—Held, that the assignment by the inventor was the entire consideration for the defendant's undertaking to pay the fees and disbursements, and a condition precedent, and that without having executed such an assignment he could not sue the defendant for not paying the 50l. necessary to be paid within three years. *Hill v. Mount*, 18 C. B. 72; 25 L. J., C. P. 190.

The day of the date of the letters patent is excluded, and the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent are granted. *Williams v. Nash*, 5 Jur., N. S. 696; 28 L. J., Chanc. 886; 27 Beav. 93.

### 3. Interpretation, Operation and Effect.

**Date and duration.**—Original letters patent for a term of fourteen years were dated on the 26th February, 1825, and renewed letters patent, were dated on the 26th of February, 1839:—Held, that the day of the date must be reckoned inclusively, and that the renewed letters patent were not granted after the original letters patent had expired. *Eusell v. Ledam*, 14 L. J., Exch. 353; 14 M. & W. 574.

By the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 25, it is enacted that where foreign letters patent are granted for a foreign invention before the grant of a patent for such invention in the United Kingdom, the rights under the English patent shall cease on the determination of the foreign patent. An English patent for a foreign invention was dated the 17th of September, but sealed on the 17th of December, and between the two dates a foreign patent was granted:—Held, that the patent must be taken to have been granted on the 17th of September, and therefore that s. 25 was not applicable. *Holte v. Robertson*, 4 L. R., Ch. Div. 9; 40 L. J., Chanc. Div. 1; 35 L. T., N. S. 457—C. A.; affirming *S. C.*, 24 W. R. 1064—R.

As to extensions and renewals,—see this title, V.

### Construction of terms in grant, generally.]

—The words used in a patent must be con-

strued, like the words of any other instrument, in their natural sense, according to the general purpose of the instrument in which they are found. *Clarke v. Adie*, 2 L. R., App. Cas. 423; 40 L. J., Chanc. Div. 598; 37 L. T., N. S. 1; 25 W. R. 45—H. L.

In this case the word "parallel" was construed in its popular and not its purely mathematical sense. *Id.*

—of specifications.]—The words of a specification are to be construed according to their ordinary and proper meaning, unless there is something in the context (which may be explained by evidence), to show that a different construction ought to be made. *Elliott v. Turner*, 2 C. B. 446; 15 L. J., C. P. 49.

In an action upon a deed of license to use a patent for making buttons, the issue being, whether buttons made by the defendant were made under the license, the specification stated the invention to be the application of such fabrics only wherein the ground is produced by a warp of soft or organzine silk, such as is used in weaving satin; and claimed the application of such fabrics to the covering of buttons, as have the ground woven with soft or organzine silk for the warp:—Held, that the proper meaning of the word "or" being disjunctive, it ought to be so construed, unless there was anything in the context, or the facts proved, to give it a different meaning; and that the judge ought not to have told the jury absolutely, that unless the buttons were made of organzine silk, they were not within the patent; but that the words "soft or organzine" were capable of being construed to mean the same thing, if the jury were satisfied that there was only one description of silk, viz., organzine, used for weaving satin at the date of the patent. *Id.*

The construction of a specification is a question of law for the court, and not for a jury. *Bovill v. Pimm*, 11 Exch. 718.

Although the construction of a specification belongs to the court, the explanation of the words used therein, or of technical terms of art, is matter of fact upon which it is the province of a jury to decide. *Hills v. Evans*, 4 De G., F. & J. 288; 8 Jur., N. S. 525; 31 L. J., Chanc. 457; 6 L. T., N. S. 90—C.

Though the construction of a patent or a specification is ordinarily for the judge, yet where a specification mentioned "the precipitated or hydrated oxides of iron," and there was (on the issue of novelty) a prior patent proved, the specification of which mentioned carbonate of iron, and the scientific evidence showed that real carbonate of iron was so difficult to be preserved, that it was not commonly sold in the shops (though it existed as a chemical substance), and what was sold for it would be, in fact, a hydrate, through absorption, but that carbonate would not be understood chemically as meaning hydrate; the judge having ruled that the specification was to be construed commercially, not scien-

sifically, that carbonate commercially meant the "hydrate," and that on the issue of novelty the plaintiff must be nonsuited, the court, after great doubt, set aside the nonsuit, and granted a new trial. *Hills v. London Gaslight Company*, 27 L. J., Exch. 60.

If a patent is taken out for blocks for paving with stone "or any other suitable material," this will include wood pavement, although no wood pavement was in actual use at the date of the patent, and although the inventor might not have had wood pavement in his contemplation. *Macnamara v. Hulse*, Car. & M. 471—Abinger.

A patentee of a sewing machine in his specification claimed "the application of a shuttle in combination with a needle, as shown in sheet 1, for forming and sewing loops of thread or other substance for the purpose of producing stitches either to unite or ornament fabrics, whatever may be the means employed for working such shuttle and needle when employed together:"—Held, that this claim was not confined to the single application of a shuttle in combination with a needle, as shown in sheet 1, but extended generally to the application of a shuttle with a needle for the attaining the object therein stated. *Thomas v. Foxwell*, 5 Jur., N. S. 37—Q. B.; affirmed on appeal, 8 Jur., N. S. 271—Exch. Cham.

A. obtained a patent for improvements in horse-clipping machines, and granted to C. a license to manufacture machines in accordance with the patent. The improvement described in the specification comprised, among other items, the parallelism of the teeth of the comb, and the addition of an extra comb-plate when required, so as to regulate the length to which the hair might be clipped. C. manufactured clippers not having parallel teeth nor an extra comb-plate, but, in other respects, similar to those patented by A., and resisted payment of the royalties under the license in respect of these clippers, on the ground that the remaining items were old, and that the specification must be so construed as to exclude these items from the claim. As evidence in support of this intention, it was sought on behalf of C. to produce prior specifications of English and American inventions:—Held, that upon the natural construction of the specification it included a claim, not only in respect of the parallel teeth and extra comb-plate, but also in respect of the other items, and that C. was not entitled to contest the validity of the patent so as to excuse him from payment of royalty under the license. *Clark v. Adia*, 46 L. J., Chanc. Div. 598; 2 L. R., App. Cas. 423; 25 W. R. 45; 37 L. T., N. S. 1—H. L.

The expressions found in a specification will be construed according to the ordinary use of the words, not by the test of minute mathematical definitions. *Id.*

As to validity and sufficiency of specifications,—see this title, II., 2.

**Comparison with provisional or other specifications.]**—In construing a specification, it is not competent to an inventor to pray in aid of the provisional specification, in order to explain or enlarge the meaning of the complete specification. *Macklean v. Rennie*, 13 C. B., N. S. 52.

In the comparison of two specifications, each of which is filled with terms of art, and with the description of technical processes, it is the duty of the court to give the legal construction, but the work of comparing the two specifications is for the jury. *Hills v. Evans*, 4 De G., F. & J. 288; 8 Jur., N. S. 525; 81 L. J., Chanc. 457; 6 L. T., N. S. 90—C.

The question of novelty of invention, when raised by the comparison of two specifications, is a question of law for the court, if the two specifications do not contain expressions of art and commerce, the meaning of which must be explained by evidence. *Thomas v. Foxwell*, 5 Jur., N. S. 37—Q. B.; affirmed on appeal, 8 Jur., N. S. 271.

In an action for an alleged infringement of a patent, where the defense is that the supposed invention is not new, the judge may compare the plaintiff's specification with the specification of a previous patent, and may, on such comparison, direct the jury to find a verdict. *Bush v. Fox (in error)*, 5 H. L. Cas. 707; 2 Jur., N. S. 1029; 25 L. J., Exch. 251.

The specification of a patent for improvements in the manufacture of gas described the invention to consist in the direct use of seeds, leaves, flowers and beech nuts, fruit and other substances and matters containing oil, or oily and resinous matter, and stated that the mode of using the seed and constructing the apparatus might be the same as the apparatus used in the mode of making gas from coal; but that the inventor preferred placing the seed in a red-hot retort. The claim was "for making gas direct from seeds and matters therein named for practical illumination or other useful purposes, instead of making it from oils, resins or gums previously extracted from such substances." On the trial of an action for an infringement of this patent, upon proof on the part of the defendant that a patent had been previously granted to a third person for improvements in artificial light, the inventor proposing by his specification to use residuary matters obtained in the manufacture of fatty substances, and also the residuum after the oil had been pressed from the seeds, such as oil-cake, and also beech nuts, or mast, cocoa nuts, and all others abounding in oil, the judge directed the jury to find a verdict for the defendant:—Held, that the direction was right, the two patents being substantially the same, and it being the province of the court to take notice of the identity apparent upon the written document, and the consequent want of novelty, and that it was not necessary to submit the question of novelty to the jury. *Booth v. Kennard*, 26 L. J., Exch. 305; 2 H. & N. 84.

Where two specifications of different dates, relating to the same external objects, contain terms of art, though the expressions used in both are identical, their construction cannot be declared to be the same without the meaning and use of the terms of art employed therein being first ascertained by evidence, and being shown to be the same at the date of both the specifications. *Betta v. Menzies*, 10 H. L. Cas. 117; 31 L. J., Q. B. 233; 11 W. R. 1; 7 L. T., N. S. 110; 9 Jur., N. S. 29.

An antecedent specification, declaring a principle, but not disclosing a practicable mode of obtaining a result, is not to be held to be an anticipation of a subsequent specification relating to the same matter, which does disclose a practicable mode of producing the result. If the latter specification alone supplies that practicable mode, it forms the ground-work for a valid patent. *Ib.*

A barren general description, probably containing some suggested information, or involving some speculative theory, cannot be considered as anticipating a subsequent specification of an invention which involves a practical truth, which is productive of beneficial results, unless the antecedent publication involves the same amount of practical and useful information. *Ib.*

D., in 1804, took out a patent for making "a new article of trade, which I denominate 'Albion metal,' and which I apply" to various purposes, such as the facings of cisterns, coffin furniture, "and other things which are required to be made of a flexible" substance. D. stated in his specification the principle of his invention, and that he proposed to unite lead and tin by pressure; but he did not state the exact proportions of the two metals, nor give with precision the mode by which they were to be combined. It did not appear that the patent had been acted on. In 1849, B. took out a patent for "a new manufacture of capsules, and of a material to be employed therein, and for other purposes." The new material was to be composed of lead and tin combined. B. specified the proportions of the two metals, gave the details of the mode of working in order to combine them, and did not claim the production of the new material except according to the directions he had given for its production:—Held, that this was not a case in which the court, looking at the two instruments, could determine the validity of the latter patent as a matter of construction only; that evidence must be resorted to; and that then it was apparent that the earlier patent only stated a principle, and that the latter patent, as it did not claim the discovery of the principle, but only a new mode of carrying it into effect, was valid. *Ib.*

**Effect of grant to two or more persons jointly.]**—When letters patent are granted to two or more persons, any one of them may use the invention for his own benefit without the consent of the others. *Mathers v. Green*,

11 Jur., N. S. 845; 35 L. J., Chanc. 1; 14 W. R. 17; 13 L. T., N. S. 420—C.

**Reservation of right of user by the crown.]**

—A grant of letters patent to a subject for an invention does not exclude the crown from using the invention without the license of the patentee. *Feathers v. Ilog*, 12 L. T., N. S. 114; 6 B. & S. 257; 30 L. J., Q. B. 200.

The crown is not responsible, by way of petition of right, for an infringement of a patent by the lords of the admiralty, but the remedy is by action against the wrong-doers. *Ib.*

A patent for the exclusive use of an improvement in the invention of anchors, contained a proviso for avoiding the patent, if the patentee should not supply for his majesty's service all such articles of the invention as should be required, on such reasonable terms as should be settled by the lords of the admiralty. The latter used the invention, but did not take the articles from the patentee. The court refused to issue a mandamus to them, to settle the terms according to the patent. *Pering, Ex parte*, 4 A. & E. 949; 6 N. & M. 472.

The crown has the right to the use of a patented process or invention without compensation to the patentee. *Dizon v. London Small Arms Company*, 1 L. R., App. Cas. 632; 46 L. J., Q. B. Div. 617; 25 W. R. 142; 35 L. T., N. S. 559—H. L.; reversing the decision of the Supreme Court of Appeal 1 L. R., Q. B. Div. 384; 35 L. T., N. S. 539; 24 W. R. 766; and affirming that of the Court of Queen's Bench, 10 L. R., Q. B. 130; 23 W. R. 317; 44 L. J., Q. B. 63; 31 L. T., N. S. 830.

This right of the crown is not because the crown is implicitly excepted from the effect of the letters patent, but because the privilege thereby granted is granted against the subjects only, and not against the crown. *Ib.*

A patent was granted for an improvement in the manufacture of firearms. The secretary at war issued a notice for a tender for the supply of 13,875 rifles of the description known as that patented. The price was settled, minus the cost of the steel barrels and the stocks, which the War Office was to supply. The rifles were to be delivered within a certain time; the manufacture of them might be inspected at any time, and they might be rejected by officers at the War Office, if not made according to pattern, or not delivered in time. The persons who took the contract employed the patented process in the formation and insertion of the lock:—Held, that they were liable to the patentee for an infringement of the patent, for that they were not servants or agents of the crown doing the work of the crown, but were private contractors with the crown to supply a certain manufactured article, and were therefore not protected in what they did by any particular privilege attaching to the crown. *Ib.*



**Amendment.**—An application for amendment of a patent granted in 1856 by rectifying an error in the spelling of the name of the patentee was refused on the ground of lapse of time. *Blumoul, In re*, 3 L. T., N. S. 800—C.

The Master of the Rolls has jurisdiction, as keeper of the records, to direct the amendment of a clerical error in a specification filed in the Patent Office, such jurisdiction being saved by the Judicature Act, 1873, s. 17, sub-s. 6. *Johnson's Patent, In re*, 5 L. R., Ch. Div. 502; 46 L. J., Chanc. Div. 555—R.

When any such amendment has been directed, notice of the order should be given to the commissioners of patents, so that the specification may be reprinted. *Id.*

**Proof of patent documents; and effect in evidence.**—[By 16 & 17 Vict. c. 115, s. 4, printed or manuscript copies or extracts, certified and sealed with the seal of the commissioners of patents, of letters patent, specifications, disclaimers, memoranda of alterations, and all other documents recorded and filed in the commissioners' office, or in the office of the Court of Chancery appointed for the filing of specifications, shall be received in evidence in all proceedings relating to letters patent for inventions in all courts whatever within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, and her Majesty's colonies and plantations abroad, without further proof or production of the originals.]

The grant of letters patent by a foreign country (being an act done by the governing power in a matter which is to affect the public interests, restraining them for the present, and giving a particular individual specific rights, throwing open and protecting the public rights after the expiration of a certain term) is an act of state, within 14 & 15 Vict. c. 99, s. 7, and is therefore provable by a copy of the letters patent, purporting to be sealed with the seal of such foreign state, without proof of the seal or signature, or judicial character of the person signing the same. *Betts' Patent, In re*, 1 Moore P. C. C. 49; 9 Jur., N. S. 137; 11 W. R. 221; 7 L. T., N. S. 577.

In the case of a patent for improvements, prior specifications relating to similar machines are admissible in evidence, to show the state of the manufacture at the time when the patent was granted, but not to show that the language of the specification is to be taken in other than its natural meaning. *Clarks v. Adie*, 2 L. R., App. Cas. 423; 46 L. J., Chanc. Div. 598; 37 L. T., N. S. 1; 25 W. R. 45—H. L.

#### 4. Disclaimer.

**Filing disclaimer.**—[By 5 & 6 Will. 4, c. 83, s. 1, any person having obtained letters patent for any invention, may enter a disclaimer of any part of his specification, or a memorandum of any alteration therein, which, when filed, is to be deemed part of such specification.

By 7 & 8 Vict. c. 69, s. 5, the disclaimer and memorandum of alteration may be made notwithstanding the original patentee may have assigned his rights.]

On an application to the law officer of the crown under 5 & 6 Will. 4, c. 83, s. 1, for leave to enter a disclaimer of any part of the title or specification of a patent, against which a caveat has been entered, the law officer has no jurisdiction to order the applicant to pay costs. *Kynoch v. National Arms Company*, 26 W. R. 22; 37 L. T., N. S. 31—C. A.

When a disclaimer had been filed without the consent of the patentee:—Held, that the Master of the Rolls had jurisdiction without bill filed to order it to be taken off the file. *Berdan's Patent, In re*, 20 L. R., Eq., 340; 44 L. J., Chanc. 544; 23 W. R. 823—R.

**Operation of disclaimer; and how construed.**—Where a patent is originally void, but amended by filing a disclaimer of part of the invention, the above act has not a retrospective operation, so as to make a party liable for an infringement of the patent, prior to the time of entering such disclaimer. *Perry v. Skinner*, 2 M. & W. 471; M. & H. 122; 1 Jur. 433.

A declaration for the infringement of a patent stated a grant to the plaintiff in 1836 of letters patent for improvements in pumps, and that a specification of the same was duly enrolled within six months. It then alleged the entering by the plaintiff in 1844 of a disclaimer of part of this title and specification, and an infringement afterwards by the defendant of the patent as altered by the disclaimer. Plea, that, in 1840, after the grant to the plaintiff, and before entry of the disclaimer, a patent was granted to B., under whom the defendant was licensee, which was alleged to cover the infringement complained of:—Held, that the plea was bad, upon the ground that it appeared from the record that the grant to B. was void, as being in respect of an invention already made known to the public by the enrollment of the plaintiff's specification. *Stocker v. Waller*, 1 O. B. 149; 9 Jur. 136.

A grantee of letters patent, who, having parted with his interest, afterwards becomes assignee of a share in them, may enter a disclaimer of part of the invention, and may maintain an action for an infringement of the patent so altered. *Spilisbury v. Clough*, 2 G. & D. 17; 2 Q. B. 406; 6 Jur. 579.

A disclaimer will be valid, notwithstanding the grantee, at the time he entered it, had assigned all his interest in the patent. *Wallington v. Dale*, 7 Exch. 888; 23 L. J., Exch. 49.

The filing of the copy of a disclaimer is a compliance with the provisions of the 5 & 6 Will. 4, c. 83, s. 1. *Id.*

In a scire facias to repeal letters patent, a disclaimer, though enrolled subsequently to issue joined, is admissible for the defendant, and is to be read as a part of the original

specification put in by the prosecutor, and it is not necessary to plead the disclaimer puis darrein continuance. *Reg. v. Mill*, 10 C. B. 379; 20 L. J., C. P. 16; 1 L., M. & P. 695; 15 Jur. 59.

A disclaimer is not essential to a specification. *Lister v. Leather*, 4 Jur., N. S. 947; 27 L. J., Q. B. 295—Exch. Cham.

The effect of a disclaimer is, merely to strike out from the specification those parts of the machinery which are disclaimed; it cannot be read as explanatory of that which remains. *Tetley v. Easton*, 2 C. B., N. S. 706—Per Cresswell.

A disclaimer cannot be made use of for the purpose of converting a barren and an unprofitable generality in a specification into a specific practical description, or to convert that which, upon the description in the specification, is not applicable to any one definite form, into a description applicable to a specific and a definite mode of proceeding. *Ralston v. Smith*, 11 H. L. Cas. 223; 35 L. J., C. P. 49; 13 L. T., N. S. 1; 20 C. B., N. S. 28. And see *S. C.*, 11 C. B., N. S. 471; 8 Jur., N. S. 100; 31 L. J., C. P. 102—Exch. Cham.

The object of 5 & 6 Will. 4, c. 83, is, that where a specification containing a sufficient and good description of a useful invention, is imperiled by reason of the description having something annexed to it which is capable of being severed, leaving the original description good and sufficient, without the necessity of addition (except of such slight additions only as may be required to render intelligible that which remains), the vicious excess may be lopped off by a disclaimer. *Ib.*

R., in his specification, described his patent for improvements in embossing and finishing woven fabrics, as enabling him, upon a roller, either spirally or longitudinally, or in a circular form, to groove, or flute, or engrave, or mill, or otherwise indent any design. The fact was, that if the design was engraved longitudinally it would destroy the material. R., therefore, in a disclaimer, altered "upon" into "around the roller:"—Held, first, that the disclaimer was bad, as it sought in effect to extend the specification or to convert a bad specification into a good one by adding words. *Ib.*

Held, secondly, that the construction of the specification, as amended by the disclaimer, excluded spiral engraving, and confined it to circular engraving or grooves. *Ib.*

Held, thirdly, the description "or roller of hard metal, or other suitable material," was not too vague as regards material. *Ib.*

All the claiming clauses may be struck out of the specification of a patent by a disclaimer, if there remain in the body of the specification words sufficiently distinguishing what the invention is which the patentee claims. *Thomas v. Welch*, 1 L. R., C. P. 192; 12 Jur., N. S. 310; 35 L. J., C. P. 200.

An alteration, verbal merely and not sub-

stantive, by means of a disclaimer, will not make a patent void. *Ib.*

S. took out a patent for an improvement in machinery used for roving cotton. His specification appeared to claim the discovery of the application of the principle of centrifugal force for such a purpose, but he filed a disclaimer, declaring that he intended to claim only the application of centrifugal force in the particular manner described in the specification:—Held, that taking those two instruments together they sustained the patent. *Seed v. Higgins*, 8 H. L. Cas. 550; 6 Jur., N. S. 1264; 30 L. J., Q. B. 314; affirming judgments of Queen's Bench and Exchequer Chamber, 4 Jur., N. S. 258; 27 L. J., Q. B. 145, 411.

The particular manner described was by the use of "a weight." The defendant employed a machine similar in many respects, but though using weight, or pressure occasioned by weight, as a force, not using "a weight:"—Held, that this did not amount to an infringement of the patent. *Ib.*

The plain language of the operative part of a disclaimer is not to be controlled or modified by any introductory sentences with which the patentee may think fit to preface such disclaimer. *Cannington v. Nuttall*, 40 L. J., Chanc. 739; 5 L. R., H. L. Cas. 265.

### III. ASSIGNMENT; SALE; LICENSE.

#### 1. Assignment and Sale.

**Agreements for assignment and sale; and remedies for breach.**—By an agreement, not under seal, between the plaintiff and A., B. and C. of the one part, and the defendant of the other part, reciting that the plaintiff had obtained a patent for an improvement in furnaces, and was solely interested in another patent invention; that the plaintiff and A. had obtained a patent for another invention; the plaintiff and B. for another; and the plaintiff and C. for another; it was agreed between the parties, that, for the considerations therein mentioned, it should be lawful for the defendant exclusively to use, manufacture and sell any or all of the patent inventions, within certain limits, during the continuance of the several patents, on certain terms specified in the agreement. In an action on this agreement by the plaintiff alone, to enforce one of such terms, the defendant set out the plaintiff's patent for the improvements in furnaces, and pleaded that it was not, at the time of the grant, a new invention as to the public use thereof in England, whereby the grant was void, which the plaintiff, at the time of making the agreement, well knew:—Held, that the plea was a bar to the action. *Chalker v. Lees*, 4 M. & W. 295; 1 H. & H. 224; *S. C.* (in error), 5 M. & W. 698, affirmed.

Held, also, that the declaration was bad, on the ground of variance, as it stated the agreement to be made between the plaintiff and defendant, whereas there were other parties

to it of the first part besides the plaintiff. *Id.*

Brown being patentee of an engine, Broadhurst bought a license of him to erect it in Cornwall only. Ridgway, by agency of Brown, contracted with Brown & Co. to erect such an engine in Cambridgeshire, Brown telling Ridgway that Philip and Broadhurst were his partners. During the building of the Cambridgeshire engine, Broadhurst frequently came to inquire how it went on, and when it would be finished. After the engine had failed in its object, Ridgway, previously to suing Philip and Broadhurst, inquired from Broadhurst if Brown had been correct in declaring that Broadhurst and Philip were his partners; to which he answered that he had. He then sued Philip and Broadhurst. The jury having found a verdict for them, on the ground that Broadhurst was not a partner, the court refused to set it aside and grant a new trial. *Ridgway v. Philip*, 1 C., M. & R. 415; 5 Tyr. 181.

By an agreement, after reciting that the plaintiff had invented a method for preventing boiler explosions, and that he had obtained a patent for the use of it, and that he was desirous of disposing of half his interest in such patent, to which he declared he had full right and title, and that he had applied to the defendant to purchase such half of his interest in such patent, it was stipulated that the defendant should pay to the plaintiff 2,500*l.*, "in such manner as shall be mutually agreed on;" and, in consideration of such engagement, the plaintiff agreed to make over, and accordingly made over, to the defendant one-half of the patent. In an action on this agreement the plaintiff assigned three breaches; first, that the defendant did not pay the 2,500*l.* on request; secondly, that he refused, after the lapse of a reasonable time, to make any agreement with the plaintiff respecting the manner in which the money was to be paid; and, thirdly, that he refused to fix any time at which the money should be paid:—Held, that the second breach was good, as, even if the agreement as to the mode of payment was a condition, the defendant, by refusing to enter into any agreement, had rendered the performance of it impossible. *Hall v. Conder*, 2 C. B., N. S. 22; 3 Jur., N. S. 366; 26 L. J., C. P. 138.

Held, that by the agreement the plaintiff did not profess to sell, nor did the defendant profess to buy, a good and indefeasible patent right, but only the moiety of the patent, such as it was; and that as there was also no express or implied warranty of title or quality, it was no answer to the breaches to plead that the invention was wholly worthless and of no public utility, and not new, and that the plaintiff was not the first and true inventor. *Id.*; *S. C.* affirmed on appeal, 3 Jur., N. S. 963—Exch. Cham.

A declaration stated that, by deed, the plaintiff sold certain letters patent to the defendants, and they covenanted to pay the price by installments; provided, that if

within twelve months from the date of the deed they should disapprove of the patent, and if they should give notice to the plaintiff of their disapprobation and intention to sell, the payment of the installments should be suspended; and if they should within six months after notice sell the patent, and, retaining to themselves 24*l.*, pay over the surplus to the plaintiff, the covenant for payment of the entire sum should cease. But if they, having given such notice, should neglect or refuse to observe all the other matters in the proviso, the covenant for payment of 840*l.* should stand. Averment, that the defendants gave due notice of their disapprobation, and of their intention to sell, and that the defendants had not sold the letters patent. Breach, non-payment of the installments. Plea, that the defendants were ready and willing and endeavored to sell the letters patent, but that no bona fide sale could be effected:—Held, that the defendants, not having sold the letters patent, were liable to pay the installments. *Cherry v. Heming*, 2 Exch. 557; 17 L. J., Exch. 305.

Action for money payable by the defendant to the plaintiff, due by agreement, in respect of a manure manufactured or sold by the defendant pursuant to the plaintiff's permission, such manure having been manufactured by means of the use of an invention mentioned in letters patent granted to the plaintiff. Plea, that at the time of the agreement, and since, the letters patent were void; that the defendant was, before and at the time of the agreement, entitled as of right, and without permission of the plaintiff, to use the invention and sell the manure; and there was not any consideration for the agreement:—Held, that the action was upon an executed consideration, and that the plea was no answer. *Laves v. Purser*, 6 El. & Bl. 930; 3 Jur., N. S. 182; 26 L. J., Q. B. 25.

A. having obtained a patent for an invention, of which he supposed himself the inventor, agreed to let B use it upon payment of an annual sum secured by bond; this sum was paid for several years, when B, discovering that A. was not the inventor, but that it was in public use before A. obtained his patent, brought an action to recover back the amount of the annuity paid:—Held, that he could not recover. *Taylor v. Hare*, 1 N. R. 260.

A declaration stated that a petition had been presented by the plaintiffs, at the request of the defendant, for the granting to the defendant of a patent; that the plaintiffs had filed a provisional specification, at their own expense, upon condition that the defendant should complete the specification within six months, and that afterwards it was agreed that the defendant should sell to the plaintiffs his right in respect of the patent for 5*l.*, to be paid by the plaintiffs to the defendant on their having completed at their own expense the patent; that it thereupon became necessary, in order to enable the plaintiffs to complete the patent in pursuance of the agree-

ment, that the defendant should sign and seal a complete specification; that the plaintiffs tendered to the defendant a complete specification for his signature. Breach, that he would not sign it:—Held, that he was bound to sign the specification. *Lewis v. Brown*, 14 W. R. 640—C. P.

A defendant signed a written proposal that the plaintiff should assign a patent in trust for an institution of which the defendant was manager, and the plaintiff was to have 5% per cent. upon the profits made thereby, and the defendant was to provide for the next payment to be made in respect of the patent; and that if the payments did not equal a certain sum in the first and subsequent years, the plaintiff should have the right, upon giving a month's notice, and repaying any moneys paid to keep up the patent, to reclaim it, unless the deficiency in the year was made up within the month; and in case of the institution not being carried on, the patent was to revert to the plaintiff, subject to repaying any moneys paid to keep it up. The plaintiff assented by word of mouth to the proposal, and allowed the institution to have the use of the patent, and otherwise fulfilled the terms of the agreement:—Held, that it sufficiently appeared from the agreement that what the plaintiff had to do was not intended to be postponed beyond the year, and therefore it was not within the 4th section of the Statute of Frauds; and that if it was within that section, the proposal signed by the defendant, and accepted by word of mouth by the plaintiff, was sufficient to satisfy the statute. *Smith v. Neale*, 2 C. B., N. S. 67; 3 Jur., N. S. 516; 26 L. J., C. P. 143.

To a declaration alleging a contract for the assignment by the plaintiff of the letters patent in trust for the institution, and upon the terms contained in the proposal of the defendant, the defendant pleaded non concessit:—Held, that the contract involved no warranty by the plaintiff that the invention was new, or that the manufacture was within the Statute of James, and that therefore the plea put in issue no more than the grant of the letters patent which the plaintiff contracted to assign. *Id.*

An agreement was entered into between four persons who were interested in patents and inventions relating to gutta percha, that all patents taken out, or in the course of being taken, or intended to be taken out, or that might at any time thereafter be taken out by any or either of them, or on account of and for the benefit of any or either of them, in relation to the preparation and application of gutta percha, or the manufacture of any article therefrom, should be assigned to trustees, and held for their common benefit. Subsequently one of the parties took out a patent for "improvements in apparatus and machinery for giving shape and configuration to plastic substances," and refused to assign the patent to the trustees, alleging that it was not comprised in the agreement:—Held, that the patent, so far as it related to gutta percha, was subject

to the trusts of the agreement, and that it could not be treated as not being so, because it was for machinery which might be applied to the manufacture of articles of gutta percha, and was not for the manufacture of any such articles. *Beasley v. Hancock*, 6 De G., M. & G. 891; 2 Jur., N. S. 289.

A covenant by a licensee for the residue of a term of fourteen years, of patented improvements in machinery for slubbing iron substances, not to make or send any slubbing frames whatever without the invention applied to them, is not void as a covenant in restraint of trade. *Jones v. Lea*, 1 H. & N. 189; 2 Jur., N. S. 645; 26 L. J., Exch. 9.

By an agreement, after reciting that the plaintiff had lately invented an improved composition or material to be employed in waterproofing or rendering woven fabrics impervious to moisture, for which he had only obtained provisional protection, and had obtained a certificate of protection, it was agreed between them for the considerations therein mentioned, and in consideration of a further sum of 350*l.* to be paid on the completion of the necessary specification and grant of the letters patent, to transfer and make over to the defendant all his interest in the invention or improvement thereof, and all benefit to be derived from the provisional protection, or from any letters patent to be thereafter granted for the invention. In an action on this agreement to recover the 350*l.*, the defendant pleaded that the plaintiff had not invented an improved composition or material to be employed in waterproofing or rendering woven fabrics impervious to moisture:—Held, that the plea was bad. *Smith v. Buckingham*, 18 W. R. 814; 21 L. T., N. S. 819—Q. B.

The plaintiff was the holder of a license to use a patented invention, from the patentee. The patentee intending to apply for a prolongation of this patent, and also for a patent for a new invention of a similar description, the plaintiff agreed to give him 150*l.* for the free use forever of the former patent, as well as for the free use for three years of the new patent which the patentee was about to take out. The money was paid to the patentee, but he died almost immediately afterwards, and in consequence of his death no application was ever made for a renewal of the former patent, or the grant of one for the new invention. The plaintiff brought an action against the patentee's executors to recover back the money, on the ground that the consideration for it had totally failed:—Held, that he was entitled to maintain the action on the ground that on the true construction of the contract between the parties he had bought the right to have an application for the patents made, not merely the right to have the benefit of it if it should happen to be made, and the consideration had therefore totally failed. *Knowles v. Bovill*, 23 L. T., N. S. 70—Exch.

An agreement by the vendor of a patent to assign to the purchaser all future patent

rights which the vendor may hereafter acquire of a like nature to the patent sold, is not contrary to public policy. *Printing and Numerical Registering Company v. Sampson*, 19 L. R., Eq. 462; 44 L. J., Chanc. 705; 32 L. T., N. S. 354; 23 W. R. 463—R.

An agreement by which the defendant contracted to sell to the plaintiff company his share of several letters patent relating to inventions applicable to the mechanism or apparatus employed for numbering and printing tickets consecutively, and for containing and delivering tickets or continuous lengths of paper, or other similar materials, contained a recital that it had been agreed that the company should purchase the shares in the several letters patent, and all patent rights and rights of a like nature, of the vendors, with respect to the inventions described in the letters patent, or the specifications thereof or otherwise relating to the mechanism or apparatus employed for numbering and printing tickets consecutively, or to the containing and delivering tickets or continuous lengths of paper or other similar material, and any improvements thereof. Subsequently, the defendant obtained letters patent for an invention of "an improved rotary and multiplicate printing and numbering machine," whereby, according to the specification, strips or lengths of paper, card, or other material could be continuously printed with any desired subject-matter, and consecutive numbers impressed thereon; such strips being applicable to the manufacture of railway and other tickets, which required that certain subject matter with consecutive numbers should be printed or impressed thereon:—Held, that the defendant's patent, being a combination of a printing machine, a perforating machine and a numbering machine, and an invention to produce a result of a like nature or of a similar kind to that which was produced by the invention which he had sold to the company, came within the agreement to assign future patent rights of a like nature, and the defendant was decreed to execute an assignment to the plaintiff company. *Ib.*

An English company was possessed of a patent, valid in England, with regard to a process of utilizing sewage; in this company A. was a large shareholder and a director. By an arrangement between A., B., C. and D., B., really acting on behalf of A., purchased from the English company for 15,000*l.* the exclusive right to use their process in Berlin; this right B. conveyed for 80,000*l.* to C., and C. again for a like sum to D. as trustee for a company to be formed at Berlin. A company was formed at Berlin, and A. became a director of it; the 30,000*l.* was paid, not to B., but to A., and A. paid the 15,000*l.* to the English company. The Berlin company discovered that the English company neither had taken out nor could take out a patent for their process in Prussia; A., B. and C. all knew, but the directors of the English company did not know, that this

patent had not been obtained. B. having brought an action against the English company for the 15,000*l.* on the ground of a failure of consideration:—Held, that B. was not entitled to recover, as he had obtained all he desired, namely, an ostensible grant of the exclusive right, in order to float the Berlin company. *Begbie v. Phosphate Sewage Company*, 24 W. R. 115; 33 L. T., N. S. 470; 10 L. R., Q. B. 491.

Held, also, that as the money was paid for the purpose of defrauding the intended shareholders in the Berlin company, by holding out to them the assurance of an exclusive right, the principle that money paid in furtherance of fraud cannot be recovered back applied. *Ib.*

**Validity and effect of assignments, generally.**—Where an act of parliament secured to certain persons for a further term of years the benefit arising from a patent for making a machine, with a proviso that it should become void if they should transfer or assign their interest therein to any persons exceeding the number of five; and two of the patentees became bankrupt:—Held, that the assignment of their interest to their assignees for the benefit of creditors, though the number exceeded twenty, was not within the proviso. *Bloxam v. Esce*, 9 D. & R. 215; 6 B. & C. 109; 1 C. & P. 558; R. & M. 187.

A voluntary assignment by a patentee of letters patent, to trustees for the benefit of creditors, more than twelve in number, is not such an assignment as will avoid the patent. *M. Alpine v. Mangnall*, 3 C. B. 496; 15 L. J., C. P. 298.

The executors of a patentee having obtained probate of their testator's will, assigned his patent to another person, but the probate was not registered till after the assignment:—Held, that the assignment was valid. *Ellwood v. Christy*, 10 Jur., N. S. 1079; 18 W. R. 498; 11 L. T., N. S. 342; 17 C. B., N. S. 754; 34 L. J., C. P. 130.

An act of parliament empowering a bankrupt patentee, his executors, administrators and assigns, to assign the right to a greater number of persons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his assigns to make a better title than they could before the act. *Hess v. Stevenson*, 3 B. & P. 565.

A., by a deed (reciting that a suit was depending between him and B. respecting certain patents, and that they could not be assigned without hazard of defeating the suit), granted absolutely the patents, together with some others, to C., excepting, however, until the determination of the suit, such patents as should be necessary to support A.'s legal title; then followed a covenant that A., upon the determination of the suit, should assign the excepted patents to C., and that until such assignment A. should stand legally possessed of the same:—Held, that the legal interest in the excepted patents vested in C. upon the determination of the suit, without

further assignment. *Cartwright v. Amatt*, 2 B. & P. 43.

Where a bond was given for payment of 10,000*l.*, with a condition that the money should be paid on the obligee's procuring subscriptions for 9,000 shares in a company to be formed of many persons, for the purpose of becoming assignees of a patent, and carrying on the patent process; and the patent contained a proviso, that it should be void if assigned to more than five persons:—Held, that the obligee must be presumed to know of that proviso, and that, as the bond was subject to a condition for the performance of an illegal act, it was void. *Duvergier v. Fellows*, 10 B. & C. 826; 1 C. & F. 39; 2 M. & P. 384.

No action can be maintained on a bond given to a person in consideration of his doing something contrary to the terms of letters patent; and he is equally incapable of recovering, whether he knew or did not know the terms of the letters patent. *Id.*

The sale of a moiety of a patent right conveys an interest pro tanto in the patent. *Wulton v. Lavater*, 6 Jur., N. S. 1251; 29 L. J., C. P. 275; 3 L. T., N. S. 272; 8 C. B., N. S. 103.

As to rights of assignees to sue for infringements of patents,—see this title, IV., 2, *a*; to obtain renewal or extension of patents,—see this title, V.

**Registration of assignments.**—[To a declaration for the infringement of a patent, brought by an alleged assignee (by deed) of the patent, the defendant pleaded, by denying the assignment *modo et forma*. On the trial it appeared that an instrument of assignment had been executed by the patentee, but that it had not been registered under 15 & 16 Vict. c. 83:—Held, that as, by s. 35, the original patentee is, until the entry of the registration, to be deemed and taken to be the sole and exclusive proprietor of the patent, the defendant was entitled to a verdict, although the objection was not specified in the notice of objections delivered by him. *Chollett v. Hoffman*, 7 El. & Bl. 686; 3 Jur., N. S. 935; 26 L. J., Q. B. 249.

It is no ground of objection to the title of an assignee of a patent that the assignors, the executors of the grantee, omitted to register the probate until after the date of the assignment; though possibly it might be an obstacle to the maintenance of an action by the assignee for an infringement, if commenced before the registration of the probate. *Elwood v. Christy*, 17 C. B., N. S. 754; 34 L. J., C. P. 130; 13 W. R. 498; 11 L. T., N. S. 342; 10 Jur., N. S. 1079.

The court will, on the motion of the persons aggrieved, correct an entry in the register of proprietors of patents which purports to affect the rights of persons not parties to the deed registered. *Horsley and Knighton's Patent, In re*, 39 L. J., Chanc. 157—R.

One of two joint patentees by deed assigned his interest in the patent to a third person,

and released to him all the rights of action against him of both the patentees; and the deed was set out completely on the register:—Held, that the other joint patentee was entitled to have the entry struck out. *Id.*

A patentee agreed with H. that he should be the sole manufacturer under the patent. This agreement was embodied in a deed, which was prepared by the solicitor of the patentee, H. employing no legal adviser. The deed was not registered in compliance with the Patent Law Amendment Act, 1852, s. 35, until after bill filed. Subsequently the patentee granted a right of manufacture to M., who had full notice of the previous agreement with H. The grant to M. was also unregistered:—Held, that, under the circumstances, the patentee could not avail himself of an objection based upon the non-registration of the agreement with H., and that as the grant to M. was also unregistered, M. also was not entitled to take the objection. *Hassall v. Wright*, 10 L. R., Eq. 509; 40 L. J., Chanc. 145; 18 W. R. 821—V. C. M.

## 2. Licenses and Royalties.

**Interpretation and effect of licenses to use and vend.**—[The grant of an exclusive license to use a patent does not invalidate the patent itself, although the patent may be vested in twelve persons; and it is wholly immaterial to its validity in what number of persons such a license is vested, whether exclusive or not. *Protheroe v. May*, 5 M. & W. 675.

Such a license would not be invalid if the districts or district covered by the license included the whole extent of the patent. *Id.*

While a person is using, under a license, a patent machine, and paying a royalty for its use, or the use of its principle embodied in any other machine, he cannot, in a proceeding against him for non-payment of royalties, in respect of the use of another machine alleged to embody the principle of the patent invention, set up as a defense that the patent is not valid. He can only be allowed to contend that the second machine does not embody the principle of the patent. *Crossley v. Dixon*, 10 H. L. Cas. 293; 9 Jur., N. S. 607; 33 L. J., Chanc. 617; 11 W. R. 716; 8 L. T., N. S. 260.

A license to A. to manufacture a patent article is an authority to his vendees to vend it without the consent of the patentee. *Thomas v. Hunt*, 17 C. B., N. S. 183.

A licensee under another's patent, is not estopped thereby from contesting the novelty of such patent. *Dungerfield v. Jones*, 13 L. T., N. S. 142—V. C. W.

A., asserting that he had a right to a patent machine, covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted that he would not use any other:—Held, that, in an action by A. on the covenant, B. was not estopped by his covenant from pleading in bar, that the invention was not new, or that the patentee was not the inventor; but he might



us show that the patent was void. *Hayne Malby*, 3 T. R. 438.

But in an action by the assignee of the patentee against the patentee, the latter is stopped from showing that it was not a new invention against his own deed. *Oldham v. Angmead*, 3 T. R. 439—Kenyon.

Where a license to use certain patent machines is granted by indenture, in which it is recited that the grantor has invented the machines, and has obtained letters patent for the sole use of the invention, and enrolled the specification, parties (and privies) to the deed are estopped from pleading either that the invention is not a new invention, or that the grantor was not the first inventor, or that no specification was enrolled. *Bowman v. Taylor*, 4 N. & M. 264; 2 A. & E. 278. S. P., *Smith v. Scott*, 5 Jur., N. S. 1356; 28 L. J., C. P. 325; 6 C. B., N. S. 771.

Action for the price of a license, granted by the plaintiff to the defendant, to use an invention for a patent furnace. The plaintiff, having obtained the patent, granted the defendant a license, which was in writing, but not under seal, to use the patent; and the defendant, having received the license, kept it, and used the invention, but, when called upon to pay the price agreed upon, objected to pay for it, on the ground that it was void, as not being under seal. By the terms of the letters patent all persons were commanded not to "make, use, or put in practice the invention, or any part of the same, nor in anywise counterfeit, imitate or resemble the same, nor make, or cause to be made, any addition thereunto or subtraction from the same, whereby to pretend himself or themselves to be the inventor or inventors, deviser or devisors thereof, without the license, consent or agreement of the patentee, in writing, under his hand and seal, first had and obtained, upon pain of a contempt of the royal command, and of being answerable to the plaintiff in damages:"—Held, first, that the defendant, having obtained the license he had bargained for, and kept it, was bound to pay for it. *Chanter v. Dewhurst*, 12 M. & W. 823; 13 L. J., Exch. 198.

Held, secondly, that the license was not void, as not being under seal. *Ib.*

N. obtained a patent for the application of the principle of smelting iron by the use of heated air applied to furnaces. B. obtained a license from him to use this process, on the payment of 1s. per ton on the iron thus smelted. Disputes, and then litigation, arose between them, and it was agreed, by an instrument in writing, dated 11th November, 1833 (which recited the previous circumstances), that both parties should withdraw their law proceedings; that, "in consideration of the payment of 400l., to be accepted by N. in full of 1s. per ton on the whole iron smelted from the erection of B.'s works up to the 11th day of November, and in consideration of the payment of 1s. per ton upon the whole iron which shall be smelted from the 11th of November till the expiration of the letters patent,

by the use of heated air in any of the modes heretofore applied, or in any other mode falling under the said patent," N. should grant to B. a license, which was described to relate to "the application or use of heated air in any of the modes heretofore practiced at B.'s works, or in any other mode falling under the description in the said patent, or in the specification thereof." N. afterwards instituted a suit to compel B. to perform this agreement. B. instituted a cross suit to suspend N.'s proceedings, on the ground that the process of smelting by heated air used at B.'s works did not fall within the patent:—Held, that, after this agreement, B. could not set up such a defense to the claim of N. *Baird v. Neilson*, 8 C. & F. 726.

By articles of agreement under seal, reciting that letters patent had been granted to the defendant, for improvements in purifying gas, and other letters patent had been granted to the plaintiff for an improved mode of manufacturing gas, and that disputes had arisen between the parties as to their rights under the letters patent to the use of oxides of iron for the purpose of purifying gas, and that a scire facias had been sued out by the plaintiff to repeal the letters patent granted to the defendant, and that another patent for purifying coal gas by oxide of iron had been applied for by the defendant, and that other letters patent had been sued out by the plaintiff, and that in order to put an end to their differences the parties had entered into that agreement; the defendant covenanted with the plaintiff, and the plaintiff agreed that the defendant should have the exclusive use of the inventions granted to the plaintiff so far as the same related to the purification of gas by the hydrated oxides of iron, paying therefor certain royalties; that the plaintiff should have the exclusive use of the inventions granted to the defendant so far as the same related to the purification of gas by anhydrous oxides of iron, paying therefor certain royalties; that, for the purpose of that agreement and the determination of the amount of royalties it should be assumed that the defendant was entitled to the exclusive use of anhydrous oxides, and the plaintiff entitled to the use of hydrated oxides. The agreement also provided that in case of any breach of certain stipulations, the party so doing should pay to the other a certain sum as liquidated damages. In an action to recover that sum the defendant pleaded that the plaintiff's patents were not valid, that the inventions were not new, and that the plaintiff was not the first inventor;—Held, that the pleas were bad, inasmuch as the defendant was estopped by the agreement from disputing the validity of the patents. *Hills v. Laming*, 9 Exch. 256; 23 L. J., Exch. 60.

Action by assignee of H., original patentee, for an infringement of a patent. Plea, a license, by deed, from H. to S. and A., and to such persons as they should from time to time license or authorize, to make, use and vend the invention in Great Britain and Ire-

land; and that S. and A. assigned to the defendant all the liberty and license granted to them by the deed. Replication, on equitable grounds, that by deed of even date with the deed of license from H. to S. and A., and made between H. of the first part, the plaintiff and five other persons of the second part, and S. and A. of the third part, reciting that under arrangements between H. and the parties of the second part, the parties of the second part were entitled to participate in the profits to be derived from the letters patent, and that S. and A. had contracted with the parties of the first and second parts for the purchase of a license for the exclusive use of the invention, and that the contract was carried out by the deed of license, it was witnessed that each one of the parties covenanted that S. and A. should not manufacture machines under the license for sale out of Great Britain and Ireland; of all which the defendant, before the assignment to him of the license, had notice; that afterwards, by deed between S. and A. and the defendant, reciting the grant of the license, and the making of the deed of even date therewith, and that in the deed were contained covenants on the part of the parties thereto with respect to the license, and that by deed of even date S. and A. assigned the license to the defendant, the defendant covenanted that he would perform all the covenants in the secondly recited deed contained on the part of S. and A. to be performed, and would indemnify S. and A. from all actions for breach of the covenants:—Held, that the deed of covenant not to manufacture for sale out of Great Britain and Ireland was no answer to the license, and that therefore the replication was not good at law, nor upon equitable grounds. *Schlumberger v. Lister*, 6 Jur., N. S. 1336; 9 W. R. 138; 3 L. T., N. S. 549; 2 El. & Bl. 870; 29 L. J., Q. B. 157.

A licensee under a patent cannot, in any way, question its validity during the continuance of his license. But he may show that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it. *Clarke v. Adia*, 2 L. R., App. Cas. 423; 40 L. J., Chanc. Div. 598; 87 L. T., N. S. 1; 26 W. R. 45—H. L.; affirming the judgment of the Court of Appeal, 3 L. R., Ch. Div. 134; 24 W. R. 1007; 35 L. T., N. S. 349.

A licensee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to show that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right. *Id.*

**Right to and recovery of royalties.**—One who makes a patent article under a license from the inventor, cannot, in an action against him for royalties, set up any objection to the novelty or utility of the invention,

or the validity of the specification: but, if the claim in the specification is susceptible of two constructions, one of which would make the specification bad, and the other and more natural one would make it good, it is competent to him to insist that the latter is the true construction. *Trotman v. Wood*, 16 C. B. N. S. 479.

Payment of royalties on letters patent cannot be refused on the ground of want of novelty in the invention. *Nelson v. Broad*, 7 H. & N. 499; 8 Jur., N. S. 155; 10 W. R. 111.

A declaration stated that on the 15th of March, 1858, an agreement was made between H. and the plaintiff that a patent of the plaintiff's for an alloy should be assigned to H., H. paying to the plaintiff by way of royalty 1*l.* per pound for each pound of alloy made or used by him under the letters patent during the existence of the letters patent, the royalty to be accounted for every six months after the date of the letters patent, or from making any of the alloy, with a covenant for further assurance by the plaintiff that, on the 13th of November, 1858, by deed between the plaintiff and H., the letters patent were assigned to H., subject to the payment of the royalty upon every pound of alloy which should be manufactured by H., and H. covenanted to pay 1*l.* per pound for each pound of the alloy which he should make or sell; that on the 17th of December, 1858, the defendant, in consideration of 250*l.*, agreed to purchase the right of the plaintiff, "in an agreement entered into with H., dated March, 1858, to receive a royalty of 1*l.* per pound on the metal sold under the patent specified therein; the second installment to be paid continually; otherwise the 250*l.* to be paid on the 23d proximo to be considered as full purchase-money for the plaintiff's right in the agreement." Breach, that the defendant had not paid the 250*l.* A plea set out the deed of November 13th, by which, reciting that the plaintiff had agreed to assign the patent to H., H. paying 1*l.* per pound on the alloy which he should manufacture and vend, the plaintiff assigned to H., subject to the payment of a royalty of 1*l.* per pound on every pound of alloy manufactured by him, to be ascertained in manner and at the times therein mentioned, and H. covenanted to pay a royalty of 1*l.* per pound on every pound of alloy which he should make and sell; and paid quarterly, the first payment to be made on the quarterly day next after the vending of any of the alloy; and, for the purpose of ascertaining the quantity sold, to keep an account of the quantity made and vend, provided that if H. neglected to supply any person desirous of purchasing alloy, it should be lawful for the plaintiff to manufacture and vend the alloy, and use the invention for his own use; that the plaintiff accepted the deed and agreement thereon in the place of the previous agreement, and exonerated H. from any further performance of the agreement; that the defendant, when he entered into the

agreement, had no knowledge of the deed or of the exoneration of H.; that the defendant meant to buy the royalty under the agreement and not under the deed; and that he had no knowledge of the provision in the deed that the plaintiff was to be at liberty to make the alloy for his own use. Replication, that before action the defendant had notice of the deed, and did not, within a reasonable time, repudiate or give any notice to the plaintiff of his intention to repudiate his agreement:—Held, first, that the plea was a good answer to the action, inasmuch as it showed that the plaintiff had, by the deed, incapacitated himself from giving to the defendant that which he had bought. *Webster v. Newsome*, 5 H. & N. 42.

Held, secondly, that the replication was bad. *Id.*

A patentee of an invention for improved beaters for threshing-machines, granted a license to C. to make, manufacture and sell machines, as described in the specification, for a term of years, and during the period to apply the invention to other machines made, or to be made, paying a royalty of 1*l.* for every threshing-machine manufactured by them, and the like sum for every machine made, or to be made, to which the invention should be wholly or in part applied by them; and they covenanted to affix royalty plates to every new and altered machine which should be manufactured or applied by them:—Held, that it was not intended that C. should pay the royalty merely on every threshing machine, but that the true construction of the license was, that they were to pay on all beaters manufactured by C. according to the patent, and applied to machines originally, or by way of renewal. *Goucher v. Clayton*, 11 Jur., N. S. 402; 13 L. T., N. S. 111—V. C. W.

A declaration set out an indenture, containing a license from A. (the patentee) to B., his executors, administrators and assigns, to make and sell certain iron pipes, yielding and paying to A. a royalty of —*l.* for every ton of pipes which B., his executors, &c. should make and sell in pursuance of the license, but such patent rent to be paid on or before the twenty-first day after each quarter; and B. covenanted with A. that he would, seven days after each quarter, deliver to A. an account of pipes sold within the quarter, and would within twenty-one days after the quarter pay to A. the money which should, upon the face of such account, be payable by way of royalty. The declaration, after setting out an assignment of the patent license from B. to the plaintiff, ultimately showed an assignment of the license to R. and M., in trust for the defendants, with a covenant by the defendants with the plaintiff to pay the money and perform the covenants payable and to be performed in respect of the license, and that the defendants made and used, in pursuance of the license, iron tubes, and that thereby sums of money became payable to A. in respect of the license. Breach, non-payment by the defendants of the sums of money;

and further, non-delivery of a true account in writing of the quantity of iron tubes sold:—Held, that the declaration contained a good breach, the covenant to render an account being auxiliary to the covenant to pay, and the defendants being shown to be the licensees of A., and to have made the pipes under such license. *Bowser v. Hodges*, 17 Jur., 1057; 22 L. J., C. P. 194; 13 C. B. 765.

Three descriptions of anchors were well known: 1. The Dutch or common anchor, in which the arms and the shank were all in one piece, the palm or fluke being sometimes placed inside and sometimes outside the extremity of the arm; 2. Rogers's anchor, the peculiarity of which was that the palm or fluke was placed outside the extremity of the arm; 3. Porter's anchor, the arms of which moved on an axis in the shank, the palm being placed inside the arm, with a horn or a toggle at the back, and of the width of the arm. T. took out a patent for improvements in anchors, such improvements mainly consisting in placing the palm at the back or outside or immediately of the breadth of the arm, and making the arm or toggle form part of, and of the same width as the palm, combined with Porter's anchor. In his specification he thus described his invention:—"The improvements are chiefly applicable to that class of anchors known as Porter's anchors, and consist, first, of forming or fixing the palm immediately of the breadth of the arm; secondly, in forming the horn wider than the arm; and thirdly, in forming or affixing the palm of that class of anchor known as Porter's anchor, at the back of the arm;" and after describing the drawings he concluded thus:—"I would remark that I am aware that it is not new to place the palm at the back of the arm of ordinary anchors; this part of the invention therefore consists of combining the fixing of the palms to the back of those arms of anchors which move on an axis. The angles which the faces of the arms and the faces of the palms make to the shank and to each other, may be varied, but it is important that the angles which the palms make to the shank and those made by the arms should be different. The constructions shown are those I employ." W. (having a license from T.) made anchors with the arms moving on an axis, like Porter's, and with the palm at the outside of the arm, with a horn of a greater width than the arm, and nearly identical with that described in T.'s specification and drawings; but he forged the arms, palm, and horn all in one piece, whereas T.'s palm and horn were formed together, and then fixed to the back or "intermediately of the breadth" of the arm. The jury, in an action against W. for non-payment of royalties, and for an account, found, as regarded the palm, that W. had adopted T.'s invention, but not being able to agree as to the horn, they were discharged from any finding as to that:—Held, that T. was entitled to an account of the anchors so made. *Trotman v. Wood*, 16 C. B., N. S. 479.

In a deed by which A. assigned to B., for a term of years, an exclusive license to use a patent, after covenants for payment of sums in the nature of royalties, there was the following clause; "that if it shall happen in any year during the term that the royalties or sums of money covenanted to be paid shall not amount to 2,000*l.*, then B. shall, within fourteen days after the expiration of any year in which it shall so happen, pay to A. such a sum of money as with the royalties will amount to 2,000*l.* for that year; or if B. shall at any time make default in payment of such sum within the time appointed for payment, then it shall be lawful to and for A., by writing signed by him, and indorsed on the deed or duplicate thereof, to declare that the deed, and the license and power thereby granted, shall cease and determine."—Held, that this was not an absolute covenant by B. to pay 2,000*l.* a year during the term, but only empowered A. to put an end to the grant upon non-payment of that sum. *Tielens v. Hooper*, 5 Exch. 830; 20 L. J., Exch. 78.

By an indenture, reciting a previous deed, by which the plaintiff licensed the defendant to use his patent during a term, paying a stated royalty, and a subsequent contract of the defendant with the plaintiff for purchase of half the patent, subject to the former deed, but with benefit to the defendant of half the royalty, the plaintiff, in pursuance of the contract, and in consideration of 2,000*l.* to be paid to him by the defendant, assigned the patent to a trustee, subject to the previous indenture, and in trust to apply the sums accruing from licenses to use the patents, and likewise to apply the royalties for or under the direction of the plaintiff and defendant, in specified proportions, and to stand possessed, as to one moiety of the letters patent, for the plaintiff, as to the other, for the defendant; and the plaintiff covenanted that for and notwithstanding anything done by him, the patent was valid, and should be held and enforced by the trustee without lawful let by the plaintiff, or any claiming under him, or by his act and default; and the defendant covenanted with the plaintiff to pay him the 2,000*l.* by installments. To a declaration for non-payment of such installments, the defendant pleaded, that the plaintiff was not the first inventor, by reason whereof the patent, before the supposed breach of covenant, was void:—Held, that the plea was bad; for, first, no eviction was stated; and in fact, the matter pleaded did not go to the whole consideration, since, even if the patent was void, the first executed deed would have bound the defendant by estoppel, to payment of the royalty; and by the latter deed he became entitled to half the royalty; and secondly, that the covenant to pay the 2,000*l.* was an independent covenant, and capable of being enforced whether the plaintiff's covenants were performed or not. *Cutler v. Bower*, 11 Q. B. 978; 12 Jur. 721; 17 L. J., Q. B. 217.

R. granted by deed to a company a license

to use a patented invention for manufacture of rifles on payment of a royalty, which the company covenanted to pay, for every rifle manufactured or produced "under the powers hereby granted." At the time the deed was entered into, as well as previously, the company had been manufacturing arms, under contracts, for the British government, in accordance with R.'s patent, and without paying royalties, under the belief that they were legally entitled to do so; and the deed itself, as R. knew, was intended by the company to apply only to rifles exclusive of those manufactured for the government. Some years afterwards it was decided that the right of the crown to the free use of a patent did not extend to manufacturers fulfilling government contracts, and R. thereupon brought his action under the deed to recover royalties on all arms so manufactured from the time that the deed was entered into:—Held, that he was not entitled to recover, for though the terms of the license would, *prima facie*, be taken to include every exercise of the patented invention, the words "under the powers hereby granted," contained a latent ambiguity, which admitted of pari evidence to show that the deed was not intended to apply to rifles manufactured for the government. *Roden v. London Small Arms Company*, 46 L. J., Q. B. Div. 213; 25 W. R. 269.

A licensee of a patented invention was ordered to account for all instruments made by him pursuant to the patent. He alleged that the instruments which he had made were not covered by the patent according to its true construction, and in support of his contention tendered in evidence a prior American specification (a copy of which was in the Library of the Commissioners of Patents, but was not proved to have been known to the patentee), for the purpose of showing that a construction large enough to cover the instruments made by the licensee would make the patent bad for want of novelty, and therefore ought not to be adopted:—Held, that the evidence was inadmissible. *Adie v. Clark*, 8 L. R., Ch. Div. 131; 35 L. T., N. S. 349; 24 W. R. 1007—C. A.

#### IV. INFRINGEMENT.

##### 1. What Infringements Actionable.

In general.]—Where a patent is for an invention consisting of several parts, the imitation of any part of the invention is an infringement of the patent. *Smit's v. London and North-Western Railway Company*, 2 El. & Bl. 69; 17 Jur. 1071.

The sale of an article of the same fabric, and made in the same manner as the article which is the subject of the patent, is evidence of a using of the invention within the prohibitory clause of the letters patent. *Gilson v. Brand*, 4 M. & G. 179; 4 Scott, N. R. 844.

The merely "exhibiting to sale" imitations of an invention is not any infringement of the patent. *Minter v. Williams*, 5 N. & M. 647; A. & E. 251; 1 H. & W. 585.

But the manufacture of a patent article for the purpose of sale and offering it for sale, although no sale is actually effected, is a user of the invention. *Ozley v. Holden*, 8 C. B., N. S. 666; 30 L. J., C. P. 68.

An infringement of any part of a patent process is actionable, if that part is of itself new and useful, so as that it might be the subject-matter of a patent, and is used by the infringer to effect the object proposed, either wholly or partially, by the patentee. *Patent Bottle Envelope Company v. Seymer*, 5 C. B., N. S. 164; 5 Jur., N. S. 174.

A patent for an entire combination is not infringed by a different combination, for the same object, of the same elements, though important, or of equivalents for them, if not a mere colorable evasion or imitation. *Curtis v. Platt*, 35 L. J., Chanc. 852—H. L.

If a patent is taken out for an invention by means of a combination, the use of a subordinate part of the combination is no infringement of the patent, unless such part is new and material. *White v. Fenn*, 15 W. R. 348; 15 L. T., N. S. 505—C. P.

In a patent for an arrangement and a combination of parts so as to form an entire machine, and not for any particular part of the machine, protection will not be given to a particular part the advantages of which are altogether collateral to the invention for which protection is claimed by the specification, and which would not in itself be patentable. *Parkes v. Stevens*, 8 L. R., Eq. 358; 38 L. J., Chanc. 627; 17 W. R. 846—V. C. J.

Demurrer to a bill stating that defendants imported barks and sold them to dyers, who used them in infringement of the plaintiff's patent, overruled. *Bancroft v. Warder*, Romilly's Notes of Cases, 103.

When a pattern of an article has been registered under 21 & 23 Vict. c. 70, s. 5, the design will be infringed by an article to all appearance the same, though not actually identical. *McCrea v. Holdsworth*, 6 L. R., Ch. 418.

A patent for a mechanical arrangement whereby a particular operation may be performed for a particular purpose, the mechanical contrivances so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of mechanical contrivances, for a similar purpose, if the mode of operation is sufficiently distinct, and different in principle from that which was described or claimed in the patent, and the object achieved is also sufficiently distinct or novel, and does not form an essential part of the patent. *Sazby v. Clunes*, 43 L. J., Exch. 228—H. L.

The principle of an invention for simultaneously moving railway points and making it possible to move the signal lever, is not

equivalent to the principle of simultaneously moving the signals and the points. *Ib.*

When a patent is taken out for a combination, it will protect the several subordinate parts and all subordinate combinations of such parts, provided the subordinate parts or combinations are themselves properly subjects for a patent, and also provided that it is clearly and precisely defined by the specification what are the subordinate parts or combinations of parts in respect of which, as well as the entire combination, protection is claimed. *Clarke v. Adie*, 2 L. R., App. Cas. 315; 46 L. J., Chanc. Div. 585; 36 L. T., N. S. 928—H. L. See *S. C.*, 3 L. R., Ch. Div. 184; 35 L. T., N. S. 349; 24 W. R. 1007—C. A.; and 10 L. R., Ch. 667; 33 L. T., N. S. 295; 23 W. R. 898.

In determining whether a defendant has infringed the plaintiff's patent, the court will regard the substance of the invention, and if the defendant has infringed the substance of the invention, although he may have made immaterial variations or used mechanical equivalents, an injunction will be granted. *Thorn v. Worthing Skating Rink Company*, 6 L. R., Ch. Div. 415, n.

**In particular instances.**—The specification of a patent for an invention of "improvements in the manufacture of envelopes," described a machine in which a piece of paper was held upon a platform, while the flaps of the envelope were folded, and concluded by claiming "the so arranging machinery that the flaps of envelopes may be folded thereby, as herein described."—Held, that a machine in which flaps of an envelope were folded might be an infringement of the patent, although the envelope was not held down during the operation of folding. *De la Rue v. Dickinson*, 7 El. & Bl. 733; 3 Jur., N. S. 841.

The specification of a patent for an invention with a similar title, described and claimed "the application of gum or cement to the flaps of envelopes by apparatus acting in the manner of surface printing."—Held, that an apparatus for applying the gum might be an infringement, although it acted only in part in the manner of surface printing, according to the description contained in the specification. *Ib.*

A declaration stated, that certain persons, through whom the plaintiffs claimed, were "the inventors of certain improvements in giving signals and sounding alarms in distant places by means of electric currents transmitted through metallic circuits;" and that the defendants had "wrongfully used and put in practice the said invention." In the title of the patent and in the specification the electric currents were throughout described as being transmitted through metallic circuits, but no claim was made to metallic circuits as a substantive invention:—Held, first, that the finding of the jury of an infringement in respect of one of the improvements was a sufficient finding of the infringement alleged

in the declaration. *Electric Telegraph Company v. Brett*, 19 C. B. 888; 15 Jur. 579; 20 L. J., C. P. 123.

Held, secondly, that inasmuch as the patentees, by the specification, made no claim to metallic circuits, but only an improved method of using the electric currents, the specification must be considered as comprising all circuits which are metallic, as far as it is material to the improvements claimed; and that, therefore, any infringement of such improvements, although the electric current should not be wholly transmitted through a metallic circuit, was an infringement of the patent. *Id.*

Held, thirdly, that whatever might have been the case if the method of transmitting the electric current adopted by the defendants had been publicly known at the time of granting the patent, yet that the title gave sufficient notice to any person secretly acquainted with that discovery. *Id.*

The plaintiff took out a patent for "improvement in the manufacture of candles, and in apparatus for applying light." In his specification he claimed, first, the mode of manufacturing candles by the application of peculiarly-formed plaited wicks; secondly, the mode of manufacturing candles by the application of two or more plaited wicks so disposed that the ends always turned outwards; and thirdly, the mode of applying lenses to lamps, in order to concentrate or conduct a portion or portions of the rays of light to a distance; the plaintiff afterwards entered a disclaimer as to the first and third parts of his invention, and he sued the defendant for an infringement of the second part. At the trial the plaintiff produced a candle purchased of the defendant, the wicks of which were so plaited that the ends always turned outwards:—Held, that the patent was not for the candle itself, but for the mode of manufacturing it, and that the mere production of a candle made by the defendant was no evidence of an infringement of the plaintiff's patent. *Palmer v. Wagstaff*, 9 Exch. 494; 2 C. L. R. 1052; 23 L. J., Exch. 217.

When a patent has been obtained for the use of a known substance, described by its specific name, and it is afterwards discovered that the use of two other and equally known substances will produce the same effect, though the evidence of scientific men may go to show that the two substances become, in the act of so using them, the one substance described in the patent, their use will not constitute an infringement of the patent. *Union v. Heath (in error)*, 5 H. L. Cas. 505; 10 C. B. 713; 2 Jur., N. S. 1029; 25 L. J., C. P. 8.

The precipitation of animal and vegetable matter from sewage water, by means of byrate of lime, for agricultural purposes, is a good subject-matter for a patent; and if another person uses the same process and obtains a product, not for the purposes of commercial profit, but for the purpose solely of deodorizing and purifying the sewage water, he is

not guilty of an infringement of the patent. *Higgs v. Goodwin*, El., Bl. & El. 529; 4 Jur., N. S. 258; 27 L. J., Q. B. 145; affirmed on appeal, 27 L. J., Q. B. 411—*Exch. Cham.*

A person claimed an invention for the purification of gas, by means of hydrated or precipitated oxides of iron, and also a process of revivification, by which the old materials could again be applied as a purifying element:—Held, that an application to the purification of gas of a natural substance called bog ochre, containing precipitated oxides of iron, was not an infringement of the patent, but the revivification of that natural substance was. *Hills v. Liverpool United Gaslight Company*, 9 Jur., N. S. 140; 32 L. J., Chanc. 26; 7 L. T., N. S. 537—*C.*

Protection being claimed by the specification of a patent for improvements in spherical gas lamps for railway stations and public places, for "the arrangement and combination of parts hereinbefore described and represented in the drawings annexed, in the manufacture of railway station and other lamps:—Held, that the use by another of a sliding spherical door for spherical lamps, which was a feature in the patentee's lamps, and one of the parts described in his specification, was no infringement of his patent. *Purkes v. Stevens*, 8 L. R., Eq. 358; 38 L. J., Chanc. 627; 17 W. R. 846.

W. took out a patent for "improvements in the manufacture of frills or ruffles, and in the machinery or apparatus employed therein." The specification described a process of plaiting fabrics by a reciprocating knife in combination with a sewing machine. The first claim was for the general construction, arrangement and combination of machinery for producing plaited frills or trimmings in a sewing machine; the second was for the application and use of a reciprocating knife for crimping fabrics in a sewing machine; and the third, for the peculiar manufacture of crimped or plaited frills or trimmings "as hereinbefore described" and illustrated by a drawing. A patent was afterwards taken out by O. for "improvements in doubling, folding or plaiting woven or other web fabrics, and in the machinery or apparatus employed therein or connected therewith." In this O. imitated with slight variations W.'s reciprocating knife, but did not combine its use with a sewing machine:—Held, first, that W.'s patent was not for the manufactured product, but for the process of manufacturing it. *Wright v. Hitchcock*, 5 L. R., Exch. 31; 39 L. J., Exch. 97.

Held, secondly, that W.'s patent was not limited to the manufacture of plaited fabrics by the knife in combination with a sewing machine. *Id.*

Held, thirdly, that O.'s process was therefore an infringement. *Id.*

The defendants bought and sold, in the way of trade, articles manufactured by O.'s process, under the description of "Orr's patent machine-made plaiting," but they were not aware that Orr's process was an infringe-



ment, nor of the existence of W.'s patent:—**Held**, that they were guilty of an infringement of W.'s patent. *Ib.*

The plaintiffs were patentees of a stopper for popping bottles containing aerated waters, which was described in their specification as being made "of hard wood, having a greater specific gravity than water, such as lignum vitæ, or other suitable material." The object gained by the patent was that, in filling the bottles in an inverted position, the stopper, which had been thrust into the bottle, would sink of its own weight into the neck, where it would be retained by the gases in the bottle and so stopper it. The defendant obtained a patent for a stopper of wood, originally of less specific gravity than water, to which he affixed a metal clip, which pulled the stopper down till the bottle was filled. The clip was then removed and used in filling other bottles in the same way. There was evidence that the defendant's stopper became by immersion of greater specific gravity than water:—**Held**, that the defendant's stopper was a colorable imitation of that of the plaintiffs, and that the plaintiffs were entitled to an injunction. *Barrett v. Vernon*, 25 W. R. 843; 35 L. T., N. S. 755—V. C. B.

A patent was taken out for improvements in a machine for clipping horses and other animals; one of the improvements relied upon was the combination in the machine of four things, viz.—(1) the arching of the cutter plate so as to give elasticity; (2) the use of fixed stems instead of screws to connect the cutter plate and comb plate; (3) the adjustment of certain nuts and washers so as to prevent friction; and (4) the mode of communicating motion to the cutter plate so as to bring it into the true time of cutting. The first item was not described or referred to in the specification, but was merely shown by drawings attached to the specification; each of the three other items was admitted to have been well known and used in the trade; the specification did not contain any distinct claim in respect of the combination:—**Held**, that the specification was not sufficient, and that the combination of the four items was not protected by the patent. *Clarke v. Adie*, 3 L. R., App. Cas. 815; 46 L. J., Chanc. Div. 585; 36 L. T., N. S. 923—H. L. See *S. C.*, 3 L. R., Ch. Div. 134; 45 L. J., Chanc. Div. 228; 35 L. T., N. S. 349; 24 W. R. 1007—C. A.; and 10 L. R., Ch. 667; 33 L. T., N. S. 295; 23 W. R. 898.

As to what novelty of invention is necessary to sustain patent,—see this title, I.

As to defenses to actions for infringements,—see this title, IV., 2, a.

As to evidence of infringement,—see this title, IV., 2, c.

**Place of infringement.**—The sale in England of a patent article imported from abroad is a user of the invention within the prohibition of the letters patent. *Walton v. Lavater*, 8 C. B., N. S. 162; 6 Jur., N. S. 1251; 20 L. J., C. P. 275; 3 L. T., N. S. 272.

Though the manufacture in England of the several parts of a patented machine, and the exportation of those parts, may not be an infringement of the patent, the machine being the novelty, and the parts being old, it is otherwise where the part exported is itself the patented invention. *Goucer v. Clayton*, 11 Jur., N. S. 462; 13 L. T., N. S. 115—V. C. W.

A patent granted for the United Kingdom, the Channel Islands, and the Isle of Man, is not infringed by acts done between Malta and Alexandria. *Newall v. Elliott*, 10 Jur., N. S. 954; 13 W. R. 11; 10 L. T., N. S. 792—Exch.

The importation and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement. *Elmslie v. Dourrier*, 9 L. R., Eq. 217; 30 L. J., Chanc. 828; 18 W. R. 665—V. C. J.

Where the owner of a patent manufactures and sells the patented article in a foreign country as well as in England, the sale of the article in one country implies a license to use it in the other. But if he has assigned his patent in either country, the article cannot be sold so as to defeat the rights of the assignee. *Betts v. Willmott*, 6 L. R., Ch. 239; 25 L. T., N. S. 188; 19 W. R. 869.

The owner of an English patent manufactured the patented article in France as well as in England. In a suit to restrain the sale of the article in England, the plaintiff proved that it was not made at his manufactory in England, but could not prove that it was not made at his manufactory in France. The bill was dismissed with costs. *Ib.*

B. held an English patent for the manufacture of a combined metal, to be applied as capsules to put on bottles. T. (who resided and carried on the business of a brewer in Scotland,) purchased capsules, made according to the process described in the patent, from a foreign manufacturer, and, in Scotland, put these capsules upon his beer bottles, which he then sent to his agents in England for transshipment and exportation. There was no evidence that the beer was sold in England for consumption there:—**Held**, that though the capsules were put on in Scotland, their use while the beer remained in England was a continued user of them which amounted to an infringement of the patent. *Neilson v. Betts*, 5 L. R., H. L. Cas. 1; 40 L. J., Chanc. 817; 19 W. R. 1121. And see *Betts v. Neilson*, 8 De G., J. & S. 82; 11 Jur., N. S. 679; 34 L. J., Chanc. 537; 13 L. T., N. S. 719; 13 W. R. 1028; *S. O.*, 3 L. R., Ch. 429; 37 L. J., Chanc. 321.

## 2. Remedies for Infringement

(a) By and against whom Actions are Maintainable; and Defenses.

**Assignees.**—Where there are two assignees of a patent, and one of them dies, an action for an infringement in his lifetime descends

to the survivor, who is entitled to recover the whole damages. *Smith v. London and North-Western Railway Company*, 2 El. & Bl. 69; 17 Jur. 1071.

An assignee of a separate and distinct part of a patent is entitled to sue for an infringement of such part, without joining persons who are interested only in the other part of the patent. *Dunnicliff v. Mallett*, 29 L. J., C. P. 70; 7 C. B., N. S. 209; 6 Jur., N. S. 252; 8 W. R. 260.

So the assignee of two several moieties of a patent has a sufficient legal interest in the patent to sue for an infringement. *Walton v. Lavater*, 29 L. J., C. P. 275; 8 C. B., N. S. 162.

An action is maintainable although there has been no infringement since the defendant has received notice that the entire interest in the patent has become vested in the assignee. *Id.*

The assignee of a patent may maintain a suit against the assignor, and subsequent licensees from the assignor with notice of the assignment, to restrain them from using the patent, although at the time of the institution of the suit, the assignment has not been registered. *Hassall v. Wright*, 10 L. R., Eq. 509; 40 L. J., Chanc. 145; 18 W. R. 821—V. C. M.

Semble, that registration of the assignment of a patent relates back to the date of the assignment, so as to entitle the assignee to maintain a suit to restrain an infringement, instituted between the dates of the assignment and the registration. *Id.*

**Agents.**—To a bill stating an agreement made between a general agent of the patentees of an American invention, to introduce and sell the invention in Great Britain, and the plaintiff, whereby he was to have the sole agency and control of the working of the patent in England, upon certain terms, including a share of royalties and profits, praying for an account for damages, and an injunction to restrain future infringement, the defendants, who were alleged to be using the invention, demurred:—Held, that the plaintiff was a mere agent for the sale of the invention, and was in no such position as gave him the right to file such a bill, which was in the form of a patentee's bill for infringement. *Adams v. North British Railway Company*, 29 L. T., N. S. 367—C.

**Defendants.**—The directors of a company are personally responsible for the infringement of a patent by their workmen, notwithstanding such infringement may be in contravention of orders. *Betts v. De Vitre*, 37 L. J., Chanc. 325; 3 L. R., Chanc. 429; 18 L. T., N. S. 165.

**Ignorance of existence of patent.**—Ignorance of the existence of a former invention is no answer to a charge of infringement, where the second invention is capable of being accurately represented as an imitation of the former. *Curtis v. Platt*, 11 L. T., N. S. 245—C.

A patentee cannot maintain a suit against a retail dealer who unwittingly sells articles which are an infringement of his patent, provided such retail dealer gives full information as to the persons from whom he obtained the articles complained of, and promises not to retail any more. *Betts v. Wilmott*, 18 W. R. 946—V. C. J.

**Questioning validity of patent infringed.**—Proceedings in chancery for an infringement of a patent, the validity of which was in question, were referred to an arbitrator, who awarded that the patent was not illegal and void:—Held, that in an action between the same parties for another infringement, the defendant was not estopped from disputing the validity of the patent. *Newall v. Elliot*, 1 H. & C. 797; 9 Jur., N. S. 319; 32 L. J., Exch. 120; 11 W. R. 438; 7 L. T., N. S. 733.

A patentee brought an action for damages for infringement against a firm, who gave judgment by consent before the delivery of a declaration, and immediately took a license to use the patent for a term. On a bill being filed by the patentee, after the expiration of the license, to restrain a further infringement of his patent by the defendants in the action, and certain other persons who had joined the firm after the date of the judgment:—Held, that the defendants in the suit were not estopped, either by the license or by the judgment, from denying the validity of the patent. *Goucher v. Clayton*, 11 Jur., N. S. 107; 34 L. J., Chanc. 239; 13 W. R. 336; 11 L. T., N. S. 732—V. C. W.

The plaintiff and the defendant were each of them possessed of a separate patent for the construction of spooling machines. The plaintiff was negotiating for the sale of his machines to different manufacturers, some of whom were already using the defendant's machines under licenses from him. The defendant wrote to these manufacturers letters stating that the plaintiff's machines were infringements of a patent of his, and that if they were used he (the defendant) would claim royalties for their use, and if that were not paid take legal proceedings. In consequence of these threats, the plaintiff lost the sale of his machines. He then brought an action, the declaration stating the above facts, and averring that the letters were falsely and maliciously written, and the defendant pleaded not guilty. At the trial, the plaintiff tendered evidence to show that the defendant's patent (which had not been disputed by scire facias or otherwise), was void for want of novelty, so that the plaintiff's machines were no infringement of the defendant's patent; and the evidence was rejected and a nonsuit directed:—Held, that this evidence was properly rejected, and that the nonsuit was right. *Wren v. Wield*, 38 L. J., Q. B. 327; 4 L. R., Q. B. 730; 20 L. T., N. S. 277.

A. and B. entered into partnership for the purpose of working a patent taken out by B, the partnership deed providing that the

**P**atent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, and warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership, having continued for seven years, was dissolved by deed, and A. and B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers, asserting that A. was infringing his patent, and threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—Held, that although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, and that B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars complained of, to have instituted proceedings against A. to establish its validity. On B. declining to undertake to institute any such proceedings, the court granted the injunction. *Azmann v. Lund*, 43 L. J., Chanc. 655; 18 L. R., Eq. 330; 23 W. R. 789; 31 L. T., N. S. 119—V. C. M.

The rule that an assignor of a patent is estopped from disputing its validity does not prevent his partner from separately raising that defense to an action for infringement. *Heugh v. Chamberlain*, 25 W. R. 742—R.

**Recovery of penalty for imitating or using name or mark of patentee.**—In an action for a penalty under 5 & 6 Will. 4, c. 83, s. 7, for putting on an article made according to a patent, the words "K. & G. Patent Elastic," without the license of the patentee, it is no defense that the invention was not a new manufacture. *Myers v. Baker*, 3 H. & N. 802; 28 L. J., Exch. 90; 7 W. R. 66.

But it is necessary to prove that such words did imitate, and were so put on with a view of imitating, the mark of the patentee. *Id.*

**Threatening suits for infringement.**—There is no presumption in law in favor of the validity of a patent, and therefore a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no bona fide intention to follow up his threats by taking such proceedings, and the court will, in such case, restrain him from making such publication. *Rollins v. Hinks*, 13 L. R., Eq. 355; 41 L. J., Chanc. 358; 20 W. R. 287; 26 L. T., N. S. 56—V. C. M.

A person alleging the invalidity of a patent is not bound to assert his claim by scire facias, in order to establish his right to

restrain the publication of statements by the patentee, threatening with legal proceedings persons buying articles of his manufacture alleged to be infringements of the patent. *Id.*

The court will restrain a patentee from issuing circulars threatening legal proceedings against infringers, unless he will undertake to commence proceedings to assert the validity of his patent; and the fact that the party seeking the aid of the court was formerly a licensee of the patent under the patentee, and had himself concurred in issuing similar circulars, does not prevent the court interfering after the expiration of the license. *Azmann v. Lund*, 18 L. R., Eq. 330; 43 L. J., Chanc. 655; 23 W. R. 789; 31 L. T., N. S. 119—V. C. M.

(b) Pleading and Practice; Particulars, Interrogatories, Inspection and Discovery.

**Declarations.**—A form of declaration for the infringement of a patent is given in Schedule (B), No. 31, to the Common Law Procedure Act, 1853.

It is material to aver that the patentee has complied with the proviso which requires him to enroll a specification within six calendar months. *Bentley v. Goldthorp*, 2 D. & L. 795; 1 C. B. 368; 9 Jur. 470; 14 L. J., C. P. 115.

**Several pleas.**—Pleas denying that parts of the invention were known, and are not the subject of letters patent, will not be allowed with pleas denying the novelty of the invention as a whole, and that the invention was a new manufacture within the meaning of the 21 Jac. 1, c. 3. *Walton v. Bateman*, 4 Scott, N. R. 397; 3 M. & G. 773.

In an action for an infringement of a patent, for six distinct improvements in an old machine, the defendants were allowed to plead that two parts of the invention were not, nor was either of them, a new manufacture within the statute of James. But the court refused to allow them to plead, that, as to a part, A. was the first and true inventor; and that, before the grant of the patent, A. and others publicly used and exercised in England a part of the invention. *Bentley v. Keighley*, 6 M. & G. 1039; 7 Scott, N. R. 987; 1 D. & L. 944; 13 L. J., C. P. 167.

A plea alleging that the plaintiff falsely represented to the Queen that the invention was an improvement; that her Majesty, confiding in such representation, made the supposed grant; that such representation was false; and that the invention was not an improvement, might properly be pleaded with a plea that the invention was of no use to the public, the two pleas not being substantially the same. *Bedells v. Massey*, 7 M. & G. 630; 8 Scott, N. R. 337; 8 Jur. 808; 13 L. J., C. P. 178.

The court allowed,—first, not guilty; secondly, the patentee not the inventor; thirdly, non-concessit; fourthly, the invention not a manufacture; fifthly, the invention not new;

and, sixthly, a traverse of the specification, on an affidavit of the defendant's attorney, that he was advised and believed that the defendant had just ground to traverse the several matters. *Platt v. Elce*, 8 Exch. 364; 17 Jur. 188; 22 L. J., Exch. 102.

In an action for infringing a patent, to which a disclaimer as to part has been entered, the defendant will not be allowed to plead that the whole invention was not new, and also, that the undisclaimed part was not new. *Clark v. Kenrick*, 12 M. & W. 219; 1 D. & L. 392; 13 L. J., Exch. 6.

The court refused to strike out a plea, that the instrument in writing in the declaration mentioned did not particularly describe and ascertain the nature of the invention in the letters patent. *Ib.*

The court disallowed a plea, that the plaintiff, having petitioned for letters patent, represented to the solicitor-general, to whom the matter was referred, that the invention consisted of matters mentioned in a paper writing exhibited to the solicitor-general, who confiding therein, reported that the letters patent might be granted; that after the grant, the plaintiff enrolled his specification and falsely described his invention therein, and that so much of the invention as was stated in the specification was not part of the invention in the paper writing and letters patent mentioned, and was not part of the invention for which the letters patent were granted. *Hincock v. Noyes*, 9 Exch. 388; 2 C. L. R. 1060; 23 L. J., Exch. 110.

**Effect and proof of pleas.**—A plea that the invention is not a new manufacture within 21 Jac. 1, c. 3, involves the question, not only whether the alleged patent is new, but also whether it is a manufacture within the meaning of the statute. *Walton v. Bateman*, 8 M. & G. 773; 4 Scott, N. R. 397.

In an action by the assignee of a patent for an infringement, non concessit is a good plea. *Bennett v. Smith*, 2 D. & L. 380; 13 M. & W. 552; 8 Jur. 1034; 14 L. J., Exch. 47.

When letters patent were granted for improvements in apparatus for the manufacture of certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the court directed the verdict to be entered for the defendant upon an issue taken upon the novelty of the invention. *Gumble v. Kurts*, 8 C. B. 425.

A declaration alleged that the plaintiff was the inventor and the grantee of the patent: plea, non concessit:—Held, that the plaintiff having, at the trial, put in the letters patent and specifications, and shown the novelty of the invention, was entitled to a verdict, on the issue joined on the plea. *Nichols v. Rose*, 8 C. B. 679.

Pleas which deny that the plaintiff was the true and first inventor, and that the manufacture was not new, do not bind the plaintiff to the description of the invention as given in the specification, so as to preclude him from

giving evidence to show that the invention does not consist, as might be inferred from the specification, in the use of several new matters, but in the new combination of several old matters. *Bateman v. Gray*, 8 Exch. 906; 22 L. J., Exch. 290.

To a declaration stating that the plaintiff was the first inventor of a new manufacture, and that the defendant infringed his patent right, a plea that the invention was not a matter for which letters patent would by law be granted, does not put in issue the novelty of the invention. *Booth v. Kennard* (in error), 1 H. & N. 527; 2 Jur., N. S. 21; 26 L. J., Exch. 23—Exch. Cham.

In an action for breach of an agreement to make the necessary periodical payments for stamp duty, to keep alive a patent which had been assigned to the defendant, a plea of non concessit, in the absence of any fraud, or of any warranty that the invention was new, or was a manufacture within the statute of James, puts in issue merely the fact of the Queen having granted the patent, and not its validity. *Smith v. Neale*, 2 C. B., N. S. 67; 3 Jur., N. S. 516; 26 L. J., C. P. 143.

In an action by an assignee, a plea that the property is not vested in him is bad, as embarrassing, and will be set aside. *Cottula v. Soames*, 3 F. & F. 93—Mellor.

To an action for the infringement of a patent for improvements in a cabriolet, the general issue, that the improvements were not new, and that the plaintiff was not the true and first inventor, were pleaded:—Held, that, on this state of the pleadings, it could not be contended that the patent was illegal, as being a monopoly. *Gillett v. Wilby*, 9 C. & P. 334—Coltman.

Held, also, that though all the improvements claimed must be shown to be new, yet it need not be shown that the defendant's cabriolet was an imitation of the whole of them; but an imitation of one was sufficient to maintain the action. *Ib.*

A plea which refers for explanation to drawings not traced on the record, but annexed to it, is inadmissible. *Betts v. Walker*, 14 Q. B. 363; 14 Jur. 647. See *Sealy v. Browne*, 9 Jur. 587; 14 L. J., Q. B. 169.

A plea that the invention is not of such use to the public as to make it a sufficient consideration for the grant of the letters patent is bad. *Ib.*

Upon an issue of not guilty to an action for infringement of a patent, the question whether there was a fraudulent evasion of the patent does not arise. *Stead v. Anderson*, 4 C. B. 806; 11 Jur. 877; 16 L. J., C. P. 250.

In determining whether a defendant has infringed a patent, no question arises as to his intention, but only as to his acts. *Ib.*

A plea, that the plaintiff was not the first and true inventor, is proved by showing a publication before the invention. *Ib.*

When the specification described a different and more extensive invention than that for which the patent was granted:—Held, that this objection might be taken either on a plea

that the patentee did not particularly describe the nature of his invention, or on a plea that the invention described was not the invention for which the letters patent were granted. *Croll v. Edge*, 9 C. B. 470; 14 Jur. 553; 9 L. J., C. P. 261.

A declaration averred that by indenture between the grantee and the plaintiff, letters patent were duly assigned to the plaintiff. Plea, that the letters patent were not assigned as alleged:—Held, first, that the allegation amounted to a statement not only that the indenture had been executed, but that the letters patent had been duly assigned to the plaintiff, so that he had a right to maintain the action as the sole and exclusive proprietor, in pursuance of the 15 & 16 Vict. c. 83, and therefore the defendant might show that the assignment was not registered. *Chollet v. Hoffman*, 8 Jur., N. S. 935; 26 L. J., Q. B. 249; 7 El. & Bl. 686.

Held, secondly, that the defendant might insist on the want of registration of the assignment, notwithstanding his notice of objections made no reference to the assignment, inasmuch as the requirements of the 5 & 6 Will. 4, c. 83, as well as of the 15 & 16 Vict. c. 83, were confined to notices affecting the validity of the patent. *Ib.*

As to what defenses are available in actions for infringement,—see this title, IV., 2, a.

**Particulars of breaches and objections.**—[By 15 & 16 Vict. c. 83, s. 41, in any action in any of the superior courts of record at Westminster for the infringement of letters patent, the plaintiff shall deliver with his declaration particulars of the breaches complained of in the action;

And the defendant, on pleading thereto, shall deliver with his pleas particulars of any objections on which he means to rely at the trial in support of the pleas in the action;

And at the trial of such action no evidence shall be allowed to be given in support of any alleged infringement or of any objections impeaching the validity of such letters patent which shall not be contained in the particulars delivered:

Provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent shall be stated in such particulars:

Provided also, that it shall and may be lawful for any judge at chambers to allow such plaintiff or defendant to amend the particulars delivered, upon such terms as to such judge shall seem fit. (A similar and more comprehensive enactment than that contained in 5 & 6 Will. 4, c. 83, s. 5.)]

In an action for infringement of Talbot's patent for improvements in obtaining pictures or representations of objects, the court refused to compel the plaintiff in his particulars of breaches to specify particularly the persons and occasions, and the particular

parts of the specification alleged to have been infringed, although the declaration merely averred an infringement in general terms. *Talbot v. La Roche*, 15 C. B. 310.

The plaintiffs carried on the business of machine-makers, and in their business sold machines to certain persons. The defendant wrote letters and made verbal statements to such persons, alleging that the machines so sold were infringements of a patent which he had obtained for such machines, and making claims in respect of such alleged infringement and the use of the machines. An action having been brought by the plaintiffs in respect of the injury caused by these letters and statements, the defendant pleaded not guilty. The court ordered him to deliver particulars to the plaintiffs, showing in what part or parts the machines of the plaintiffs mentioned in the declaration were an infringement of the defendant's patents, and pointing out by reference to line and page of his specifications what part of the inventions therein described he alleged to have been infringed. *Wren v. Wild*, 38 L. J., Q. B. 88; 4 L. R., Q. B. 213; 20 L. T., N. S. 277.

The practice prescribed by 15 & 16 Vict. c. 83, s. 41, with respect to actions for the infringement of letters patent, ought to be followed in suits in equity as closely as circumstances will permit. *Finnegan v. James*, 19 L. R., Eq. 72; 44 L. J., Chanc. 185; 23 W. R. 373—R.

A plaintiff in a patent suit ought either to state in his bill the particulars of the breaches complained of, or to deliver along with his bill a written statement of such particulars, which statement need not be filed. A defendant in such a suit ought to set forth in his answer the particulars of any objections on which he relies. *Ib.*

Although upon the trial of questions in a patent suit the particulars of breaches should give the defendant full, fair, and distinct notice of the case intended to be made against him, it is not necessary, in the case of an alleged infringement of a patent for improvements of a particular article (*e. g.*, cartridges), for the particulars to point out the precise portions of the specification alleged to have been infringed when the matter alleged to be an infringement has been made an exhibit. *Butley v. Kynock*, 19 L. R., Eq. 229; 44 L. J., Chanc. 219; 31 L. T., N. S. 573; 23 W. R. 200—V. C. B.

The provisions contained in these statutes, as to notice of objections for infringement of a patent, are confined to objections affecting the validity of letters patent; and a defendant may object to a validity of an assignment of the patent, though no notice of such objection has been given. *Chollet v. Hoffman*, 26 L. J., Q. B. 249; 7 El. & Bl. 686.

A particular of objections must be precise and definite; it is not sufficient to say that the improvements, or some of them, have been used before: the defendant should point out which. *Fisher v. Dewick*, 4 Bing. N. C.

706; 6 Scott, 587; 6 D. P. C. 789; 1 Arn. 282.

A defendant pleaded, first, that the nature of the invention and manner in which it was performed were not particularly described in the specification; and, secondly, that the invention was not new; and the objections delivered with the pleas stated, first, that the specification did not sufficiently describe the nature of the invention and the manner in which it was to be performed; and, secondly, that the invention was not new, as being wholly or in part used and made public before the obtaining of the letters patent:—Held, that the first of these objections was sufficient, but that the second was bad, and ought to have pointed out what portions of the invention were previously in use. *Heath v. Unwin*, 2 D., N. S. 482; 10 M. & W. 684; 6 Jur. 1068; 12 L. J., Exch. 47.

The notice of objections ought to contain more particular information than that which is necessarily conveyed by the pleas. *Jones v. Berger*, 5 M. & G. 208; 6 Scott, N. R. 208; 7 Jur. 883; 12 L. J., C. P. 179. S. P., *Betts v. Walker*, 14 Q. B. 363.

When a defendant pleads that the patentee was not the first inventor, and that the alleged invention was not new, he is not bound to state in his objections who was the first inventor, or under what circumstances the alleged improvements had been used previously. *Russell v. Ledsam*, 11 M. & W. 647; 1 D. & L. 847; 7 Jur. 585; 12 L. J., Exch. 439; *Heath v. Unwin*, 2 D., N. S. 482; 10 M. & W. 684; 6 Jur. 1068; 12 L. J., Exch. 47. S. P., *Bulnois v. Muckenzie*, 4 Bing. N. C. 127; 6 D. P. C. 215; 5 Scott, 489.

Where a defendant pleads, that the report of the judicial committee of the privy council on which the letters patent were granted was obtained by fraud, covin and misrepresentation, he ought to state in his notice of objections the species of fraud, covin and misrepresentation on which he intends to rely. *Id.*

Notices of objection were, first, that the patentee did not, by the specification, sufficiently describe the nature of the invention; secondly, that he had not caused any specification sufficiently describing the nature of the invention to be enrolled:—Held, that the last objection was not sufficiently precise. *Leaf v. Topham*, 2 D. & L. 863; 14 M. & W. 146; 14 L. J., Exch. 231.

A notice of objections stated that the invention was known to, and used by, M. R., J. W. and others, before the grant of the patent. The court refused to strike out the words "and others." *Bentley v. Keighley*, 8 Scott, N. R. 372; 7 M. & G. 652; 1 D. & L. 944; 13 L. J., C. P. 167.

The court has a general power to order a particular of the alleged infringements. *Electric Telegraph Company v. Nott*, 4 C. B. 462; 11 Jur. 590; 16 L. J., C. P. 319.

A defendant cannot, by his notice of objections, go beyond his pleas. *Macnamara v. Hulse*, Car. & M. 471—Abinger.

Where a defendant relies on a general user

of the supposed invention, it is sufficient to state in his particulars of objection that the invention was used by manufacturers generally at a particular place, without naming any person or specifying any manufactory. *Palmer v. Wagstaff*, 8 Exch. 840; 17 Jur. 581; 22 L. J., Exch. 295.

A plaintiff's particulars of breaches cannot be called in aid of the defective particulars of objection. *Palmer v. Cooper*, 9 Exch. 231; 2 C. L. R. 430; 23 L. J., Exch. 82.

If the objections are not sufficiently specific, the plaintiff's course is to apply to a judge for an order for the delivery of a more specific notice; but if he omits to do so, he cannot object to the generality of the notice at the trial: the only question then is, whether the notice is sufficiently large to include the objections relied on by the defendant. *Neilson v. Harford*, 8 M. & W. 806.

If the particulars of objections delivered with the pleas are too general, the party who means to object to them must procure an order for better particulars. *Hull v. Ballard*, 1 H. & N. 134; 25 L. J., Exch. 304.

The act does not prevent defective particulars from being available at the trial, and the plaintiff cannot resist the admission of evidence which is within the literal meaning of the particulars, on the ground that the statement is too general, and that the particulars do not give the required information as to the place in which the invention is alleged to have been used. *Id.*

In an action for infringing a patent for machinery for grinding corn, the defendant delivered the following particulars: that the improvement was not new, and that the same had been generally known and publicly used in corn-mills for many years previously:—Held, that evidence on the part of the defendant was admissible of a user by two millers at Chester of the invention in question prior to the granting of the patent, such evidence being within the literal meaning of the words in the particulars, and that the plaintiff was too late in his objection to the admissibility of it, it being his duty, if he objected to the generality of the particulars, to apply to have them amended. *Id.*

In a patent suit the form of order requiring defendant to furnish further and better particulars of objections, should follow the words of the Patent Law Amendment Act, s. 41, and require the defendant to state in his particulars merely "the place or places at, or in which, and in what manner, the invention is alleged to have been used or published prior to the date of the patent," but under such an order the defendant must furnish full and sufficient particulars. *Flower v. Lloyd*, 45 L. J., Chanc. Div. 746; 25 W. R. 17; 35 L. T., N. S. 454—C. A.

The objections are not part and parcel of the record, so as to be incorporated with the issues raised, and show that those specific objections are in issue. *Reg. v. Mill*, 1 L., M. & P. 695; 10 C. B. 379; 15 Jur. 59; 20 L. J., C. P. 18.

Under notice of objection by a defendant,



to an action for infringing a patent, that the invention was not new, he can at the trial show that one of two inventions described in the specifications is not new, and that the patent is therefore bad. *Sugg v. Silber*, 2 L. R., Q. B. Div. 498—C. A.

As to particulars in proceedings to repeal patents,—see this title, VI.

**Interrogatories and discovery.**—Where a defendant does not deny the infringement, it is no ground for his refusing to answer interrogatories, that the answers would expose persons to whom he had sold the patented articles to actions. *Tetley v. Easton*, 18 C. B. 648; 25 L. J., C. P. 208.

But the court refused to allow a plaintiff to administer interrogatories before declaration, it appearing that the cause of action arose more than six years before the action was commenced. *Jones v. Pratt*, 6 H. & N. 697; 7 Jur., N. S. 978; 80 L. J., Exch. 865; 9 W. R. 696; 4 L. T., N. S. 411.

A plaintiff in a patent case, where the novelty of the invention is denied by the answer in equity, has no right to a discovery of the particulars on which the defendant relies, as showing a user of the thing patented prior to the date of the patent. *Daw v. Eley*, 2 Hem. & M. 725.

In an action by a patentee against his licensee, on a covenant to pay for using machines made with his invention, and to make none without; first, breach in paying for roving machines made with the invention; and secondly, in making machines without it; the defendant having, in answer to interrogatories, admitted the making of hundreds of roving machines, but not with the invention, and declared that he could not state to whom they were sold, nor give any further information about them without disclosing his own evidence; and the plaintiff claiming in respect of all the machines the defendant had made under one or other of the covenants, and asserting that he had seen some of them which had his invention applied:—Held, that the defendant was entitled to such particulars as should describe those portions of the machines to which the plaintiff contended that his invention had been applied, so as to enable the defendant to understand as far as possible the nature of the machines as to which he was to be charged under either of the covenants; and that it was no answer to the application for such particulars, that the defendant's answer to the interrogatories was insufficient to enable the plaintiff to furnish the particulars; for if the answers were insufficient, they should have been objected to. But the plaintiff was allowed to inspect the machines on the premises of the defendant, and also to examine him *viva voce*. *Jones v. Lee*, 25 L. J., Exch. 241.

Form and extent of interrogatories which may be exhibited to a defendant for the infringement of letters patent, before plea. *Thomas v. Tillie*, 17 Ir. C. L. R. 783.

The plaintiffs obtained a verdict in an action for the infringement of a patent; a rule to enter the verdict for the defendant was discharged, and the defendant appealed. An order was afterwards made for an account of profits, which was not appealed against, but on the parties appearing before the master for the purpose of taking the account, the defendant refused to produce his books. The court made absolute a rule for production and inspection of his books, and for interrogatories to him, notwithstanding the pendency of the appeal. *Sazby v. Kesterbrook*, 7 L. R., Exch. 207; 41 L. J., Exch. 113; 20 W. R. 751; 20 L. T., N. S. 439.

A patentee of improvements in brick-cutting machines, who was a manufacturer of the machines by an agent at the agent's works and not a licenser, having obtained a perpetual injunction against defendants, who were also manufacturers of brick-cutting machines, from infringement, the defendants were ordered to file an affidavit stating the number of machines made by them since the date of the patent, and the names and addresses of the persons to whom the same had been sold, and of the agents concerned in the transactions:—Held, that the plaintiff was entitled to have discovery of the names and addresses of the purchasers, but not of the agents concerned, there being nothing to show that any agents had been employed. *Murray v. Clayton*, 15 L. R., Eq. 115; 43 L. J., Chanc. 191; 21 W. R. 498; 27 L. T., N. S. 644—V. C. B.

In an action upon a deed licensing the defendant to manufacture gates upon a patented principle, in which the defendant covenanted to pay certain royalties upon all gates manufactured by him according to the principle, and to deliver quarterly statements of the gates so manufactured to the plaintiff, and to stamp the gates so manufactured, and not to sell any gates so manufactured below certain specified prices, the court refused to allow interrogatories to be administered to the defendant, asking the number of gates constructed by the defendant wherein the apparatus for closing or opening the gates acted simultaneously upon signals. The patent being one for an improved apparatus for closing and opening gates acting simultaneously upon signals, there being other methods besides the patented one of constructing gates so acting, and it being denied by the defendant that he had broken his covenants, interrogatories as to prices of gates sold were also disallowed, it not appearing that the plaintiff relied upon this as a substantial cause of action. *Lea v. Sazby*, 82 L. T., N. S. 731—Exch.

In a suit to restrain the infringement of a patent the defendant was required to state whether he was not making articles in all respects identical with those of the plaintiff, and to set forth in what respects they differed, and by what process they were made:—Held, that the defendant, who alleged prior user by himself and others, had sufficiently answered by stating that, save so

far as the articles manufactured by him before the date of the patent were similar to those of the plaintiff, the articles he now made differed from those made by the plaintiff, but he could not show in what they differed without ocular demonstration. *Crosby v. Tomay*, 2 L. R., Ch. Div. 533; 34 L. T., N. S. 476—V. C. M.

Held, also, that the defendant was bound, in alleging prior user by other persons, to set forth the names of some of those persons. *Id.*

**Inspection of machinery or articles alleged to infringe patent.**—[By 15 & 16 Vict. c. 83, s. 42, in any action in the superior courts of record at Westminster for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an inspection, and to give such direction respecting such inspection, as to such court or judge may seem fit.]

The inspection intended by this provision is an inspection of the instrument or machinery manufactured or used by the parties, with a view to evidence of an infringement, and not an inspection of books. *Vidi v. Smith*, 8 El. & Bl. 969; 1 Jur., N. S. 14; 23 L. J., Q. B. 843

The court will not grant an order for an inspection of a machine, upon an affidavit, that the machine used by the defendant is the same for which the plaintiff has obtained a patent. *Shaw v. Bank of England*, 23 L. J., Exch. 26.

A plaintiff having brought an action against the defendant for an alleged infringement of a patent for the use of certain machinery, was, in company of two scientific witnesses, allowed an inspection of the machinery complained of as an infringement. That action was afterwards discontinued and a fresh action brought after the passing of the above statute, and the plaintiff applied for a second inspection. The court refused to make the order, on the ground that there had already been an inspection. *Shaw v. Bank of England*, 23 L. J., Exch. 210.

An application to inspect the defendant's machinery may be made by the plaintiff before the delivery of the declaration in an action for infringement of his patent, but such inspection will not be granted as of course, or without the party applying for it showing that the inspection is material for the purposes of the cause. *Amies v. Kelsey*, 23 L. J., Q. B. 84; 16 Jur. 1047; 1 B. C. C. 123—Crompton.

In an action for the infringement of a patent for a mode of making veneers or moldings, the court refused to order an inspection of the defendant's manufactory and machinery, it being doubtful, on the plaintiff's affidavit, whether his patent was for the kind of veneering or for the process by which it was done, and the defendant positively swear-

ing that he used no machinery in the process. *Mendozas v. Karkma*, 29 L. J., Exch. 207.

In an action by an inventor against the publisher of a newspaper, the plaintiff had bought and used the newspaper, and having applied to the court to make the defendant to "permit the plaintiff to send an agent and witnesses, to inspect the printing press of the defendant used by him in printing the newspaper, and if necessary to take copies of the paper for the purpose of being an evidence to produce evidence at the trial of the cause," the court refused the application. *Type-founding Company v. Water*, 5 E. & B. 192; 29 L. J., Exch. 207; 6 Jur., N. S. 104.

But the plaintiff subsequently filed a bill in equity against the defendant, and an order was made for inspection and the delivery of a competent portion of the type for the purposes of analysis. *S. C.*, Johns. 757; 5 W. R. 353.

An order will not be made on the application of a plaintiff, in a suit to restrain an alleged infringement of his patent, for inspection of the defendant's works and machinery, unless the court is satisfied that the inspection is essential to enable the plaintiff to prove his case. *Batley v. Kynock*, 19 L. R., Eq. 96; 44 L. J., Chanc. 89; 23 W. R. 52—V. C. R.

#### (c) Evidence; and Trial.

**Evidence of infringement.**—When a question of novelty, or infringement, depends merely on the construction of the specification, it is one entirely for the judge; but where it also depends on other circumstances, such as the degree of difference or of similitude between two machines, it is a mixed question of law and fact; what the jurymen find to have been done is a matter of fact, but the judge must apply that fact according to the rules of law, and is entitled and bound to say whether what has been done amounts to an infringement. *Seed v. Higgins*, 8 H. L. Cas. 550; 80 L. J., Q. B. 314; 6 Jur., N. S. 1264.

The opinion of scientific witnesses as to whether there has or not been an infringement ought to be received. *Id.*—Lord Wensleydale.

The plaintiff obtained letters patent for improvements in the manufacture of iron and steel. In his specification he declared his invention to be the use of carburet of manganese in any process whereby iron is converted into cast steel, and he described the process which he claimed thus:—"I do it, by introducing into a crucible bars of steel broken into fragments, mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet of manganese." He then stated that he did not claim the use of the mixture of cast and malleable iron and carbonaceous matter as any part of his invention, but only the use of carburet of manganese, in any process for converting iron into cast steel. The defend-

ant produced the same result,—a superior and more valuable description and quality of cast steel,—as certainly and more cheaply, by substituting for the carburet of manganese, its elements: viz., oxide of manganese and coal tar, which, being put into the crucible with the iron, according to the evidence of chemists, would form carburet of manganese before the iron was in a state of fusion, and consequently before any combination therewith could take place. The judge told the jury that there was no evidence of infringement:—Held, a right direction. *Unwin v. Heath*, 10 C. B. 713; 5 H. L. Cas. 505; 25 L. J., C. P. 8.

A patent for the use of a substance in a process is infringed by the use of a chemical equivalent, known to be such at the time of the use, if used for the purpose of taking the benefit of the patent, and of making a colorable variation therefrom. S. P., 13 M. & W. 583; 9 Jur. 231.

In ordinary cases, the duty of establishing that the thing patented has been pirated lies on the patentee, and courts of equity grant limited orders of inspection for the purpose of enabling him to discharge that duty. Such orders cannot be granted where the piracy alleged has taken place abroad, and semble, that then it becomes the duty of the defendant to give evidence of a negative character to prove (in answer to the *prima facie* case made by the patentee) that the process used was of a different character from that which had been patented. Where that negative evidence was not given by the defendant, but positive evidence on the part of the patentee was given by one workman that he had been employed at the foreign manufactory, and there saw the patented articles manufactured by a process not distinguishable from that of the patentee:—Held, that these circumstances justified the conclusion of identity of material and process, and were sufficient warrant for the grant of an injunction. *Neilson v. Betts*, 5 L. R., H. L. Cas. 1; 40 L. J., Chanc. 317; 19 W. R. 1121. See *Betts v. Neilson*, 3 De G., J. & S. 82; 11 Jur., N. S. 679; 34 L. J. Chanc. 537; 12 L. T., N. S. 719; 18 W. R. 1028.

Where a patent had been taken out by D. in 1804, and another patent had been taken out by B. in 1849, and B. took proceedings against N. for infringement, to which N. set up as an answer want of novelty, and proved D.'s patent, evidence of all that was done in the trade to which the patent related, between the date of D.'s patent and of B.'s patent, was held admissible on this question of novelty. *Id.*

In a suit to restrain the sale of a patented article, it is incumbent on the plaintiff not only to prove the sale, but to prove that the article was not made by himself or his agents. *Betts v. Willmott*, 6 L. R., Ch. 230; 25 L. T., N. S. 188; 19 W. R. 369.

**Declarations of prior use.**—In an action for an infringement of a patent taken out in

1849, the defendant, in support of a plea that the invention was not new, gave evidence that O., who was dead, had in 1846 used a process identical with that in the patent. On the cross-examination of the witnesses it appeared that, if O. used the invention and sold the product before the date of the patent, it was only in very small quantities, and that it was not brought into general use; and one of the witnesses, being asked in cross-examination whether O. had not sold some of the product to S., testified that he had. The plaintiff in reply called S., who gave evidence that in 1850 or 1851, O. sold him a small quantity of the product, and at the time of the sale said that it was a new article, that he did not wish it to be publicly known, and he would sell him all he could manufacture:—Held, that evidence of what O. said at the time of that sale was not admissible in reply, as it would not have been admissible in chief on an issue whether O., before 1849, used the invention. *Hyde v. Palmer*, 3 B. & S. 657; 11 W. R. 433; 7 L. T., N. S. 823.

**Questions of law and fact; issues; and mode of trial.**—Where, in an action for infringing a patent for blocks for pavement, the plaintiff claimed as his invention that his block was bevelled both inwards and outwards on the same side of the block, and it was alleged that the defendant's blocks were an imitation of the plaintiff's, as two of the defendant's blocks were equivalent to one of the plaintiff's:—Held, that it was for the jury to say whether the defendant's blocks were, in effect, the same as the plaintiff's, although no single block of the defendant's was bevelled both inwards and outwards on the same side. *Macnamara v. Hulse*, Car. & M. 471—Abinger.

The question of infringement or not is for the jury and not for the judge, although there is no question with respect to whether the defendant has or has not used the particular machine or process which is alleged to be an infringement. *De la Rue v. Dickinson*, 7 El. & Bl. 738; 3 Jur., N. S. 841.

One hundred and thirty-four suits were instituted against as many defendants by a patentee for infringement of his patent, and interrogatories were served. Seventy-seven defendants, combining together among themselves so as to make four bodies in all, moved, before putting in any answers, that the plaintiff might be directed to proceed with one suit only until it should have been determined, or until the validity of the patent should have been finally decided, or until further order; and that the proceedings in the other suits might in the meantime be stayed, or that the time for answering and producing documents might be enlarged, the moving defendants undertaking to be bound by the result of the selected suit so far as the question of the validity of the patent was concerned. The court, upon terms, and the plaintiff not opposing, made an order, with a view of trying before itself the question of validity

in the first instance, before entering upon the question of infringement. *Fozzwell v. Webster*, 4 De G., J. & S. 77.

The usual issues may be granted in a patent suit before the hearing of the cause, although the defendant denies the validity of the plaintiff's patent on the ground of the generality of the claim in the specification. *Arnold v. Bradbury*, 6 L. R., Ch. 706.

In the absence of special circumstances the ordinary issues in a patent suit will be tried before the court itself without a jury. *Patent Marine Inventions Company v. Chadburn*, 10 L. R., Eq. 447; 21 W. R. 745; 28 L. T., N. S. 614—C.

When a patent is taken out for an invention, consisting of the combination in one thing of several subordinate parts, the question whether or not a person taking and using a certain number of such parts and omitting others has taken the substance of the invention, and thereby infringed the patent, is a question not of law but of fact, to be decided by the jury or court with reference to the circumstances of the particular case. *Clarke v. Adie*, 40 L. J., Chanc. Div. 583; 36 L. T., N. S. 923; 2 L. R., App. Cas. 315—H. L. See *S. C.*, 3 L. R., Ch. Div. 134; 45 L. J., Chanc. Div. 223; 85 L. T., N. S. 349; 24 W. R. 1007—C. A.; and 10 L. R., Ch. 607; 33 L. T., N. S. 295; 23 W. R. 898.

**Discovery of new evidence.**—The court will, at any time during the progress of a patent suit, allow a defendant to raise a fresh issue on the discovery of facts which could not with due diligence have been discovered before. *Holste v. Robertson*, 4 L. R., Ch. Div. 9; 46 L. J., Chanc. Div. 1—C. A.

#### (d) Damages and Costs.

**Damages.**—A suit was instituted in equity to restrain a defendant from infringing the plaintiff's patent for an invention applicable to steam vessels. By the decree the defendant was ordered to pay to the plaintiff the damages which he had sustained by reason of the defendant's user or vending of the invention. The plaintiff had been in the habit of granting licenses to use the invention at the rate of 2s. 6d. per horse power per ship:—Held, that the compensation to which he was entitled was a sum calculated on this basis upon the ships to which the defendant had applied the invention, and that he was not entitled to any additional sum in respect of contracts which he had missed by reason of the piracy. *Penn v. Jack*, 37 L. J., Chanc. 136; 5 L. R., Eq. 81—V. C. W.

The Court of Chancery will not entertain a bill for the mere purpose of giving relief in damages for the infringement of a patent when the bill has been filed so immediately before the expiration of the patent as to render it impossible to have obtained an interlocutory injunction. *Betts v. Gallais*, 10 L. R., Eq. 892; 18 W. R. 945.

As to election between damages and account of profits,—see this title, IV., 2, f.

**Costs.**—[By 15 & 16 Vict. c. 83, s. 43, in taxing the costs in any action in any of the superior courts at Westminster, for infringing letters patent, regard shall be had to the particulars delivered in such action, and the plaintiff and the defendant respectively shall not be allowed any costs in respect of any particular unless certified by the judge before whom the trial was had to have been proved by such plaintiff or defendant respectively, without regard to the general costs of the cause;

And it shall be lawful for the judge before whom any such action shall be tried to certify on the record that the validity of the letters patent in the declaration mentioned came in question; and the record, with such certificate, being given in evidence in any suit or action for infringing the said letters patent, or in any proceeding by *scire facias* to repeal the letters patent, shall entitle the plaintiff in any such suit or action, or the defendant in such proceeding by *scire facias*, on obtaining a decree, decretal order, or final judgment, to his full costs, charges and expenses, taxed as between attorney and client, unless the judge making such decree or order, or the judge trying such action or proceeding, shall certify that the plaintiff or defendant respectively ought not to have such full costs. (Similar to 5 & 6 Will. 4, c. 83, s. 3, impliedly repealed.)

By 5 & 6 Will. 4, c. 83, s. 6, in any action for infringing the right granted by letters patent, in taxing the costs thereof, regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had, and the costs of each part of the case shall be given according as each party has succeeded or failed therein, regard being had to the notice of objections as well as the counts in the declaration, and without regard to the general result of the trial.]

In an action for the infringement of a patent, the defendant obtained a verdict on one issue, which covered the whole cause:—Held, that he was entitled to the costs of that issue, and the general costs of the cause, subject to deduction in respect of the issues found for the plaintiff. *Losh v. Hague*, 7 D. P. C. 495; 5 M. & W. 387; 3 Jur. 409.

The certificate of the judge who tries the cause, that the defendant's particulars of objections have been proved by him, is a condition precedent to his right on taxation to any costs in respect of such particulars, even upon a nonsuit. *Honiball v. Bloomer*, 10 Exch. 538; 1 Jur., N. S. 189; 24 L. J., Exch. 11.

The certificate should be as to the determination of each objection of which notice has been given, and not as to the issues. *Losh v. Hague*, 5 M. & W. 387; 7 D. P. C. 495; 3 Jur. 409.

To an action for the infringement of a patent, there was a plea denying the novelty of the invention:—Held, at the trial, that the validity of the patent might be considered

is having come in question under this plea, so as to entitle the plaintiff to a certificate to that effect, under 5 & 6 Will. 4, c. 83, s. 3. *Gillet v. Wilby*, 9 C. & P. 334—Coltman. See *Gillet v. Green*, 7 M. & W. 347; 9 D. P. C. 219.

But if the defendant at the trial consents to a verdict for the plaintiff, without any evidence being given, the judge will not certify that the validity of the patent came in question before him. *Stocker v. Rodgers*, 1 C. & K. 99—Erskine.

An action having been brought by a patentee (substantially) for the recovery of royalties under a due license, a compromise was entered into before the plaintiff's case was closed, and an order of nisi prius was drawn up, under which the defendant was to pay an agreed sum, and a verdict was to be entered for the plaintiff in the action, for 40s. damages, and costs, with all usual certificates. After the cause was thus disposed of, the judge, upon an ex parte application, indorsed on the record a certificate that the record in a certain action, wherein B. was plaintiff and K. was defendant, and the certificate thereon indorsed, were given in evidence at the trial of this action:—Held, that this certificate was improperly granted, the record and certificate in the former action not having been given in evidence, and it not being, under the circumstances, a usual certificate within the contemplation of the parties. *Bovill v. Hadley*, 17 C. B., N. S. 485; 10 L. T., N. S. 650.

In an action for infringement of a patent, the plaintiff, after giving notice of trial, abandoned the action. The defendant had delivered with his pleas particulars of objections:—Held, that he was entitled to his costs of preparing the particulars, and the evidence in support of them, inasmuch as s. 43, which makes the certificate of the judge who tried the cause, that the particulars of objections have been proved by the defendant, a condition precedent to his right on taxation to any costs in respect of such particulars, applies only where there has been a trial. *Greaves v. Eastern Counties Railway Company*, 5 Jur., N. S. 733; 28 L. J., Q. B. 290; 1 El. & El. 961.

Held, also, that the cause not having been tried, the defendant, under 6 Geo. 4, c. 50, s. 34, was not entitled to the costs of a special jury applied for by him. *Id.*

In an action for the infringement of a patent an order was made giving further time for pleading, the defendant to take short notice of trial, and the plaintiff to be at liberty at once to set the cause down for trial by a special jury. Pleas were afterwards delivered, but issue was never joined. A special jury was nominated by the plaintiff, but it was not struck. The plaintiff having obtained a rule to discontinue without ever having given notice of trial:—Held, that the master was right in refusing to allow the defendant any of the costs of preparing for trial. *Curtis v. Platt*, 10 Jur., N. S. 823; 38 L. J., C. P. 255; 10 L. T., N. S. 883.

In a suit to restrain the infringement of a patent, the plaintiff, shortly before the hearing, obtained the common order to dismiss the bill with costs. Among the items in the defendant's bill of costs were charges for drawing particulars of breaches, and having the same settled by counsel, which the master had allowed; charges for remuneration of scientific witnesses, which he had reduced; and a charge for the construction of a model, which he had also reduced:—Held, that the Patent Law Amendment Act, 1852, 15 & 16 Vict. c. 83, s. 43, had no application to the case of a plaintiff dismissing his own bill before the hearing; that the allowance of remuneration to scientific witnesses was part of the ordinary practice; and that the expense of having a model made might also be allowed. *Butley v. Kynock*, 20 L. R., Eq. 632; 44 L. J., Chanc. 565; 33 L. T., N. S. 45—V. C. B.

As to costs of opposing renewal or extension of patent,—see this title, V., 2.

#### (e) Injunction to restrain Infringement.

**Power to grant, generally.**—[By 15 & 16 Vict. c. 83, s. 43, in any action in any of the superior courts of record at Westminster, for the infringement of letters patent, it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, and to give such direction respecting such injunction, and the proceedings therein respectively, as to such court or judge may seem fit.]

Injunction granted by a court of equity against subjects of the kingdom of Holland, to restrain them from using on board their ships, within the dominions of England, without a license, an invention, to the benefit of which the plaintiffs were exclusively entitled under the Queen's patent. *Caldwell v. Vanvlietengen*, 9 Hare, 415; 16 Jur. 115; 21 L. J., Chanc. 97.

The court will interfere by interlocutory injunction in support of a patent right, where the patent is an old one, and there has been long and undisturbed enjoyment of it, or where its validity has been established elsewhere, and the court sees no reason to doubt the result, or where the conduct of the defendant has been such that as against him there is no reason to doubt the validity of the patent. *Dudgeon v. Thomson*, 22 W. R. 404; 30 L. T., N. S. 244—R.

The fact of an interdict having been granted against an infringer in Scotland is, as against him, sufficient *prima facie* evidence of the validity of a patent for the United Kingdom to warrant an interlocutory injunction. *Id.*

An interim injunction will not be granted to restrain the infringement of a patent several years old, but never established by legal proceedings, unless there has been an actual

user of the patent for a considerable time. *Plimpton v. Malcolmson*, 20 L. R., Eq. 37; 44 L. J., Chanc. 257; 23 W. R. 404—R.

In a suit to restrain the infringement of a patent relating to roller skates, the plaintiff moved for an injunction against the defendant until the hearing:—Held, that the plaintiff was entitled to an injunction upon giving an undertaking as to damages. Inasmuch as the defendant's trade was only a new one, there would be less hardship in stopping it and requiring the plaintiff to give an undertaking to rely upon the defendant's undertaking to keep an account of his sales and profits. *Plimpton v. Spiller*, 4 L. R., Ch. Div. 286; 35 L. T., N. S. 656; 25 W. R. 152—C. A.

**Proceedings to obtain.**—In an order to obtain an injunction against the violation of a patent, the party must, at the time of applying, swear as to his belief that he is the original inventor. *Hill v. Thompson*, 2 Moore, 424; 8 Taunt. 375; Holt, 636; 3 Mer. 622.

A rule for a writ of injunction to restrain a defendant from infringing a patent, under 17 & 18 Vict. c. 125, s. 83, is a rule to show cause only in the first instance. *Gittins v. Symes*, 15 C. B. 362; 24 L. J., C. P. 48.

The same relief may be had under 15 & 16 Vict. c. 83, s. 42. *Id.*

**Suspension pending appeal.**—In an action to restrain the infringement of a patent for improvements in the method of making ornamental tin plates, the plaintiff obtained an injunction. The defendant, being about to appeal, moved to suspend the injunction pending the appeal, offering to give any undertaking as to damages that the court might think fit to impose, and to prosecute the appeal with diligence, and alleging that if he was prevented from carrying out the numerous contracts he had in hand, the result would be to destroy their connection and to cause him irreparable damage:—Held, no ground for suspending the operation of the injunction, for that the defendant could buy the articles in the market and so fulfill his contracts. *Flower v. Lloyd*, 36 L. T., N. S. 444—V. C. B.

#### (f) Account of Sales and Profits.

**Power to grant, generally.**—[By 15 & 16 Vict. c. 83, s. 42, in any action in any of the superior courts of record at Westminster for the infringement of letters patent it shall be lawful for the court in which such action is pending, if the court be then sitting, or if the court be not sitting then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an account and to give such direction respecting such account and the proceedings therein, as to such court or judge may seem fit.]

This provision vests in the courts of common law the powers before exercised exclu-

sively by courts of equity, and enables them to grant either by interlocutory order an account of all patented articles sold during the action, or, after verdict for the plaintiff, and as part of the final judgment, an account of all profits made by the defendant since the commencement of the action and after notice that an account would be required. *Holland v. Fox*, 2 C. L. R. 1576; 3 El. & Bl. 977; 1 Jur., N. S. 13; 23 L. J., Q. B. 357.

But the court has no power, where damages, nominal or substantial, have been recovered, to order an account of profits made by the defendant prior to the commencement of the action, the damages assessed by the jury being considered as the compensation for the loss of such profits. *Id.*

Where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. *Vidi v. Smith*, 3 El. & Bl. 909; 2 C. L. R. 1573; 1 Jur., N. S. 14; 23 L. J., Q. B. 342.

But, upon reasonable evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, he will be ordered to keep an account of all sales to be made of the article alleged to be an infringement of the patent, and of the profits thereon, until the further order of the court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favor of the defendant, to pay to him the expense of keeping such account. *Id.*

Where a patentee has obtained a verdict against the defendant for infringing the patent, the court will compel him to render to the plaintiff an account of all articles made by him in imitation of his patent articles, and to pay to the plaintiff a sum equal to the price of those which he has sold, and a further sum equal to the value of so many of such articles as the defendant has remaining in stock. *Holland v. Fox*, 23 L. J., Q. B. 211—B. C.—Erle.

The court will only direct an account to be taken of the profits which have been actually made by the defendant, and not of the loss which the plaintiff has sustained by the infringement. *Elwood v. Christy*, 18 C. B., N. S. 494; 34 L. J., C. P. 130; 13 W. R. 493.

In the case of an assignee of the patent, the account will only be taken from the date of the registration of the assignment. *Id.*

**The rule or order.**—For a form of rule or order for an account, see *Wallon v. Lucater*, 8 C. B., N. S. 102.

**Election between award of damages and account of profits.**—Where the court directed an inquiry as to damages, and also an account of profits:—Held, that the plaintiff should be called upon to elect between the two which he would adopt, since an account of profits amounts to a condonation of the infringement.



*Neilson v. Betts*, 5 L. R., H. L. Cas. 1; 40 L. J., Chanc. 40; 19 W. R. 1131.

The rule that, upon a decree against a party for the infringement of a patent, the patentee is not entitled under 21 & 23 Vict. c. 27, ss. 2, 5, to have both an account of profits and an inquiry into damages, is now established, and applies to every case of infringement. The patentee must therefore elect which of the two forms of relief he will adopt. *De Vitre v. Betts*, 6 L. R., H. L. Cas. 319; 21 W. R. 705.

#### V. CONFIRMATION, RENEWAL AND EXTENSION.

##### 1. In what Cases, and upon what Grounds, Terms and Conditions granted.

**Statutes.**—[See 5 & 6 Will. 4, c. 83, s. 4, 2 & 3 Vict. c. 67; 7 & 8 Vict. c. 69; 15 & 16 Vict. c. 83, s. 40; 16 & 17 Vict. c. 115, s. 7.]

**Power to grant, and how exercised, generally.**—The 5 & 6 Will. 4, c. 83, s. 4, does not authorize the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the committee is limited to reporting on matters as between the public and the party applying. *Latham v. Russell (in error)*, 1 H. L. Cas. 687; affirming *S. C.*, 14 M. & W. 574; 16 M. & W. 633; 9 Jur. 557; 14 L. J., Exch. 353; 16 L. J., Exch. 145.

An application for a renewal is prosecuted with effect, within the terms of 5 & 6 Will. 4, c. 83, s. 4, if the party applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent. *Ib.*

The crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void because they are dated after the expiration of the original letters patent. *Ib.*

If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed. *Ib.*

Original letters patent, for a term of fourteen years, were dated on the 26th of February, 1825, and renewed letters patent were dated on the 26th February, 1839:—Held, that the day must be reckoned inclusively, and that the former term expired on the 25th February, 1839, and consequently, the renewed letters patent were granted after the original letters patent had expired. *Ib.*

By an act of parliament reciting that letters patent had been granted to A., that the specification was enrolled within six months, instead of being enrolled within four months, after date, as required by the letters patent, that the letters patent contained a proviso for making them void, if they should become vested in, or in trust for more than twelve persons, and that certain persons had agreed to form themselves into a company for working the patent, powers were given for the

formation of a company, and enabling the patentee to assign the patent to them, or to license them to work it. A subsequent section, reciting the enrollment of a specification within due time, and that such enrollment had arisen from inadvertence and misinformation, and that it was expedient that the patent should be rendered valid to the extent thereafter mentioned, enacted, that the letters patent should, during the remainder of the term, be considered, deemed, and taken to be as valid and effectual to all intents and purposes as if the specification so enrolled by A., within six months after date, had been enrolled within four months:—Held, that the confirmation of the patent was unconditional, and was not dependent on the formation of a company. *Stead v. Carey*, 1 C. B. 496; 9 Jur. 511; 14 L. J., C. P. 177.

The authority conferred upon the crown by 5 & 6 Will. 4, c. 83, s. 2, to confirm letters patent, is discretionary, in the Judicial Committee, to recommend or not a confirmation. *Honiball's Patent, In re*, 9 Moore P. C. C. 378.

The jurisdiction is one which is most cautiously and sparingly to be exercised, as the effect of a confirmation of letters patent is to give force and validity, by a quasi legislative authority, to a grant of monopoly actually void, and to exclude from the use of the invention not only other subjects of her Majesty in England, but even the first and original inventor, who may have actually brought it into public, though not into general use, before the patent was taken out. *Ib.*

Two conditions are required from a petitioner applying for a confirmation, to establish, first, that before the date of the letter patent (the subject of application) the invention was not publicly and generally used; and, second, that the grantee of such letters patent believed himself the first and original inventor. *Ib.*

The 5 & 6 Will. 4, c. 83, s. 2, applies to confirmation of letters patent for an extended term, as the grant of such extended term is a grant of new letters patent, which are subject to the same conditions and open to the same objections, and entitled to the same advantages as the original letters patent. *Ib.*

The judicial committee has jurisdiction to entertain a petition, referred to them by the crown, seeking to revoke an order in council, made upon their recommendation, upon an application by patentees for a prolongation of letters patent, and to recall the warrant for sealing such letters patent. *Schlumberger, In re*, 9 Moore P. C. C. 1.

The power given by 7 & 8 Vict. c. 69, s. 2, to recommend an extension of the term of letters patent for an invention, is exhausted when an extension has been once recommended, and new letters patent granted. *Goucher's Patent, In re*, 2 Moore P. C. C., N. S. 532.

In the objections filed by the objectors, this point was not taken:—Held, that the

objection could be raised on the application to fix a day for hearing of the petition. *Id.*

The prolongation of a patent is, by 5 & 6 Will. 4, c. 83, and 16 & 17 Vict. c. 115, the same as a new grant. *Betts' Patent, In re*, 1 Moore P. C. C., N. S. 40; 9 Jur., N. S. 137; 11 W. R. 221; 7 L. T., N. S. 577.

**Assignees.**—Assignees of letters patent may lawfully obtain a renewal of such letters patent. *Ledsam v. Russell*, 14 M. & W. 574; 9 Jur. 557; 14 L. J., Exch. 853; affirmed in Exch. Cham., 16 M. & W. 693; 16 L. J., Exch. 145; and in Dom. Proc., 1 H. L. Cas. 687.

The inventor and patentee had lost largely by the patent, but his assignees had lately made very considerable profits, and from their position in the trade were likely to command a very large sale of the patent article. The patent was of high merit, and of great service to the public safety. A prolongation of the term was granted to the assignees for four years, upon conditions, first, that the assignees secured to the patentee half the profits derived from the sale; and, secondly, that the patented article should be sold by the assignees to the public at a fixed price. *Hardy's Patent, In re*, 6 Moore P. C. C. 441; 13 Jur. 177.

Where the executor of the surviving assignee of a patentee petitioned for an extension, and it was established that a valuable consideration had been given for the assignment, and that the assignee had sustained considerable loss, the Judicial Committee, in granting an extension, refused to impose terms upon the petitioner, in favor of the patentee. *Bodmer's Patent, In re*, 6 Moore P. C. C. 468.

When a patentee entered into an agreement with parties to work the patent, but owing to disputes between them the invention was not prosecuted until a short time before the expiration of the letters patent, an extension was refused. *Patterson's Patent, In re*, 6 Moore P. C. C. 469; 13 Jur. 593.

An extension was recommended in favor of an assignee, on his securing an annuity to the inventor during the subsistence of the new letters patent. *Whitehouse's Patent, In re*, 2 Moore P. C. C. 496.

To entitle an equitable assignee to appear with the legal assignees of a patent, on a petition for a prolongation of the letters patent, the name of such equitable assignee must appear with the other petitioners in the advertisements required by 5 & 6 Will. 4, c. 83, s. 4, and rule 2. *Noble's Patent, In re*, 7 Moore P. C. C. 191.

After an assignee of a patentee had incurred considerable loss in carrying out a patent for a smoke prevention apparatus, a statute passed to compel the owners of furnaces in the metropolis to construct them so as to consume their own smoke:—Held, that though the act might, in effect, compel the use of the petitioner's patent, yet that such circumstance

formed no objection to a renewal of the term of the letters patent, the merits of the invention and loss incurred in carrying it out being established. *Foard's Patent, In re*, 9 Moore P. C. C. 376.

The committee has power, under 7 & 8 Vict. c. 69, s. 4, to grant an extension to the assignee of the patentee. *Napier's Patent, In re*, 13 Moore P. C. C. 543; 9 W. R. 390.

Although, by 7 & 8 Vict. c. 69, s. 4, the assignee of a patentee is entitled to apply for an extension, yet he does not, unless under peculiar circumstances, stand on the same favorable footing as the original inventor, as the ground that the merits of the inventor ought to be properly rewarded, in dealing with an invention which has proved useful and beneficial to the public, does not exist in the case of an assignee, unless such assignee is a person who has assisted the patentee with funds to enable him to perfect and bring out his invention, and thus to bring it into use. *Norton's Patent, In re*, 1 Moore P. C. C., N. S. 339.

**Scotch patents.**—The use of an invention in England prior to the date of letters patent granted for Scotland will invalidate the Scotch patent; and the Judicial Committee accordingly refused to confirm a Scotch patent, the invention being used in England before the date of the Scotch patent. *Robinson's Patent, In re*, 5 Moore P. C. C. 65.

Three separate original letters patent were granted to the inventor for England, Scotland, and Ireland, respectively. The Scotch patent was void for want of novelty, and afterwards a prolongation of the terms of the three original patents was granted by one and the same letters patent under the great seal of the United Kingdom, pursuant to 15 & 16 Vict. c. 83:—Held, that the grant of prolongation was divisible, and operated as if there had been separate grants by separate instruments for the three countries, so that the prolongation of the English patent was not rendered void by the invalidity of the Scotch patent. *Bonill v. Finch*, 39 L. J., C. P. 277; 5 L. R., C. P. 523; 18 W. R. 1071; 23 L. T., N. S. 151.

**Residents abroad.**—Where the party applying for an extension of a patent is resident abroad, and has no manufacture in England, advertising in the newspapers published in the towns or county where the persons to whom he has granted licenses are resident, is a sufficient compliance with the 5 & 6 Will. 4, c. 83, s. 4. *Derosne's Patent, In re*, 4 Moore P. C. C. 413.

**Foreigners and foreign inventions and patents.**—The importer of an invention from abroad is an inventor within the 5 & 6 Will. 4, c. 83, and entitled to apply for an extension, but the Judicial Committee will look with jealousy into the merits of an invention imported. *Claridge's Patent, In re*, 7 Moore P. C. C. 394.

An importer of a foreign invention, by which the public is benefited, is entitled to be put on the same footing as an original in-

entor, when applying for a prolongation for each foreign importation. *Berry's Patent, In re, 7 Moore P. C. C. 187.*

An alien resident abroad, who was interested in an English patent by a foreign inventor, and who had also considerable dealings in England in respect of sales of the patented machine and in granting licenses for the use of such patent, has such a locus standi as to entitle him to petition the crown to revoke an order in council for granting an extended term of the English patent, and to recall the warrant for sealing such patent. *Ib.; Schlumberger, In re, 9 Moore P. C. C. 1.*

Application was made under 5 & 6 Will. 4, c. 83, and 2 & 3 Vict. c. 69, by assignees of a patentee, for extension of an English patent for a foreign importation, patented in France. At the date of the application the French patent had expired:—Held, that as the foreign patent had expired, no renewed grant would be valid by s. 25 of the 15 & 16 Vict. c. 83, as s. 7 of the 16 & 17 Vict. c. 115, made an extended patent a new patent, within the provisions of 15 & 16 Vict. c. 83, s. 25. *Aube's Patent, In re, 9 Moore P. C. C. 43.*

The provisions of the 15 & 16 Vict. c. 83, s. 25, apply only to patents granted in the United Kingdom subsequent to the passing of that statute. *Bodmer's Patent, In re, 8 Moore P. C. C. 282.*

A patent (a communication from a foreigner abroad) was taken out in England, and the inventor a few weeks afterwards obtained letters patent for the invention in America. An application was made for the prolongation of the English patent before the American patent had expired:—Held, that the case fell within the spirit of the provisions of the 15 & 16 Vict. c. 83, s. 25, and the application was refused. *Newton's Patent, In re, 15 Moore P. C. C. 176; 9 Jur., N. S. 109.*

On an application for the prolongation of a patent granted in the United Kingdom in January, 1849, it was proved that the applicant obtained letters patent in France in respect of the invention in January, 1850, and letters patent in Belgium in respect of the invention in January, 1852, which last letters patent had expired at the time of the application:—Held, first, that the earlier part of s. 25 of the 15 & 16 Vict. c. 83, applies only to cases where patents have been granted in foreign countries before the grant of the patent in the United Kingdom, and that the words in the proviso, "any such patent or like privilege," must be taken to refer to the entire description of the patents mentioned in the foregoing part of the section, and to no others. *Betts' Patent, In re, 1 Moore P. C. C., N. S. 49; 9 Jur., N. S. 137; 11 W. R. 221; 7 L. T., N. S. 577.*

When a patent is taken out in a foreign country before a patent for the invention in the United Kingdom, the latter patent is to terminate at the same time as the foreign patent. *Ib.*

Where the term in a foreign patent has expired, any grant of letters patent in the

United Kingdom made after that period is of no validity. *Ib.*

Letters patent for an invention communicated by a foreigner resident abroad, were extended for five years, in a case where the invention (machinery for letter-press printing) was of a meritorious and useful character, but of an expensive nature, and only at the latter end of the term of the letters patent brought into public use; and although the patent had been worked at a profit, it was not, in the opinion of the Judicial Committee, sufficiently remunerative, considering the value of the invention. *Newton's Patent, In re, 14 Moore P. C. C. 156; 10 W. R. 731.*

The 15 & 16 Vict. c. 83, s. 25, does not deprive the Judicial Committee of the power to entertain an application for an extension of the term of letters patent taken out first in England, though a patent has been obtained for the same invention in a foreign state; and the foreign patent would expire before the expiration of the prolonged term. *Poole's Patent, In re, 1 L. R., P. C. 514.*

Secus, if the patent was first obtained abroad by a foreign subject, and afterwards taken out in England. *Ib.*

When a foreigner patented his invention first in England and afterwards in France, which latter patent, at the date of the application for a prolongation of the English patent, had a year to run, the Privy Council will not recommend the crown to extend the term upon the chance of the French patent being extended. *Normand's Patent, In re, 3 L. R., P. C. 193; 6 Moore P. C. C., N. S. 477.*

Held, also, that if the French patent had expired there was no power to recommend an extension of the English patent. *Ib.*

An assignee of the patentee, who had taken an assignment of four-fifths of the patent within a few months of the expiration of a patent, which had only just been brought into use, for a small consideration, is not entitled to any extension. *Ib.*

Exposition of the principles which regulate the Judicial Committee in recommending the crown to extend the term of letters patent of an invention, consisting of a communication from a foreigner residing abroad, who had previously to the English patent taken out a patent for the same invention in a foreign state. *Johnson's Patent, In re, 4 L. R., P. C. 75; 8 Moore P. C. C., N. S. 232.*

The 15 & 16 Vict. c. 83, s. 25, does not apply where a patent is taken out in England, before a patent for the same invention is obtained in a foreign country. *Winan's Patent, In re, 4 L. R., P. C. 93; 8 Moore P. C. C., N. S. 306.*

A patent by American subjects was taken out in England, and shortly afterwards in America and France for the same invention. After the expiration of the French patent, and within a few months of the expiration of the American patent, an application was made for a prolongation of the English patent. Such application was refused, as the Judicial Committee would not, on the ground of general

policy, recommend a renewal of the English patent after the French patent had been allowed to expire. *Id.*

A patent was first taken out in America, afterwards in England, and two days after the date of the English patent the invention was patented in France. The French patent was allowed to drop. On an application for prolongation of the English patent:—Held, that although the Judicial Committee might have jurisdiction under 15 & 16 Vict. c. 83, s. 25, to entertain the application, yet, on the ground of public policy, as the French patent had been allowed to expire, they would not, in the exercise of the discretion vested in them, recommend the extension of the term of the English patent. *Blake's Patent, In re*, 4 L. R., P. C. C. 535; 9 Moore P. C. C., N. S. 873.

As to grants of letters patent for foreign inventions.—see this title, I., 1.

**Upon what grounds, terms and conditions granted.**—To entitle a patentee to a confirmation of letters patent, under 5 & 6 Will. 4, c. 83, s. 2, the patentee must show that he believed himself the first and original inventor. *Curd's Patent, In re*, 6 Moore P. C. C. 207; 12 Jur. 507.

The merit and utility of the invention; the merit of the petitioner in patronizing an ingenious inventor, and liberally expending money to introduce the invention; the amount of profit not being greater than the ordinary profit on capital employed in similar trades; the annoyances, anxiety, and costs of litigation, are several grounds of consideration in recommending an extension. *Whitehouse's Patent, In re*, 2 Moore P. C. C. 406.

An extension was granted for five years, the invention being of great merit and public utility, and the patentee and his grantees having received no remuneration in consequence of the originality of the patent being disputed at law. *Smith's Patent, In re*, 7 Moore P. C. C. 133.

An extension was opposed by the apprentices of the patentee, who alleged that they should not be able to get employment. It appearing, however, that they had been so instructed as to be able to get employment in another branch of the trade, no condition was imposed on the patentee on that account. *Baxter's Patent*, 13 Jur. 533—P. C.

Where letters patent embraced several subjects, one only of which had been worked out, and that part of the patent was affected by subsequent patented improvements by the same patentee, and could not be effectually used without such subsequent improvements, the Judicial Committee, before recommending an extension of the term of the first patent, put the petitioner upon terms of disclaiming all the parts of the original patent not worked out, and restricted the prolongation of the unexpired term of the subsequent patents. *Bolmer's Patent, In re*, 8 Moore P. C. C. 282.

A patentee, formerly in partnership with J.

and W., by a deed of dissolution stipulated that they should have the exclusive right of granting, in certain cases, licenses for manufacturing the patent article. In recommending an extension, the Judicial Committee imposed a condition upon the patentee to serve to J., in whom the interest under the deed of dissolution then vested, the same interest in the new letters patent as related to the granting of licenses as was provided by the deed of dissolution, but refused to allow J. to substitute new licenses for those granted under the original letters patent, in the event of the original licensees declining to renew their licenses from him under the new grant. *Normandy's Patent, In re*, 9 Moore P. C. C. 452.

If it can be clearly shown that the patent sought to be extended is bad for want of originality, the Privy Council will not entertain the application. Aliter, if at most, a doubtful question as to the validity of the letters patent can be raised. *Betts' Patent, In re*, 1 Moore P. C. C., N. S. 49; 9 Jur., N. S. 137; 11 W. R. 221; 7 L. T., N. S. 577.

The grounds on which extensions of patents are granted have all reference to the inventor. They are, first, to reward the inventor for the peculiar ability and industry he has exercised in making the discovery. Secondly, to reward him, because some great benefit of an unusual description has by him been conferred upon the public through the invention itself; or, thirdly, because the inventor has not been sufficiently remunerated by the profits derived from his strenuous exertions to make the invention profitable. All these grounds proceed on the supposition that the invention is a new and a useful invention. But where an inventor intentionally delays for a great length of time attempting to put the invention into practice, those reasons for a prolongation of the patent cannot be relied upon by him, unless he shows some reasonable ground, such as want of funds, for the delay. *Norton's Patent, In re*, 1 Moore P. C. C., N. S. 339; 9 Jur., N. S. 419; 11 W. R. 720. S. P., *Markwick, In re*, 8 W. R. 333; 13 Moore P. C. C. 310.

In an application for a prolongation, the Privy Council will not try the validity of the patent; and though in general it will not enter into questions of doubtful validity, yet it will not recommend an extension of a patent which is manifestly bad. *Hills' Patent, In re*, 1 Moore P. C. C., N. S. 258; 9 Jur., N. S. 1209; 12 W. R. 25; 9 L. T., N. S. 101.

In determining whether to recommend an extension, though the validity of a patent may not be directly impeached, yet with respect to the novelty and the utility of the invention, the degree of merit to be attributed to the petitioner is to be taken into account, as well as the amount of remuneration received by him under the patent, as an extension is not of strict right, but rather of equitable reward. *Id.*

A patent was granted in England before 15 & 16 Vict. c. 83. A patent for a similar invention had been granted in France to

another person prior to the English patent, at it did not satisfactorily appear that the English patentee had any previous knowledge of the foreign invention. The French patent had not expired at the time of the application or prolongation:—Held, that, although the case did not fall strictly within the terms of s. 25, yet that the policy which the legislature here indicated, was to guide the committee in the exercise of their discretion, that policy being, to prevent, in the case of inventions made and patented in any foreign country, the continuance of a monopoly in England by means of an English patent granted subsequently, and after the time when the discovery shall have become public property in the foreign country, and that the prolongation of an existing patent fell within such rule. *Ib.*

The patentee of a patent had received large sums of money from the government for the expenses of experiments, and by way of bounty and reward, but from the nature of the patent had not, in the opinion of the Judicial Committee, received sufficient remuneration for his invention; and in granting an extension, the committee refused to impose a condition in the new grant, that the crown should be at liberty to use the invention for the public service without license from the patentee. *Lancaster's Patent, In re, 2 Moore P. C. C., N. S. 189.*

When the utility of a patent has not been tested by actual employment, for a period of fourteen years, although efforts have been made by the patentee to bring it into use, it raises a very strong presumption against its practical utility, which presumption can only be rebutted by the strongest evidence. *Allin's Patent, In re, 1 L. R., P. C. 507; 36 L. J., P. C. 76.*

If an invention has not been brought into practical use during the term of the letters patent, it raises a strong, though not conclusive, presumption against its utility; and unless there are circumstances to rebut such presumption, an extension will not be granted. *Herbert's Patent, In re, 1 L. R., P. C. 899.*

The fact of a patent of a valuable nature, but having a limited market, not having been so generally used as to remunerate the inventor, is sufficient to remove the presumption against the utility of the invention. *Ib.*

After the presentation of the petition for prolongation by a patentee, together with the assignees of a moiety of the patent, and before the hearing, the patentee died, having by his will appointed his widow executrix and residuary legatee. An extension was granted to the assignees on condition that they should hold the moiety of the patent in trust for the widow of the patentee. *Ib.*

A patentee, who was not a manufacturer, granted a license to a manufacturing firm to manufacture the patented article, which, by agreement between them, was of an almost exclusive character. In granting a prolongation, the new letters patent were directed to be made upon condition that licenses should

be granted by the patentee to the public upon terms similar to the one already granted. *Mallet's Patent, In re, 1 L. R., P. C. 308.*

The patentee of a patent for improvements in the manufacture of fire-arms had received large sums of money from government for the expenses of experiments, and by way of bounty and reward, but from the nature of the patent had not, in the opinion of the Judicial Committee, received sufficient remuneration for his invention, and in granting an extension the committee refused to impose a condition in the new grant that the crown should be at liberty to use the invention for the public service without license from the patentee. *Lancaster's Patent, In re, 2 Moore P. C. C., N. S. 189.*

## 2. Proceedings to obtain.

**Application.]**—Letters patent being about to expire, an application for an extension will be heard during the pendency of legal proceedings as to the validity of the patent. *Kay's Patent, In re, 2 Moore P. C. C. 241.*

The circumstance of there being a lis pendens respecting the validity of the letters patent is no objection to the grant of an extension of the original letters patent. *Heath's Patent, In re, 8 Moore P. C. C. 217.*

On an application for the prolongation of a patent it is not the practice to decide upon the novelty or utility of the patent, except so far as such novelty or utility may properly be described as merit of that high degree that, every other requisite being satisfactory, it would entitle the patentee to a prolongation. *Suzby's Patent, In re, 7 Moore P. C. C., N. S. 82; 19 W. R. 513.*

As the recommendation to the crown for the prolongation of the term of letters patent is a matter of discretion in the Judicial Committee, it is imperatively necessary that the petition for a prolongation should state fairly and fully everything relating to the patent; an omission to do so is fatal to the application. *Pitman's Patent, In re, 4 L. R., P. C. 84; 8 Moore P. C. C., N. S. 293.*

When a petition omitted to state that the patent was, in fact, a communication from a foreigner living abroad, who had previously to the English patent patented the invention in America, and that the American patent had expired, though afterwards renewed in America, the Judicial Committee refused the application. *Ib.*

**Account of profits.]**—The account of profit and loss of the patentee in working a patent, ought to be clear and precise; and it is the duty of a patentee, if engaged in any other business, or as a manufacturer of his own invention, to keep the accounts of the patent and the manufacture separately. *Betts' Patent, In re, 1 Moore P. C. C., N. S. 49; 9 Jur., N. S. 187; 11 W. R. 221; 7 L. T., N. S. 577.*

If a patentee is also manufacturer of his patent article, in taking account of the profits

of the patent he is entitled to deduct his profits as a manufacturer. *Id.*

In taking an account of the profits and loss of the working of a patent, the patentee is entitled to charge, as part of his expenses, for loss of time in endeavoring to bring the invention into general use. *Newton's Patent, In re, 14 Moore P. C. C. 156; 10 W. R. 781.*

In calculating whether any profit has been obtained through or by means of a patent, it is correct to deduct, in the first place, beyond the cost price, a fair manufacturer's profit on the articles sold; and the mere preference of the market obtained by the manufacturer is not to be deemed a profit derived from the patent. *Galloway's Patent, In re, 7 Jur. 453.*

The most unreserved and clear statement of the patentee's remuneration is an indispensable condition for extension. *Hill's Patent, In re, 1 Moore P. C. C., N. S. 258; 9 Jur., N. S. 1209; 12 W. R. 25; 9 L. T., N. S. 101.*

The patentee was also manufacturer and sold the patented articles. In his accounts he deducted two-thirds as profits from the manufacture and sale, and only credited the patent with one-third:—Held, to be an unreasonable deduction. *Id.*

Although law expenses by the patentee in maintaining his patent rights are allowed in deduction of his profits, yet where the patentee compromised suits and gave up costs to which he had an apparent title, a deduction on that head will not be allowed. *Id.*

To entitle a patentee to a prolongation of the term of letters patent, he must satisfactorily establish the amount of his profits. *Trotman's Patent, In re, 1 L. R., P. C. 118.*

Licencees stand with respect to the profits, in the same position as assignees of the patent. *Id.*

Application, under 14 & 15 Vict. c. 99, s. 6, by parties who opposed an extension, for production and inspection of the petitioner's accounts previously to the hearing of the petition, refused, with costs. *Bridson's Patent, In re, 7 Moore P. C. C. 499.*

The books of a petitioner in respect to the profits having been lost during his bankruptcy, the account of profit and of loss was taken upon his own evidence. *Hutchinson's Patent, In re, 14 Moore P. C. C. 864.*

A patentee, residing in America, for the purpose of getting the patented article into general use in England, arranged with an agent in England, and in consideration gave him a moiety of the royalties:—Held, that in estimating the profits of the patentee derived from the patent, such moiety was to be deducted. *Pool's Patent, In re, 1 L. R., P. C. 514.*

A patentee, in order to obtain a prolongation of the term of a patent, must satisfy the Judicial Committee by his accounts, in a manner which admits of no controversy, what has been the amount of remuneration which, in every point of view, the invention has brought him, and it is his duty to frame the accounts in such a shape as to leave no doubt

as to what the remuneration has been that he has received. *Saxby's Patent, In re, 7 Moore P. C. C., N. S. 82; 19 W. R. 513.*

When the patentee is also the manufacturer, the profits which he makes as a manufacturer, although not strictly profits of the patent, must yet be taken into consideration in estimating the amount of his remuneration. *Id.*

Therefore, when a patentee was also the manufacturer of the patented article, and was himself necessarily engaged in fixing and putting up the patented apparatus, and the accounts for such services were so intermixed as to render it impracticable on their face to separate the items of profit received from the patent, and the receipts were large, and even on the balance alleged a considerable gain to the patentee, the Judicial Committee held that such accounts were unsatisfactory, and refused an application for a prolongation of the patent, but without costs. *Id.*

A prolongation of the term of letters patent for seven years was granted, the invention being a meritorious one, and of great value as a raw material for the manufacture of paper; no profit having been made either by the inventor or his assignees. The statement of accounts furnished being *prima facie* satisfactory, the petitioners were allowed to prove the merits of the invention before going into the accounts. *Houghton's Patent, In re, 3 L. R., P. C. 461; 7 Moore P. C. C., N. S. 309.*

A patentee, seeking the grace and favor of the crown, in applying for an extension of the term of letters patent, is bound to bring his accounts before the committee in such a shape as to leave no doubt what the remuneration has been that he has received from the patent. *Clark's Patent, In re, 3 L. R., P. C. 421; 7 Moore P. C. C., N. S. 255.*

Where a petition for extension, and the accounts furnished by the patentee did not contain sufficiently full and accurate information in respect to the patent, or the remuneration received by him, the Judicial Committee declined to recommend a prolongation of the term. *Id.*

An account of profits and loss filed by a patentee on his application for a prolongation of the term of letters patent being *prima facie* unsatisfactory, the Judicial Committee directed the question of accounts to be taken before considering the merits of the invention. *Wield's Patent, In re, 4 L. R., P. C. 89; 8 Moore P. C. C., N. S. 300.*

The accounts of a patent not being satisfactorily explained, an application for extension of the term of the patent will be refused. *Id.*

Upon circumstances showing a want of adequate remuneration, an extension of the term of letters patent was granted for six years. *Carr's Patent, In re, 4 L. R., P. C. C. 539; 9 Moore P. C. C., N. S. 879.*

In estimating the profits derived from the patent, the Judicial Committee will take into consideration a deduction from the profits of



he patent for the personal expenses of the patentee, for the exclusive devotion of his time in bringing the patent into practical operation and public notice. *Ib.*

The Judicial Committee will refuse to enter upon accounts in a patent case if they have not been filed as required by the 9th rule. Two cognate patents, having different terms to run, were extended so that both should expire on the same day. *Johnson's and Atkinson's Patents, In re, 5 L. R., P. C. C. 87.*

**Caveats.**—The Judicial Committee will not permit a party to be heard in opposition to an application for a prolongation, unless a caveat has been entered in his name. *Lowe's Patent, In re, 8 Moore P. C. C. 1.*

Any one of the public has a right to enter a caveat, and to be heard in opposition. *Ib.*

Practice respecting hearing of counsel where several parties enter caveats. *Woodcroft's Patent, In re, 3 Moore P. C. C. 171.*

An application by the Lords of the Admiralty to enter a caveat, and be heard against a petition for an extension, such caveat not having been filed within the time required by the rules of the Privy Council Office, refused, as the attorney-general was present to watch the interests of the government. *Smith's Patent, In re, 7 Moore P. C. C. 133.*

A petitioner inserted the last advertisement of his intention to petition for a prolongation on the 24th May, but did not present his petition until the 5th of June. The registrar refused to receive the petition, as being too late. Upon a special application for that purpose, it appearing that the delay arose from a mistake of the petitioner's agent, an order was made admitting the petition. A caveat had been entered:—Held, that as the party filing the caveat was interested in sustaining the objection to the reception of the petition, notice of the application must be served on him. *Hutchinson's Patent, In re, 14 Moore P. C. C. 364.*

**Attorney-general.**—In cases for an extension the attorney-general represents the government and the public generally. *Smith's Patent, In re, 7 Moore P. C. C. 133.*

**Costs.**—The Judicial Committee will exercise a discretion as to the allowance of an opposer's costs upon an abandoned petition for extension of letters patent. *Milner's Patent, In re, 9 Moore P. C. C. 39.*

A gross sum allowed for costs of opposers, instead of referring their costs to taxation. *Ib.*

An affidavit of merits by a petitioner, upon the question of costs, was rejected, as no copy had been served upon the opposers. *Ib.*

Where there were two opponents to an application for a prolongation, upon substantially the same grounds of objection, upon a successful opposition, a gross sum was allowed for the costs of both parties. *Jones's Patent, In re, 9 Moore P. C. C. 41.*

Opponents' costs were directed to be taxed at 100*l.*, and divided between the opponents. *Ib.*

Opposition to an application for extension or confirmation is rather encouraged than otherwise, and upon a successful opposition, the opposer's costs will, in general, be allowed. *Honiball's Patent, In re, 9 Moore P. C. C. 378.*

When a petition is abandoned, it is not necessary that the opposers should serve the petitioners with notice of their intended application to the court for costs of opposition. *Bridson's Patent, In re, 7 Moore P. C. C. 499.*

On a petition for prolongation, a day was fixed for hearing. Objections were lodged against an extension. Before the hearing, the petitioners abandoned the prosecution of the petition, and the costs of the opposition were allowed. *Hornby's Patent, In re, 7 Moore P. C. C. 503.*

When there were several opponents, on dismissing the petition a lump sum was awarded to the opponents, to be divided pro rata for costs. *Johnson's Patent, In re, 4 L. R., P. C. C. 75; 8 Moore P. C. C., N. S. 75.*

Considerations which induce the Judicial Committee to give costs to bonâ fide opponents in patent cases. *Wield's Patent, In re, 4 L. R., P. C. C. 89; 8 Moore P. C. C., N. S. 300.*

## VI. REPEAL.

**When scire facias lies for repeal of letters patent.**—[By 15 & 16 Vict. c. 83, s. 15, the writ of scire facias shall lie for the repeal of any letters issued under that act, in the like cases as the same would lie for the repeal of letters patent which may now be issued under the great seal.]

By 12 & 13 Vict. c. 109, s. 29, the writ of scire facias shall or may be directed to the sheriff of any county.]

**Parties.**—To a declaration in scire facias to repeal letters patent, on the ground that B. and S. were not the first and true inventors, and that the invention was not new, or an improvement, B. pleaded that before the suing out of the scire facias, S. assigned to him all his share in the letters patent, and the privilege thereby granted, and had not since had any interest whatever in the letters patent; that S. could not be compelled to plead or demur to the writ and declaration, and therefore B. prayed judgment, whether he ought to be compelled to plead or demur to the declaration:—Held, that both had been properly made defendants, the letters patent having been granted to them jointly. *Reg. v. Betts, 15 Q. B. 540; 14 Jur. 912; 19 L. J., Q. B. 531.*

Held, also that the joinder of too many defendants could not be made the subject of a plea in abatement, and therefore that the plea was bad. *Ib.*

**Pleadings.**—[By 12 & 13 Vict. c. 109, s. 31, the pleadings are to be delivered and not filed.]

The notice of objections in scire facias to

repeal a patent, is not part of the record. *Reg. v. Mill*, 1 L. J., M. & P. 695; 10 C. B. 379; 15 Jur. 59; 20 L. J., C. P. 16.

A scire facias having issued out of chancery to repeal letters patent, the patentee presented a petition to the common law side of the court, alleging that the writ contained improper recitals and suggestions, which, if used as a defense in an action for the infringement of a patent, would be inadmissible, and praying that the writ might be quashed or reformed by striking out the objectionable matter. *Cranworth, C.*, declined to exercise the jurisdiction reserved to him by 12 & 13 Vict. c. 109, s. 46, on the ground that, by s. 39, jurisdiction in such cases was conferred on the judges of the superior courts of common law, and that they could more satisfactorily dispose of the question of pleading involved in the case. *Reg. v. Hancock*, 5 De G., M. & G. 332.

**Particulars.**—[By 15 & 16 Vict. c. 83, s. 41, the prosecutor in any proceedings by scire facias to repeal letters patent shall deliver, with the declaration, particulars of any objections on which he means to rely at the trial in support of the suggestions of the declaration in the proceedings by scire facias;

And at the trial of such proceeding by scire facias no evidence shall be allowed to be given in support of any alleged infringement, or of any objection impeaching the validity of such letters patent which shall not be contained in the particulars delivered as aforesaid:

Provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters patent, shall be stated in such particulars:

Provided also, that it shall and may be lawful for any judge at chambers to allow such prosecutor to amend the particulars, upon such terms as to such judge shall seem fit. (Similar to 5 & 6 Will. 4, c. 83, s. 5, but more comprehensive.)]

On scire facias to repeal a patent, the prosecutor having, while the record was in chancery, filed notice of objections, namely, that other persons than the patentee had used the invention in England before the grant of the patent, the court refused to order delivery of a particular, stating the names and addresses of such persons. *Reg. v. Walton*, 2 Q. B. 969.

**Trial.**—[By 12 & 13 Vict. c. 109, s. 32, issues may be tried in any of the superior courts.

By 15 & 16 Vict. c. 83, s. 41, at the trial of any proceedings by scire facias to repeal letters patent, the defendant shall be entitled to begin and to give evidence in support of such letters patent, and in case evidence shall be adduced on the part of the prosecutor, impeaching the validity of such letters patent, the defendant shall be entitled to the reply. See *Reg. v. Cutler*, 3 C. & K. 215.]

The court upon terms postponed the trial of a patent cause for a definite period, to await the result of a motion pending in another court on a scire facias to repeal the

patent. *Smith v. Upton*, 6 Scott, N. R. 804; *S. C.*, nom. *Muntz v. Foster*, 1 D. & L. 942.

Pending a proceeding in scire facias to repeal a patent, the patentee disclaimed a part. The prosecutor still proceeded, and ultimately failed:—Held, that he ought to pay the costs subsequent to the disclaimer. *Reg. v. Mill*, 14 Beav. 312.

A patentee applied to the Court of Chancery to stay all proceedings on a scire facias to repeal the patent, or that a nolle prosequi might be entered, on the ground, first, that the prosecutor was an alien; secondly, that he had no special interest in the patent or the repeal of it, but was acting in collusion with other persons, with a view to oppress the patentee; and thirdly, that the security for costs given by the prosecutor was improper and insufficient:—Held, that the court had no authority to interfere in the matter. *Reg. v. Prosser*, 11 Beav. 306; 13 Jur. 71; 18 L. J., Chanc. 35.

The attorney-general conducts the proceedings on a scire facias according to his own judgment and discretion, and may, when he thinks fit, stay the proceedings or enter a nolle prosequi. The control which the attorney-general exercises is subject only to the responsibility to which every public servant is liable in the discharge of his duty, and subject to the jurisdiction which the courts may have over him, upon a charge properly brought against him for negligence or an erroneous performance of his duty. *Id.*

**Judgment.**—On scire facias brought in the Petty Bag Office in Chancery to repeal letters patent for an invention, if issues of fact are joined there, and the record sent to the Queen's Bench for a trial, which is had, and a verdict found for the crown, the Queen's Bench, though the letters patent remain in Chancery, may give judgment that they be revoked, canceled, vacated, disallowed, annulled, void and invalid, and be altogether had and held for nothing, and also that the enrollment thereof be canceled, quashed and annulled, and that they be restored to the Court of Chancery, there to be canceled. *Bynner v. Reg. (in error)*, 9 Q. B. 523; 10 Jur. 867; 15 L. J., Q. B. 414—Exch. Cham.

After a judgment in scire facias in the Queen's Bench, annulling letters patent, and directing that they should be restored to the Court of Chancery to be canceled, the lord chancellor has no jurisdiction to stay the execution of the judgment, his duty in canceling the enrollment being only ministerial. *Reg. v. Eastern Archipelago Company*, 4 De G., M. & G. 199.

**Patron.**

See ECCLESIASTICAL LAW.

## Pauper.

**I. ACTIONS AND OTHER PROCEEDINGS BY OR AGAINST, 9843.**

**II. SETTLEMENT AND RELIEF OF. See POOR LAW.**

**I. ACTIONS AND OTHER PROCEEDINGS BY OR AGAINST.**

**Statutes.**—[By 11 Hen. 7, c. 12, *such persons as are poor may be admitted to sue in formâ pauperis.*

By 55 Geo. 3, c. 184, Schedule, Part 2, *all proceedings for or on behalf of any person legally admitted to sue or defend in formâ pauperis, are exempted from all stamp duties.*]

**Admitting party to sue in formâ pauperis.**]

—No person shall be admitted to sue in formâ pauperis, unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his attorney, that the same case contains a full and true statement of all the material facts, to the best of his knowledge and belief; shall be produced before the court or judge to whom application may be made; and no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the masters, or associates, or at the judges' chambers, or elsewhere, by reason of a verdict being found for such pauper exceeding 5*l.* Reg. Gen., Q. B., C. P. and Exch., H. T. 16 Vict. r. 121; 1 El. & Bl., App. xxii.

A person admitted to sue in formâ pauperis shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge. Reg. Gen., Q. B., C. P. and Exch., T. T. 16 Vict. r. 28; 1 El. & Bl., App. lxxxi.

A judge of a county court has power to allow parties to sue in formâ pauperis. *Chinn v. Bullen*, 8 C. B. 447; 7 D. & L. 297; 14 Jur. 201; 19 L. J., C. P. 42.

The affidavit to ground an order to be admitted to sue in formâ pauperis must be made by the party, not by a third person. *Wilkinson v. Belsher*, 2 Bro. C. C. 272.

If one is admitted to defend a suit in chancery in formâ pauperis, his solicitor can only recover of him money actually paid out of pocket for the defense of the suit. *Philips v. Baker*, 1 C. & P. 533—Abbott.

On the trial of an action brought in formâ pauperis, a king's counsel or sergeant may appear for the plaintiff alone without a junior. *James v. Harris*, 7 C. & P. 257—Williams.

The hand of counsel to the petition of a pauper, certifying that he has good cause of action, is for the information of the court; and it is not necessary that a rule, admitting the plaintiff to sue in formâ pauperis, be drawn up on reading such certificate. *Bryant v. Wagner*, 7 D. P. C. 676; 8 Jur. 893—B. C.

A plaintiff may, on one motion, apply to be admitted to sue in formâ pauperis, and by prochein amy. *Id.*

A rule for leave to sue in formâ pauperis pendente lite is absolute in the first instance. *Hall v. Jos or Ives*, 8 Scott, N. R. 715; 3 D. & L. 610; 7 M. & G. 1001; 14 L. J., C. P. 24.

A plaintiff may be admitted to sue in formâ pauperis after the commencement of the action. *Brunt v. Warille or Wardell*, 3 M. & G. 584; 4 Scott, N. R. 188; 1 D., N. S. 229. S. P., *Doe d. Pitcher v. Roberts*, 2 D., N. S. 894; 12 L. J., Q. B. 178; *Doe d. Ellis v. Owen*, 9 M. & W. 455; 1 D., N. S. 404; 10 M. & W. 514; 2 D., N. S. 420; 12 L. J., Exch. 53; *Holmes v. Penny*, 9 Exch. 584; 23 L. J. Exch. 139.

But when he is so admitted, he is liable for costs antecedently incurred. *Id.*

The privilege of suing in formâ pauperis does not extend to a step collateral to the cause, such as a rule calling on his attorney to pay the costs of the day incurred through his negligence. *Bell v. Port of London Assurance Company*, 1 L., M. & P. 641—B. C.—Patteson.

A party suing in formâ pauperis is not entitled to an amendment in his pleading, which has been demurred to, without payment of costs. *Foster v. Bank of England*, 6 Q. B. 878; 2 D. & L. 700; 9 Jur. 107; 14 L. J., Q. B. 178.

An order to allow a plaintiff to sue in formâ pauperis had been obtained on an affidavit, which was defective for the want of an addition of his profession or occupation:—Held, that the effect was a mere irregularity, and that after several months had elapsed, in which the defendant might have examined the affidavit, and in which various steps had been taken in the cause, it was too late for the defendant to move to set aside the order for the defect, and dispauper the plaintiff, although it was sworn that the defendant had only acquired knowledge of the defect three days before the motion. *Seymour v. Maddox*, 10 L. J., Q. B. 525—B. C.—Wightman.

After a plea of payment of money into court the plaintiff obtained an order to sue in formâ pauperis. A judge, therefore, made an order that the money should remain in court, to abide the event of the cause, unless the plaintiff would take it out in full satisfaction. The defendant having obtained the verdict, the court ordered that the money should be paid out to him in satisfaction of his costs antecedent to the order to sue in formâ pauperis. *Casey v. Tomlin*, 7 M. & W. 189.

A party is not entitled to sue in formâ pauperis if, on his own affidavit, the court can see that he has no cause of action. *Odbett, In re*, 27 L. J., Exch. 199.

As a general rule, the court will not uphold any agreement of compromise between a plaintiff suing in formâ pauperis and the defendant, having for its object the deprivation of the plaintiff's attorney of his costs; and, therefore, a plea of release puis darrein continuance was set aside by the court. *Wright v. Burroughes*, 3 C. B. 344; 10 Jur. 860; 18 L. J., C. P. 277.

— to prosecute other proceedings.]—A prosecutor cannot prosecute in formā pauperis without special cause. *Rea v. Clarke*, 8 Burr. 1308.

A defendant removing an indictment by certiorari without good cause cannot be admitted to sue in formā pauperis. *Rea v. Reynolds*, 1 W. Bl. 280.

The court will not allow a party to prosecute in the King's Bench in formā pauperis on the common affidavit of poverty, but special grounds must be laid for such an application. *Rea v. Wilkins*, 1 D. P. C. 536.

— to defend.]—In an information under the excise laws, the court will admit a defendant to defend in formā pauperis, on an affidavit that he is not worth 5*l.*, over and above his wearing apparel. *Att. Gen. v. Dummie or Duffy*, 2 C. & M. 393; 4 Tyr. 284.

A motion to defend in formā pauperis upon an attachment for a contempt was denied. *Rea v. Pearson*, 2 Burr. 1089.

A farming tenant who has valuable crops on his farm, but no other property, will not be admitted to defend in formā pauperis, although he has in the suit been restrained from selling or removing the crops. *Ridgway v. Edwards*, 9 L. R., Ch. 148; 22 W. R. 288; 29 L. T., N. S. 906.

**Dispaupering, or ordering plaintiff to pay costs.**—Where a pauper omits to proceed to trial pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid. Reg. Gen., Q. B., C. P. and Exch., H. T. 16 Vict. r. 122; 1 El. & Bl., App. xxii.

An order, allowing a plaintiff to sue in formā pauperis, must be made a rule of court before the court will entertain a motion to discharge it. *Hawes v. Johnson*, 1 Y. & J. 10.

If it appears that he has no meritorious cause of action, the court will discharge an order authorizing him to sue in formā pauperis. *Id.*

If he has been guilty of repeated defaults in not proceeding to trial, he may be dispaupered, and ordered to pay the costs of the day by the same rule. *Bedwell v. Coulstring*, 1 B. C. Rep. 97; 3 D. & L. 767—Wightman.

Where a pauper gave notice of trial, and, on the second day of the assizes, withdrew his record, on the ground of its requiring amendment, the court dispaupered him. *Faur or Facer v. French*, 5 D. P. C. 534; W., W. & D. 195.

A plaintiff in ejectment suing in formā pauperis will be dispaupered in case of vexatious delay. *Doe d. Leppinguell v. Trussell*, 6 East, 505; 2 Smith, 876.

When a pauper makes default in proceeding to trial, in pursuance of notice, and is resident without the jurisdiction of the court, on an application for the costs of

the day, for not proceeding to trial, the defendant is entitled to make the payment of the costs a condition precedent to further proceedings. *Cross v. Port of London Assurance Company*, 13 Jur. 125; 18 L. J., Q. B. 72—B. C.

If a person suing in formā pauperis neglects to proceed to trial pursuant to notice, the defendant is entitled to the costs of the day, but not to dispauper him. *Waller v. Joy*, 10 M. & W. 60; 4 D. & L. 338; 16 L. J., Exch. 17.

Although the omission occurred through the negligence of the attorney's clerk. *Hodges v. Toplis*, 3 F. & L. 786; 2 C. B. 921; 10 Jur. 498; 15 L. J., C. P. 195.

If a pauper withdraws his record because he is not prepared with a certain necessary document at the assizes, the court will compel him to pay the costs of the day. *Doe d. Lindsey v. Edwards*, 2 D. P. C. 471.

A rule requiring a pauper to pay the costs of the day, for not proceeding to trial, is nisi in the first instance. *Id.*

The court will make absolute a rule requiring a pauper plaintiff to pay the costs of the day for not proceeding to trial. *Gore v. Morpheu*, 8 D. P. C. 137; 1 W., W. & H. 33.

## Pawnbroker and Pledge.

### I. CONTRACT OF PLEDGE AND RIGHTS OF PLEDGEE, 9846.

#### 1. In General, 9846.

#### 2. Pledge by Agent of Property of Principal. See PRINCIPAL AND AGENT.

### II. PAWN AND PAWNBROKER, 9848.

#### 1. Licensing and Regulation of the Business of Pawnbroking, generally, 9848.

#### 2. Rate and Amount of Interest, 9849.

#### 3. Rights and Liabilities of Pawner and Pawnbroker, 9851.

### I. CONTRACT OF PLEDGE AND RIGHTS OF PLEDGEE.

#### 1. In General.

#### Title to property; right of pledgee to sell.]

—The deposit of personal chattels with another as a pledge to secure the repayment of money on a given day, with power to sell in case of default, creates an interest and a right of property in such chattels in the pledgee, and the wrongful act of such pledgee does not annihilate the contract between the parties, or the interest of the pledgee in the chattels under such contract, so as to enable the pawnor to maintain detinue without tendering the amount due. *Donald v. Suckling*, 1 L. R., Q. B. 585; 12 Jur., N. S. 795; 35 L. J., Q. B. 232; 15 W. R. 13; 14 L. T., N. S. 772; 7 B. & S. 788. S. P., *Halliday v. Holgate*, 3 L. R., Exch. 200; 37 L. J., Exch. 174—Exch. Cham.

A creditor who loses or disposes of a pledge loses his lien, and the pledgor can recover its value without deducting the debt due. *Cooke v. Haddon*, 8 F. & F. 229—Byles.

A. deposited a dock warrant for brandies with B. as a security for a loan, which was to be repaid on the 29th of January, or, in default, the brandies were to be forfeited. On the 28th, B. agreed for the sale of the brandies to C., and on the 29th delivered to him the dock-warrant, and C. took actual possession of the brandies on the 30th:—Held, that the sale on the 28th, and the delivery of the dock-warrant to the vendee on the 29th, A. having the whole of that day to redeem it, amounted to a conversion. *Johnson v. Stear*, 15 C. B., N. S. 830; 10 Jur., N. S. 99; 83 L. J., C. P. 130; 12 W. R. 347.

Held, by Erie, C. J., Byles, J., and Keating, J., that the proper measure of damages was the actual damage which A. had sustained by the wrongful conversion, which, as there was no intention on his part to redeem the pledge, was merely nominal. *Id.*

But by Williams, J., that the proper measure of damages was the value of the thing converted, the bailment having been terminated by the wrongful sale. *Id.*

Where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day,—Sembles, that such a power of sale is implied by law from the nature of the transaction. *Pigot v. Cubley*, 15 C. B., N. S. 701; 10 Jur., N. S. 318; 83 L. J., C. P. 134; 12 W. R. 467.

But where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties, it is not competent to the pawnee to sell without a proper demand and notice. *Id.*

A notice that he will sell unless an excessive sum be paid immediately, is not such a notice as will justify the sale. *Id.*

B., being indebted to A., entered into an agreement that certain goods should be held by A. as a security for the debt, and the agreement contained an acknowledgment that A. had received into his possession the goods which were the subject of the pledge. Part of the goods was, in fact, delivered to A.; but a cart and one set of harness were, by arrangement, left in the possession of B. Shortly afterwards, upon A. getting into difficulties, B. took back all the goods which were the subject of the pledge into his own possession; but upon A.'s being declared bankrupt, his assignees seized the goods, and sold them for the benefit of his creditors:—Held, in trover by B. against the assignees, that there was a constructive delivery of all the goods into the possession of the pawnee. *Martin v. Reid*, 11 C. B., N. S. 730; 81 L. J., C. P. 126.

As to effect of pledge by agent of property of his principal,—see PRINCIPAL AND AGENT.

As to obtaining loan on pledge of goods by false pretenses,—see CRIMINAL LAW.

## II. PAWN AND PAWNBROKER.

### 1. Licensing and Regulation of the Business of Pawnbroking, Generally.

**Statutes.**—[19 & 20 Vict. c. 27, amended the 25 Geo. 3. c. 49, 55 Geo. 3, c. 184 (as to stamp duty on licenses), and 39 & 40 Geo. 3, c. 90, regulating the business of pawnbrokers.

And by s. 1, the following shall be deemed to be persons using and exercising the trade or business of a pawnbroker within the meaning of those acts, and in addition to the persons declared by those acts; (that is to say,) every person who shall keep a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels, by way of security for money advanced thereon, and shall purchase or receive or take in any goods or chattels, and pay or advance or lend thereon any sum of money not exceeding 10*l.*, with or under any agreement or understanding, express or implied, or which, from the nature or character of the dealing, may reasonably be inferred, that such goods or chattels may be afterwards redeemed or re-purchased on any terms whatever.

By s. 2, a person neglecting or omitting to take out the proper license forfeits 50*l.*, which is recoverable by information before a justice of the peace.

By 22 & 23 Vict. c. 14, the provisions and enactments contained in sections 52, 53, 54 and 85 of 2 & 3 Vict. c. 71, for regulating the police courts of the metropolis, are extended to 39 & 40 Geo. 3, c. 90, and to all parts of England; and whenever the word magistrate is used in the said sections, or any of them, it shall be construed, deemed and taken, for the purposes of the act, to mean any stipendiary magistrate or other justice or justices of the peace for the district, county, riding, division, city, liberty, town or place where the offense has been committed.

By 2 & 3 Vict. c. 47, s. 50, a penalty not exceeding 5*l.* is imposed upon any pawnbroker within the metropolitan police district purchasing or taking goods in pawn of or from any person apparently under the age of sixteen years. (Extended by 23 & 24 Vict. c. 14, to all parts of England.)

By 6 & 7 Vict. c. 40, s. 4, pawnbrokers knowingly taking in pawn woolen, worsted, linen, cotton, flax, mohair or silk materials, or tools for manufacturing the same, will be guilty of a misdemeanor, punishable under that act.

By 9 & 10 Vict. c. 98, no pawnbroker shall receive or take in, or permit or suffer to be received or taken in, any goods or chattels by way of pledge, or pawn, or in exchange, before eight o'clock in the forenoon or after seven of the clock in the evening between 29th September and 25th March following, or before seven in the forenoon or after eight in the evening during the remainder of the year, excepting only until eleven on the evenings of Saturday throughout

the year, and the evenings next preceding Good Friday and Christmas-day, and every fast or thanksgiving-day appointed by her Majesty, under a penalty of not less than 20s., nor exceeding 5l.

The Pawnbrokers Act, 1872, 35 & 36 Vict. c. 93, consolidates with amendments the acts relating to pawnbrokers in Great Britain, and repeals all existing statutes.]

**Secret partnerships.**—Two persons entered into an agreement to be partners in the business of pawnbrokers, to be carried on under the firm of one of them; and, in pursuance of the articles of agreement, that one's name alone was painted over the door of the business premises; the license also was taken out and the tickets to the customers were issued in his sole name, while the other partner (carrying on another business) attended occasionally to inspect the books of the firm, and drew a percentage on his share of the capital out of the profits:—Held, that the agreement constituted a secret partnership, and was therefore illegal and void, as being in contravention of the policy and enactments of 89 & 40 Geo. 3, c. 99. *Gordon v. Howden*, 12 C. & F. 237. S. P., *Fraser v. Hill*, 1 Macq. H. L. Cas. 392; 1 C. L. R. 7; *Armstrong v. Lewis*, 4 M. & Scott, 1; 2 C. & M. 274.

## 2. Rate and Amount of Interest.

**Statutes.**—[By 80 & 40 Geo. 3, c. 90, s. 2, the following rates of interest only are to be taken by pawnbrokers:—

For every pledge upon which there shall have been lent any sum not exceeding 2s. 6d. the sum of one halfpenny for any time during which the said pledge shall remain in pawn not exceeding one calendar month, and the same for every calendar month afterwards including the current month in which the pledge shall be redeemed, although it shall not have expired;

Upon 5s., one penny;

Upon 7s. 6d., one penny halfpenny;

Upon 10s., two pence;

Upon 12s. 6d., two pence halfpenny;

Upon 15s., three pence;

Upon 17s. 6d., three pence halfpenny;

Upon 1l., four pence, and so on progressively, and in proportion, for any sum not exceeding 40s.;

Upon any sum exceeding 40s., and not exceeding 42s., eight pence;

And upon every pledge, upon which shall have been lent any sum exceeding 42s., and not exceeding 10l., at and after the rate of three pence and no more, for the loan of every 20s. for all such money so lent, by the calendar month, including the current month, and so in proportion for any fractional sum, which said fractional sums shall be taken in lieu of and as a full satisfaction for all interest due, and charges for warehouse room.

By s. 3, in all cases where any intermediate sum lent upon any pawn or pledge exceeds 2s. 4d., but does not exceed 40s., the rate of four

pence for the loan of 20s. by the month is to be paid, including the current month.

By s. 5, nothing is to be charged for the first seven days of the second or subsequent month, and only half a month for the first fourteen days; but after that time the whole month may be charged.

Very full directions are given, and enactments framed, for the regulation of the business of a pawnbroker.

By 22 & 23 Vict. c. 21, it shall be lawful for all persons using and exercising the trade or business of a pawnbroker to take one halfpenny for every note or memorandum containing a description of the things pawned, as required by 80 & 40 Geo. 3, c. 90, s. 6, where the sum shall be less than 10s.

17 & 18 Vict. c. 90, which abolishes the usury laws, expressly provides that the rate of interest to be taken by law by pawnbrokers is to remain unaffected by the repeal. (Similar to previous provision, 2 & 3 Vict. c. 37, which suspended temporarily the operation of the usury laws.)

**Offences against the statutes.**—[The 39 & 40 Geo. 3, c. 90, having enacted that pawnbrokers shall and may take, by way of profit, a certain rate of interest on pledges, and no more, the taking of more interest is an offense within the act, cognizable by a justice of peace on summary information within s. 6. *Rea v. Beard*, 12 East, 673.

When the sum payable to a pawnbroker for interest on a loan for a month, at the rate of 20 per cent., would be three farthings and one fifth of a farthing, even if he is entitled to receive 1d. for a single month on account of the necessity of the case, he is not therefore, on a loan for a longer period, entitled to treat the contract as a monthly contract, and to receive at the rate of 1d. a month for such period, when there would no longer be any difficulty in paying him at the exact rate of 20 per cent. *Reg. v. Godburn*, 3 N. & P. 468; 1 W., W. & H. 362; 8 A. & E. 503; 2 Jur. 857.

**Contracts void, under the statutes.**—[A pawnbroker received a parcel of goods on one day, and on that day and several subsequent days he advanced sums of money, each not exceeding 10l., as on different parts of the parcel, and received pawnbrokers' interest of three pence in the pound per month on those sums:—Held, that it was a question for the jury, whether this really was the transaction, or a mere contrivance for obtaining the higher interest on the whole sum, in which case it was void; or whether the advances were really distinct. *Cowie v. Harris*, M. & M. 141—Tenterden.

A pawnbroker advanced 200l. to a trader in distress, upon a deposit of silks, and entered the transaction in his books as several advances, each of less value than 10l., but amounting in the whole to 200l. The trader having become bankrupt, and his assignees having sued in trover for the silks, the court refused to disturb a verdict for the plaintiff.



upon a direction to the jury to find whether the goods had been deposited on a contract to pay more than 5l. per cent. interest. *Tregoning v. Attenborough*, 7 Bing. 97; 4 M. & P. 722.

In trover by assignees of a bankrupt against a pawnbroker for certain goods, the defendant pleaded that the bankrupt pledged the goods with him; to which the plaintiff replied, that it was corruptly agreed between the defendant and the bankrupt, that the defendant should advance him a sum exceeding 10l., to wit, 77l., and that the defendant should give day of payment for a year, redeemable in the meantime, contrary to the statute. It appeared at the trial, that the goods were deposited with the defendant, to secure more than 10l. at one time:—Held, that it sufficiently appeared upon the pleadings, that the contract was within the statute, and that this was proved at the trial. *Nickisson v. Trotter*, 8 M. & W. 130; M. & H. 350; 1 Jur. 871.

Advances made by a pawnbroker, on the deposit of goods, in sums exceeding 10l., and at pawnbrokers' interest, are not void for non-compliance with the provisions of the 39 & 40 Geo. 3, c. 90, the 6th section of which only extends to loans of money in sums not exceeding 10l. *Pennell v. Attenborough*, D. & M. 145; 4 Q. B. 868; 7 Jur. 927; 13 L. J., Q. B. 370. S. P., *Fitch v. Rochfort*, 1 Mac. & G. 184; 1 H. & T. 255; 13 Jur. 351; 18 L. J., Chanc. 458.

Where a pawnbroker, after 2 & 3 Vict. c. 87, advanced larger sums than 10l. at one time, at usurious interest, on the deposit of goods:—Held, that the loans were protected by that act. *Id.*

### 3. Rights and Liabilities of Pawner and Pawnbroker.

#### Title to and possession of property pawned.]

—A pawner of a chattel retains his property in it (though qualified by the right existing in the pawnee), which he has a right to sell, and, by the sale, to transfer that property to the buyer; and if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover to recover it. *Franklin v. Neate*, 13 M. & W. 481; 14 L. J., Exch. 59. See *Binstead v. Buck*, 2 W. Bl. 1117.

A pawnbroker has no lien on plate, after the death of a tenant for life who pawned it with him, as against the remainderman, although the pawnbroker had no notice of the settlement. *Hoare v. Parker*, 2 T. R. 876.

On the 24th of July goods were pledged with a pawnbroker, in the name of Mary Warne, and the duplicate was made out accordingly. She was, in fact, the wife of the plaintiff, but it did not appear that this fact was then known to the pawnbroker. A few days afterwards, the same person applied to him for a copy of the duplicate, and a form of declaration of the loss of it. On the 6th of August, the plaintiff produced the

duplicate to the pawnbroker, and demanded the goods, tendering the money advanced on them and interest, but he refused to deliver them, on the ground of the declaration having been obtained. The plaintiff applied to a magistrate to compel him, and the pawnbroker then (on the 9th of August) learned that the party who pledged the goods was the plaintiff's wife:—Held, that the judge was wrong in directing the jury that the detention of the goods was in point of law a conversion; and that he ought to have left it to them to say, whether the pawnbroker had a bona fide doubt as to the title of the goods; and if so, whether a reasonable time for that doubt to be cleared up, by the party going before a magistrate and verifying the declaration, had elapsed on the 6th of August, and if it had, that the refusal then to deliver them to the plaintiff amounted to a conversion. *Vaughan v. Watt*, 6 M. & W. 492.

Goods deposited with a pawnbroker in the way of his trade are privileged from distress; and this, though they may have been pledged more than twelve months. *Swire v. Leach*, 18 O. B., N. S. 479; 11 Jur., N. S. 179; 24 L. J., C. P. 150; 11 L. T., N. S. 680.

If they are distrained, the pawnbroker is entitled to recover their full value from the landlord, and not merely the amount which he has advanced on them. *Id.*

Title to property stolen or fraudulently obtained.]—[By 1 Jac. 1, c. 21, s. 5, the sale, exchange, pawn or mortgage of goods wrongfully or unjustly purloined, taken, robbed or stolen, to any pawnbroker pawned within the city of London, Westminster, Southwark, or within two miles of the city of London, shall not alter the property therein.

By 2 & 3 Vict. c. 71, s. 28, any metropolitan police magistrate may order that any goods unlawfully pawned, pledged or exchanged, which shall be brought before him, and the ownership of which shall be established to the satisfaction of such magistrate, shall be delivered up to the owner by the party with whom they were so unlawfully pawned, pledged or exchanged, either without compensation, or with such compensation to the party in question as the magistrate may think fit. (Extended by 22 & 23 Vict. c. 14, to all parts of England.)]

Where goods stolen are pawned, the owner may maintain trover against the pawnbroker. *Packer v. Gillies*, 2 Camp. 336, n.—Ellenborough.

If goods are obtained from A. by fraud, and pawned to B. without notice, and A. prosecutes the offender to conviction, and gets possession of his goods, B. may maintain trover for them. *Parker v. Patrick*, 5 T. R. 175. But see *Horwood v. Smith*, 2 T. R. 750.

Trover lies, at the suit of a pawnbroker, for plate which he had taken from a man who at the time produced a receipt for the price, which he had obtained by fraudulently giving a draft, which was of no value, where the thief was indicted by the person from whom he

obtained the goods, and convicted upon the production of the goods by the pawnbroker, upon which the defendant took and detained the plate; the court saying that the case was not within 1 Jac. 1, c. 21. *Davis v. Morrison*, Lofft, 185.

A pawnbroker, who, in taking pledges, omits to pursue the course required by 39 & 40 Geo. 3, c. 99, s. 6, acquires no property in the pledges, and cannot maintain a lien on them against the assignee of a pawn, who afterwards becomes a bankrupt. *Ferguson v. Norman*, 5 Bing. N. C. 76; 6 Scott, 794; 1 Ara. 418; 3 Jur. 10.

A pawnbroker who makes of the party pledging goods the inquiries directed by 39 & 40 Geo. 3, c. 99, s. 6, and delivers to him a note or a memorandum drawn up in accordance with the information thus supplied, does not lose his right to the pledge or the money advanced if that information proves untrue, unless the pawnbroker knew it to be so at the time when he made the note. *Attenborough v. London*, 8 Exch. 661; 17 Jur. 419; 23 L. J., Exch. 251.

Where there have been several acts of pawning with the same pawnbroker by the same person on different occasions, the pawnbroker is not bound to renew on each occasion the inquiry directed by the statute, unless he has reason to suspect a change in the circumstances which the statute requires to be entered on the note. *Id.*

Semble, that where a person pledges property to which he has no title, the pledgee may deliver it to the real owner, there being in the ordinary course of a pledge an implied undertaking on the part of the pledgor that the property pledged is his own, and on the part of the pledgee that he will return it to the pledgor, provided it is not the property of another. *Cheesman v. Exall*, 6 Exch. 341.

A. having deposited with B. goods as a security, a dispute arose concerning the goods, upon which B. obtained from C., a police magistrate, a summons requiring A.'s appearance on a day named. Upon the appearance before C., B. made oath to a written information, that he believed the goods to have been illegally pawned or disposed of by A. C. gave a further day to the parties, when, after evidence being gone into, C. committed A. for re-examination on a charge of suspicion of having unlawfully disposed of the goods of B.:—Held, that the charge was not sufficiently made so as to give the magistrate jurisdiction over the matter under 39 & 40 Geo. 3, c. 99, s. 8. *Tate v. Chambers*, 3 N. & M. 523.

**Duplicate tickets.**—If one employed to sell goods by commission pawns them, the owners of the goods may maintain trover against the pawnbroker, after a demand and a refusal, although the duplicate has not been tendered according to 39 & 40 Geo. 3, c. 99, s. 5. *Pest v. Baxter*, 1 Stark. 472—Ellenborough.

On an execution in a county court against

the goods of a defendant, in a suit of A. v. B., goods in the hands of C. were seized, who paid money to release them, and proceeded by interpleader. The goods originally belonged to B., but previously to the execution had been pawned with a pawnbroker, it did not appear by whom, and the duplicates had been deposited in the hands of C. by L. to redeem them, and hold them as security for the money advanced, who redeemed them accordingly. There was no evidence to show the time at which, or the circumstances under which, L. became possessed of the duplicates, or that he had any interest therein:—Held, that C. was entitled to the money paid to release the goods. *Furber v. Sturmy*, 5 Jur., N. S. 45—Exch.

A duplicate is the subject of larceny. *Reg. v. Morrison*, Bell C. C. 158; 5 Jur., N. S. 604; 28 L. J., M. C. 210.

A person who utters a forged duplicate may be indicted for uttering a forged accountable receipt for goods. *Reg. v. Fitchie*, Dears. & B. C. C. 175; 3 Jur., N. S. 419; 26 L. J., M. C. 90.

**Delivery of pledge on loss of ticket.**—A person who had pledged goods, having unknowingly given the ticket to a third person, obtained under 39 & 40 Geo. 3, c. 99, ss. 15, 16, the form of affidavit, therein mentioned, went immediately with it to a magistrate as therein provided, and showed it afterwards to the pawnbroker:—Held, that under that statute the pawnbroker was not justified in afterwards delivering the goods to the ticket-holder, as the ticket was "lost or mislaid," and it was not necessary to deliver the affidavit and redeem the goods. *Burslem v. Attenborough*, 42 L. J., C. P. 102; 8 L. R., C. P. 122; 21 W. R. 406; 28 L. T., N. S. 115.

[By 5 & 6 Will. 4, c. 62, s. 12, a declaration is substituted for an affidavit required by 39 & 40 Geo. 3, c. 99, s. 16, of the loss or destruction of a duplicate ticket and the circumstances attending the case.]

**Sale of unredeemed pledges.**—The 39 & 40 Geo. 3, c. 99, s. 17, declares, that goods which are pledged and not redeemed within a year after the day of pledging, shall be forfeited, and may be sold by the pawnbroker:—Held, that where a party pawned a watch, and, after the year expired, tendered the money lent and interest to the pawnbroker, and he refused to deliver it up, the owner might maintain trover, not having forfeited his title to the goods by reason of s. 17. *Waller v. Smith*, 1 D. & R. 1; 5 B. & A. 439.

A pawnbroker who sells a chattel as a forfeited pledge, merely undertakes that the subject of the sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it. *Morley v. Attenborough*, 8 Exch. 500; 18 Jur. 282; 18 L. J., Exch. 148.

A harp having been pledged with a pawnbroker, by a party who had no title to it, the pawnbroker, being ignorant of that fact, sent it for sale to an auctioneer after the expiration

of the time for redemption. The auctioneer, describing the sale as consisting of unredeemed pledges and other effects, sold the harp to a party, who having been compelled to restore it to the true owner, brought an action against the pawnbroker on an alleged breach of title to sell:—Held, that as the auctioneer had no authority to sell the harp except as a forfeited pledge, the pawnbroker was to be considered as selling that right only which he himself had, and as undertaking merely that the article was a forfeited pledge, and that he was not cognizant of any defect of title. *Id.*

Where A. pawned three articles at different times, which upon being sold realized more than sufficient to repay the principal money, interest, and expenses of sale, but other articles pawned by him with the same pawnbroker did not upon sale realize sufficient to repay the principal money, interest and expenses of sale:—Held, that the pawnbroker had no right to set off the loss upon these latter articles against the overplus upon the sale of the others under 39 & 40 Geo. 3, c. 99, s. 20. *Dobres v. Norcliffe*, 23 L. T., N. S. 552—Q. B.

**Liability of pawnbrokers for loss of or injury to goods pawned.**—The 39 & 40 Geo. 3, c. 99, s. 24, enables justices, in case it shall be proved before them that any goods pawned have been sold contrary to the act, or have been embezzled or lost, or are become or have been rendered of less value than at the time of pawning, through the default, neglect or willful misbehavior of the person with whom the same were pawned, to award satisfaction to the owner, as there specified:—Held, that justices have no power, in the above cases, to commit in default of such satisfaction being made. *Cording, Ex parte*, 4 B. & Ad. 198; 1 N. & M. 85.

Under 39 & 40 Geo. 3, c. 99, s. 24, the injury done to goods pawned by an accidental fire on the premises of a pawnbroker, not affirmatively shown to have occurred through the default, neglect or willful misbehavior of the pawnbroker, does not authorize a justice to give satisfaction to the pawner, there being no *prima facie* presumption that such fire is owing to the default, neglect or misbe-

havior of the owner of the premises. *Syred v. Curruthers*, EL, BL. & EL. 460; 4 Jur., N. S. 549; 27 L. J., M. C. 273.

Leaving valuable goods in a pawnbroker's house during the night, without any person on the premises, is not a careful dealing with the goods by the pawnbroker, and will justify justices in making an order on the pawnbroker for satisfaction, for, being a bailee for reward, he is bound to take reasonable care of the goods. *Healing v. Cattrell*, 6 Jur., N. S. 96, n.—Q. B.

A common informer may lay an information against a pawnbroker, for an offense under 39 & 40 Geo. 3, c. 99, s. 26, and is entitled to a moiety of the penalty imposed upon the offender. *Caswell v. Morgan*, 1 EL. & EL. 809; 5 Jur., N. S. 1252; 28 L. J., M. C. 208; 7 W. R. 463.

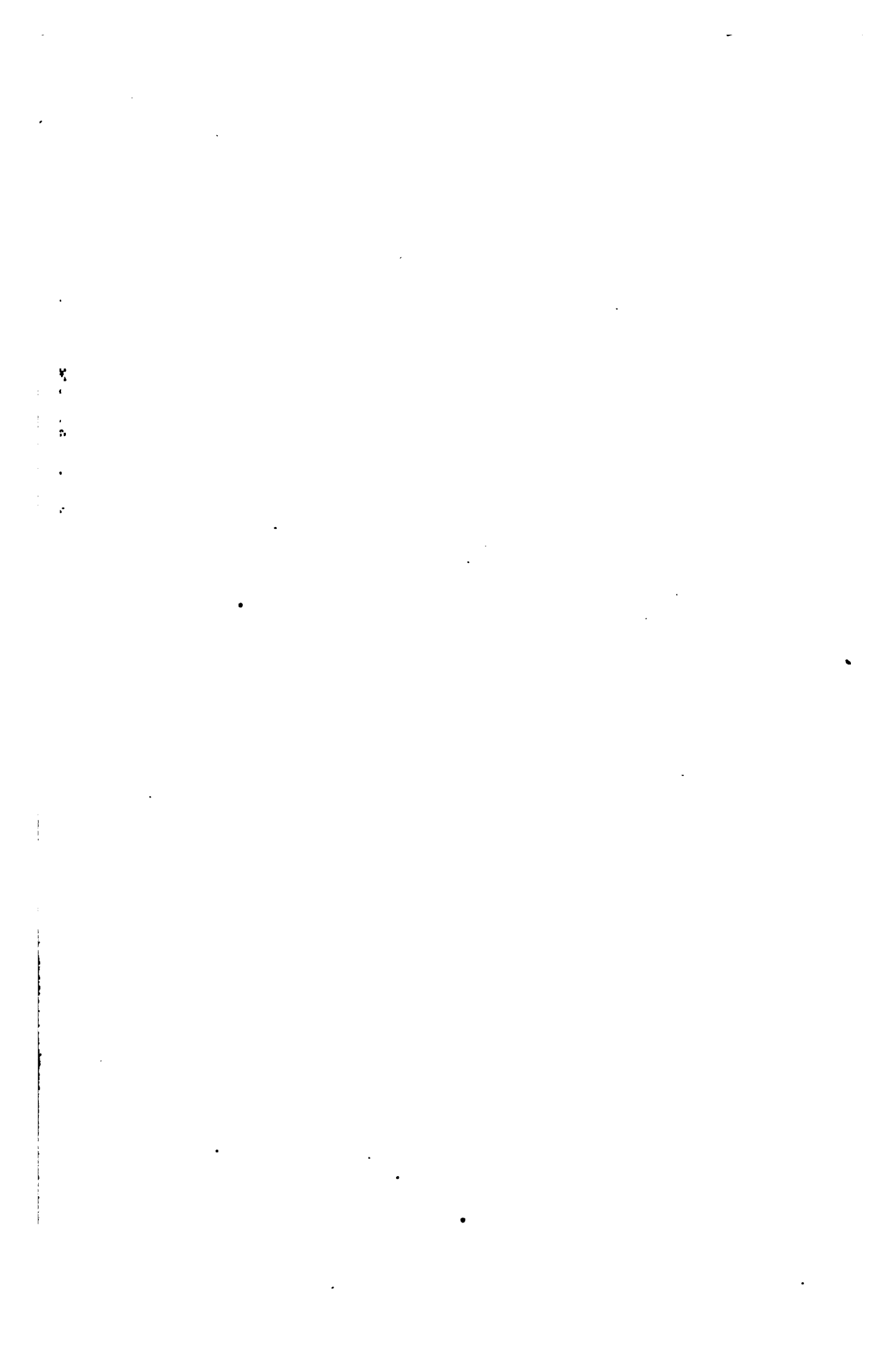
Goods pledged with a pawnbroker were lost through a burglary on his premises, caused by his negligence. The owner laid a complaint before justices, against the pawnbroker, for refusing, without reasonable cause, to deliver up the goods upon tender of the proper amount. The justices made an order that the pawnbroker, not having shown reasonable cause to their satisfaction to the contrary, should deliver up the goods, or, in default, compensate the owner:—Held, that the order was bad; s. 14 of the 39 & 40 Geo. 3, c. 99, under which the order was made, in effect applying only to cases of willful refusal by a pawnbroker to deliver up goods actually in his possession; and that the justices should have made an order under s. 24, which empowers them to award compensation to the owner if, in the course of any proceedings under the act, they should find that the goods were lost through the default, neglect or willful misbehavior of the pawnbroker. *Shackell v. West*, 2 EL. & EL. 320; 29 L. J., M. C. 45; 8 W. R. 22; 1 L. T., N. S. 28.

## Payee.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

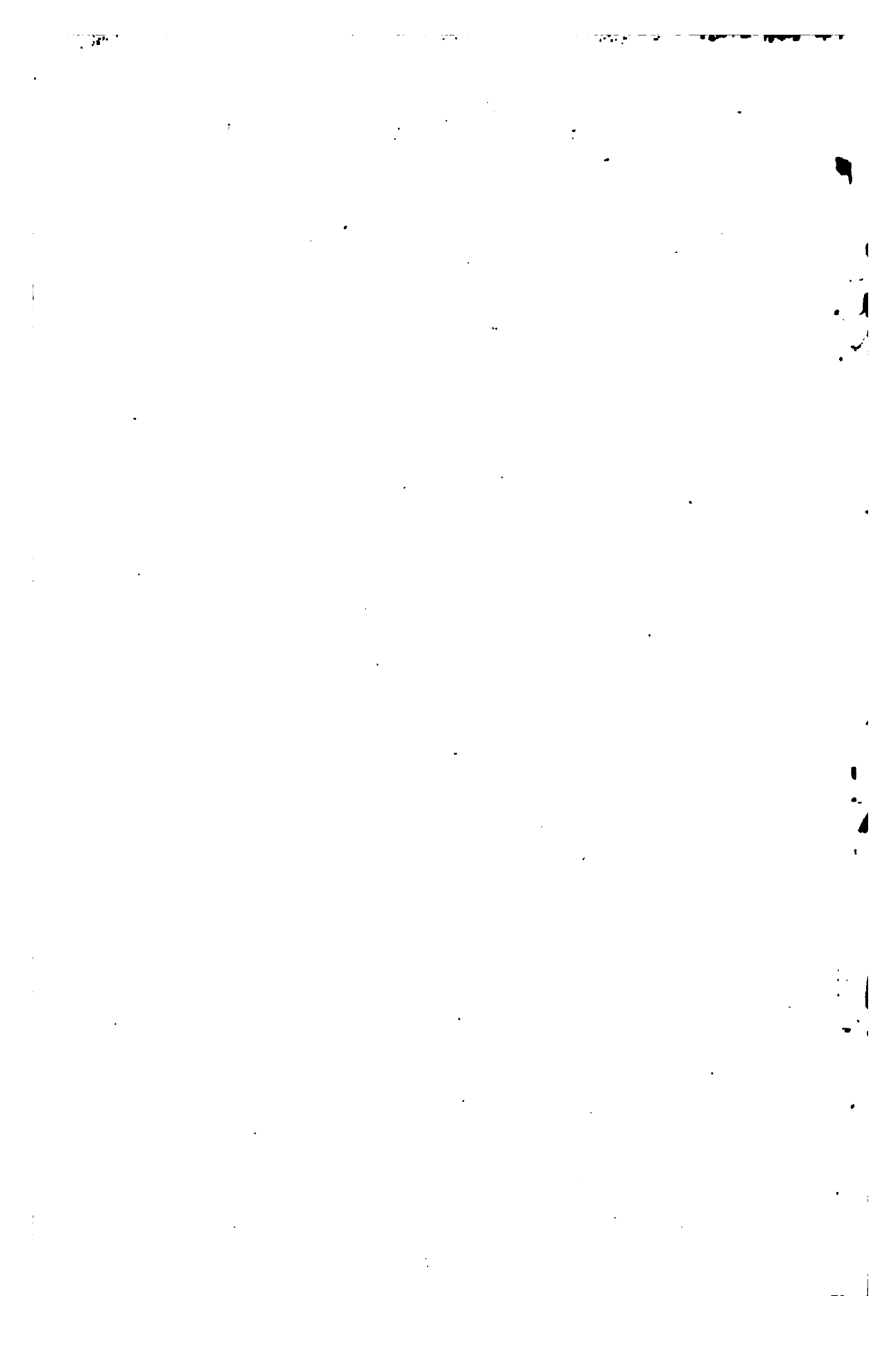












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